



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

PETITION NO.33 OF 2016

PURITY MWONJORIA KAMURUCIPETITIONER

VERSUS

THE NYANDARUA COUNTY ASSEMBLY SERVICE BOARD.....RESPONDENT

RULING

The ruling herein relates to the application dated 20th February, 2018 and filed by the respondent, the Nyandarua County Assembly Service Board and seeking for orders that;

Pending the hearing and determination of the intended appeal, this court be pleased to stay the execution of the decree and judgement of 14th July, 2017 and any consequential orders arising therefrom directing the respondent/applicant to pay to the Petitioner/respondent the sum of Kshs.2,403,240/= as compensation plus costs.

The application is supported by the annexed affidavit of Nderi Ndiani the Clerk, County Assembly of Nyandarua and on the grounds that the court in the judgement on 14th July, 2017 allowed the claim by the petitioner and gave an award of Kshs.2, 403,240.00 and the respondent being aggrieved with the whole judgement has preferred an appeal and issued Notice of Appeal dated 24th July, 2017. The petitioner has gone ahead to file Bill of Costs herein for the sum of kshs.309, 529.00 and such is with intent to execute judgement herein. Where there is execution the respondents appeal shall be rendered nugatory and noting the amount of the judgement there will be loss and the respondent may not be able to recover the same upon success appeal as the petitioner will not be able to refund the same.

In his Affidavit, Mr Ndiani avers that the respondent has filed Notice of Appeal immediately the judgement was delivered and also applied for typed proceedings to be able to lodge appeal to the Court of Appeal. In the interests of justice orders sought should issue.

In reply the Petitioner filed Replying Affidavit on 12th March, 2018 and avers that the application by the respondent is an afterthought as it has been filed with delay and with the intention to frustrate the judgement herein. There is no evidence that the petitioner shall be unable to repay the judgement amount where the appeal is to succeed. The petitioner is able to honour her financial obligations.

The Petitioner also avers that the orders sought by the respondent are discretionary and noting the act of the responding in dismissing her have been found without justification she should be allowed to enjoy the fruits of judgement. The application does not meet the provisions of order 42 Rule 6(2) of the Civil Procedure Rules, 2010 where an applicant must satisfy there is not inordinate delay in making application and in this case application is filed one (1) year after judgement, there is no appeal filed within 60 days and no security in satisfaction of the decretal sum has been offered. The grant of orders sought would be prejudicial to the petitioner and should be dismissed with costs.

Both parties made oral submissions in court.

Determination Putting into account the application by the respondent dated 20th February, 2018 and the Replying Affidavit by the petitioner, the submissions by both parties the issues for determination are whether the court should allow a stay of execution ending hearing and determination of the intended appeal and whether the respondent the applicant has satisfied the principles for the grant of such orders.

Order 42 Rule 6 and Section 3A of the Civil Procedure Act, 2010 requires that when the court is addressing an application seeking stay of execution pending appeal, even where discretion is allowed to be guided by the principles and conditions that; That the Application has been made without unreasonable delay; That substantial loss will result to the Applicant unless such order is made; and that Security for due performance of the decree has been given by the Applicant.

Judgement herein was delivered on 14th July, 2017 and Notice of Appeal filed on 24th July, 2017. The respondent has also since applied for typed proceedings vide letter dated equal date.

The time differences from date of judgement to the actions taken by the respondent I find are reasonable and without undue delay as the application herein was subsequently filed on 20th February, 2018 and the typed proceedings have not yet been availed. They are not on record.

On the question of substantial loss being occasioned to the respondent where the judgment sum is paid, the respondent asserted in submissions that under the provisions of the Evidence Act Cap 80 Laws of Kenya the duty is upon the petitioner to set out that she is a person of means and should be able to pay the judgement sum where the appeal is to succeed.

In addressing What constitutes substantial loss this is enumerated by the court in the case of **James Wangalwa & Another versus Agnes Naliaka Cheseto HC Misc No. 42 of 2012 OR (2012) eKLR** where it was held *inter alia* that;

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of **Silverstein vs. Chesoni**, the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.*

The respondent as the applicant has the duty to set out the grounds with regard to what substantial loss they will incur if the petitioner executes the judgement. The rationale is to be found in the principles set out in the case of **Equity Bank Ltd versus Taiga Adams Company Ltd [2006] eKLR** the court stated as follows:-

In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out—in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse-as/he is a person of no means. Here, no such allegation is established by the appellant.

Similarly, in the case of **Machira t/a Machira & Co. Advocates versus East African Standard (No 2) (2002) KLR 63**, the court held that;

In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay...

This legal burden does not shift to the Respondent to prove he is possessed of means to make a refund. Except, however, once the Applicant has discharged his legal burden and has adduced such *prima facie* evidence such that the Respondent will fail without calling evidence, the law says that evidential burden has been created on the Respondent.

Noting the above, the respondent as the applicant has offered to deposit the decretal sum with the court or in a joint interest earning account, such put into account and in view of the analysis above, and there being no major objections by the petitioner save for the fact of having a judgement and the question of unfair termination of employment now dressed by the court, conditional stay of execution shall issue.

Accordingly, application dated 20th February, 2018 I hereby allowed on the following terms and conditions;

- (a) Stay of execution is hereby allowed and the respondent shall make a deposit of the judgement amount of Kshs.2,403,240.00 in a joint interest earning account in the name of both advocates for the parties;**
- (b) where no such account is opened and a deposit made within 21 days from the date herein, such monies shall be deposited with the court;**
- (c) where the above (a) and (b) is not addressed within the 28 days stay herein shall automatically lapse. Costs in the cause.**

Delivered in open court at Nakuru this 14th day of June, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant:

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