



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT MERU**

**APPEAL NO. 2 OF 2018**

**BLOOMINGDALE ROSE (K) LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**GLADYS KATHURE NTEERE.....RESPONDENT**

**RULING**

1. The Appellant seeks stay pending appeal which is intended to be preferred against the decision of Hon. H. Ndungu delivered on 22<sup>nd</sup> February 2018 in Meru CMCC No. 239 of 2016. The application expressed to be brought under Order 42 Rule 6(1) and Order 51 of the Civil Procedure Rules 2010, Section 63 (e) and Section 3 & 3A of the Civil Procedure Act (cap. 21) Laws of Kenya seeks a stay of execution of the of the order or decree from the judgment delivered by in CMCC No. 239 of 2016 pending the hearing of the appeal herein. The motion is supported by grounds on the face of the motion as well as the affidavit of Helen Nzioki sworn in support of the notice of motion application. The Appellant wishes to appeal against the entire decision of the learned Chief Magistrate. The memorandum of appeal has 6 grounds against the decision of the learned Chief Magistrate who gave a judgment in favour of the Respondent (plaintiff) in the lower court. In the grounds and the affidavit in support, the Appellant asserts that the learned Chief Magistrate erred in fact and in law in awarding the Respondent general damages for the purported negligence of the Appellant, special damages as well as costs. The Appellant advanced the argument that the appeal has high chances of success as the same raises weighty matters of law such as limitation and jurisdiction of the court to handle work injury benefits. The Appellant stated that the imminent execution would lead to substantial loss and irreparable damage if the judgment, order and decree were executed as the Appellant would be unable to recover from the Respondent upon the appeal being successful. The Appellant argued that it was not able to ascertain the means of the Respondent to refund the sum of Kshs. 186,000/-.The Appellant offered security for the performance of the decree of the lower court and prayed for the grant of stay.

2. The Respondent was opposed and filed a replying affidavit. In her affidavit she argued that the appeal was filed by someone who was not on record for the Appellant in the lower court and that the application was thus made irregularly and without jurisdiction by a stranger. She deponed that the sum was peanuts to the Appellant and the said Appellant had not demonstrated what prejudice it would suffer if it met the decree in favour of the Respondent. She deponed that the appeal was just academic and based on flimsy grounds. She argued that the learned Chief Magistrate had all the requisite jurisdiction to determine the suit which renders the appeal a non-starter. She stated that she had the wherewithal to refund the judgment amount without pressure if the appeal herein succeeds though she highly doubted it would. She urged the court to disallow the application which lacked merit and dismiss it with costs.

3. The application was canvassed on 9<sup>th</sup> April 2018 and it was submitted on behalf of the Appellant that the application was made without delay and that the Appellant was ready to abide by any order the court may be pleased to make on costs. The counsel for the Respondent argued that the application and appeal were irregular and unmerited as the advocate who had made them was not the advocate on record in the primary suit and that the advocate who filed the present motion did not seek leave to come on record as required under the law. He argued that the appeal only challenges the jurisdiction of the learned Chief Magistrate who had handled the suit and stated that there was no basis for the appeal. He thus sought the dismissal of the application for stay.

4. In a brief rejoinder, counsel for the Appellant submitted that the appeal has high chances of success as the case before the learned Chief Magistrate was statute barred and that there was an arguable appeal. He argued that the Respondent had not demonstrated that she was a woman of means and would therefore be able to refund the decretal sum. He stated the Appellant was ready to deposit the sum in court.

5. In matters of stay pending appeal, the court has to consider the following factors enunciated in the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another [2015] Eklr** where Visram, Koome (JJA) and Mwilu (JA, as she then was) held that

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable *one, that is, that it is not a frivolous appeal,*
2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

Lastly, both limbs must be demonstrated to exist before one can obtain relief under rule 5(2) (b). (See **Republic v Kenya Anti-Corruption Commission & 2 others [2009] KLR 31**).

And later in the judgment

In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.

6. An arguable appeal need not be an appeal that must succeed. Indeed, the appeal may well fail but that is for the appellate court to determine. In this case, the court that is to hear the appeal against the decision of the lower court is this court. In exercising the discretion to grant or deny the stay, these same principles that would guide the Court of Appeal guide this court as it is the appellate court. In my view, it is arguable as to whether the learned Chief Magistrate had the jurisdiction to entertain the suit as can be gleaned from grounds 1, 2, 3 and 5. The stay if not granted in this case would not necessarily rendered nugatory. I state this as the decree is monetary and the consideration for the same is often whether the respondent has means to refund. The Court of Appeal in the above case said that the court must go beyond the mere consideration of the capacity to refund. It stated thus citing with approval the dicta in the Court of Appeal decision in the case of **Kenya Hotel Properties Limited v Willesden Properties Limited Civil Application No. 322 of 2006 (UR 178/06)** (unreported)

**“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.**

7. The Respondent asserts that she has the capacity to refund the sum on short notice and therefore there would be no need to order stay as the fruits of judgment would be returned should the appeal succeed. Given the competing interests and the rival positions taken, the court would accede to the grant of a stay pending appeal on terms. The Appellant offered security and in that regard the court would hold that a deposit of the decretal sum in an interest earning account in a reputable bank in the joint names of the advocates for the parties herein would suffice. The successful party would be able to access the funds upon the determination by the appellate court. The deposit to be made within 2 weeks of today. Costs for this application will abide the outcome in the appeal.

It is so ordered.

**Dated and delivered at Meru this 11<sup>th</sup> day of May 2018**

**Nzioki wa Makau**

**JUDGE**