



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**SUIT NO. 45 OF 2015**

**(FORMERLY NAKURU CAUSE 19 OF 2015)**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION (KPAWU).....CLAIMANT/RESPONDENT**

**VERSUS**

**GREYSTONE FARM (FORMERLY**

**EQUITORIAL NUT LIMITED).....RESPONDENT/APPLICANT**

**RULING**

1. The Notice of Motion Application dated 16<sup>th</sup> June 2017 and filed on 22<sup>nd</sup> June 2017 is up for ruling. It seeks the stay of the orders of Ongaya J. given on 12<sup>th</sup> May 2017 ordering stay of execution of the decree of the court pending the hearing and determination of the intended appeal on condition that the applicant deposits the decretal amount by 1<sup>st</sup> July 2017 in an interest earning account in the joint names of the Claimant and the Respondent's advocates and that the record of appeal be filed on 1<sup>st</sup> July 2017 and all consequential orders thereon be reviewed and set aside and that costs of this application be borne by the Claimant. The motion was supported by the affidavit of Beth Nyambura and the grounds expressed on the face of the motion which in summary are that the Respondent/Applicant is not in any financial position to deposit the said decretal sum as the company was only managing the firm formerly known as Equitorial Nuts Farm. The application is opposed by the Claimant who filed a replying affidavit sworn by Thomas Kipkemboi on 6<sup>th</sup> July 2017. The sum of the replying affidavit was that the prayers by the Respondent/Applicant are not merited as the Respondent/Applicant was employing all manner of tactics to deny the Claimant/Respondent the fruits of judgment and that the application did not meet the threshold for review. Parties filed written submissions in support and opposition of the application for stay of the orders of the judge.

2. The Respondent/Applicant filed submissions on 27<sup>th</sup> February 2018 while the Claimant/Respondent filed submissions on 13<sup>th</sup> March 2018. In its submissions, the Respondent/Applicant submitted that the issues for determination were whether the application satisfies the requirement for review. It was submitted that for the grant of a review, the following grounds had to be satisfied

- i. The applicant's discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by them at the time when the decree was passed or order made;
- ii. A mistake or error apparent on the face of the record; or
- iii. Any other sufficient reason.

The Respondent/Applicant submitted that it had indicated in its application that it was not able to comply with the order requiring it to deposit the entire decretal amount due to the fact that it was not in a financial position to comply with the same. The Respondent/Applicant asserts that it had offered security as performance of the decree as a clear attestation of the readiness and willingness to comply with court orders. The Respondent/Applicant submitted that it was only managing the company formerly known as Equitorial Nut Limited and its obligations and mandate was not extended to covering the former company's financial obligations. The Respondent/Applicant submitted that if it was compelled to deposit the entire decretal sum of money it would force the Respondent/Applicant into financial jeopardy and disable its entire operations causing it to close down. It was submitted that the ends of justice will be defeated at that instance as one party will have been rewarded at the grave expense of the other. The provisions of Article 159(2)(a) of the Constitution which provides that courts shall ensure justice shall be done to all irrespective of status were cited as was case of **Jeremiah Muku v Methodist Church of Kenya Registered Trustees & Another [2009] eKLR** where Emukule J. quoting the Court of Appeal decision in **Touring Cars (K) Ltd v Mukanji [2000] 1 E.A. 261** held:-

“...Order XLV rule 1 of the Civil Procedure Rules provides for these heads under which a review may be applied for produced where a judge finds the new and important evidence has been produced he is under a duty to consider whether this evidence could not have been discovered after the exercise of due diligence by the party seeking to produce it. In the circumstances of the case and if this ground was to be considered the new evidence was not of a kind that Mukanji could not have discovered during the hearing of the suit.

The case of **Origo v Mungala [2005] KLR 307** was also cited and it was submitted that the Respondent/Applicant had no prior knowledge of its financial position prior to the issuance of the court orders and only learnt of its inability to deposit the decretal amount after the information was disclosed by the bank during its attempt to comply with the orders. The Respondent/Applicant submitted that it had succeeded in demonstrating that it had given a sufficient reason for the grant of the orders sought. Reliance was placed on the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** where the Court of Appeal (Akiwumi & O’Kubasu JJA) held that *these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice ‘be limited to the discovery of new and important matters of evidence, or occurring of a mistake or error apparent on the face of the record’*. The Respondent/Applicant submitted that the application was brought without delay as required under Order 45 Rule 1(1)(b) as it was brought a month after the said orders were issued by the court. The Respondent/Applicant submitted that it had brought the application without unreasonable delay.

The Respondent applicant thus urged the court to grant the orders sought in the interests of justice.

3. The Claimant/Respondent on its part submitted that the Respondent/Applicant had not met the standard for review. The Claimant cited the provisions of Section 16 of the Employment & Labour Relations Act and Rule 33 of the Employment & Labour Relations Court (Procedure) Rules 2016. The Claimant submitted that the Respondent ought to have known of the conditional nature of the grant of stay and relied on the case of **Elena Duodoladova Korir v Kenyatta University [2014] eKLR** where the court cited the case of **Halai & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365**. The Claimant submitted that the Respondent should have been aware of the need to furnish security for the performance of the decree. The Claimant submitted that the Respondent had not met the threshold for the grant of the review sought. Reliance was placed on the case of **Mugambi v Housing Finance Co. (K) Ltd [2006] eKLR** and **National Bank of Kenya Limited v Ndung’u Njau [1997] eKLR** on the absence of bona fides and the lack of error apparent on the face of the record. The Claimant sought the dismissal of the application for review with costs.

4. In an application for review, it is clear the parameters are as set out under Rule 33 of the Employment & Labour Relations Court (Procedure) Rules 2016. The Respondent/Applicant argues that it became aware of the inability to comply and made the application with due dispatch and within a month of the grant of the orders. The Respondent/Applicant argues there was no unreasonable delay. Though the application was finally argued in 2018, it is clear from the record the Respondent made the application for stay and review of the orders of Ongaya J. with dispatch. There was no unreasonable delay. As I held in the case of **Elena D. Korir v Kenyatta University** (supra) while citing the wise words of the Court of Appeal in the case of **Halai & Another v Thornton & Turpin** (supra) *the High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security*. In the matter before me, the Respondent/Applicant has not made any pretensions to offer security. It merely asserts that compliance with court orders will cause it financial ruin. No financial statement is given or projections to show the earnings expected would be surpassed by the expenditure or the like. There is no exception to the rule on stay that has been given to suggest that the Court can grant stay so as not to have the Respondent/Applicant suffer financial embarrassment. I do not buy the argument that the Respondent was unaware of the financial state it was in when it offered to deposit the decretal sum in court. The sum is less than 2 million shillings and the Respondent has of necessity to deposit the same within 14 days of the Ruling failing which the stay given by the court will automatically lapse.

It is so ordered.

**Dated and delivered at Nyeri this 24<sup>th</sup> day of April 2018**

**Nzioki wa Makau**

**JUDGE**