



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 313 OF 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 1<sup>st</sup> October, 2018)**

**FLORENCE A. ODHIAMBO.....CLAIMANT**

**VERSUS**

**WANANCHI TELCOM LIMITED.....1<sup>ST</sup> RESPONDENT**

**WANANCHI GROUP LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Application before Court is one dated 5<sup>th</sup> April 2018 brought under Order 42 rule 6, 7 and Order 51 rule 1 of the Civil Procedure Rules, Section 63(e) of the Civil Procedure Act and under all other enabling Provisions of the Law seeking Orders:-

***1) That this application be certified urgent and be heard as a matter of priority.***

***2) That there be a stay of execution of the judgment delivered on 15<sup>th</sup> December 2017 and finalized on 15<sup>th</sup> March 2018 and subsequent decree pending the hearing and final determination on the Respondents/Applicants appeal.***

***3) That costs for this application be provided for.***

***4) That the Honourable Court do grant such other relief as it may deem fit and just to grant.***

2. The Application which is supported by the affidavit of one Caroline Julio and is premised on grounds:-

***a) That the Respondents/Applicants have filed a Notice of Appeal against the judgment delivered on 15<sup>th</sup> December 2017, finalized on 15<sup>th</sup> March 2018.***

***b) That unless this application is granted, the Respondents/Applicants are apprehensive that the Claimant will levy execution against them.***

***c) That if stay of execution pending appeal is granted, the Respondents/Applicants appeal will be rendered nugatory and the Respondents/Applicants will suffer substantial loss with the Claimant's onerousness in repayment.***

***d) That the Respondents/Applicants is ready, willing and able to give security through a Bank Guarantee that if the Court may order for due performance on the judgment delivered on 15<sup>th</sup> December 2017 and finalized on 15<sup>th</sup> March 2018, it shall be binding on it.***

***e) That no Application for a temporary stay of execution was made before this Honourable Court by the Respondents/Applicants.***

***f) That this Application has been made without any unreasonable delay.***

***g) That this Application ought to be granted in the interest of justice and the tenements of equity.***

3. The Claimant filed her Replying Affidavit where she avers that the Application is mala fide, misconceived, incompetent, vexatious, frivolous and an abuse of the process of the Honourable Court, brought in bad faith and in bad law as the Applicant's case does not meet the

legal threshold established by law in granting stay order and the Applicant has neither suffered nor will they suffer loss should the stay order Application of the Respondent not be granted.

4. She states that the execution has not commenced in these proceedings therefore there is no basis for fear and apprehension on the part of the Applicant therefore this Honourable Court should not interfere with the exercise of its discretion unless it is satisfied that the Court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that this Court was clearly wrong in the exercise of its discretion and as a result there has been injustice.

5. She further avers that it is an ordinary principle and trite in law that a successful party is entitled to the fruits of his judgment or any decision of the Court given his/her success at any stage. The Court sight must be firmly fixed on upholding the overriding objective of the rules of procedure for handling and to prevent abuse of the process of the Court therefore the success of the appeal would not be rendered nugatory since the decree is a money decree.

### **Submissions**

6. The Respondents filled their submissions where they submit that they filed the Notice of Appeal on 23<sup>rd</sup> March 2018 and thereafter the Application herein on 6<sup>th</sup> April 2018 after the judgment was finalized on 15<sup>th</sup> March 2018, 22 days after the date of the judgment which they aver was reasonable to enable them obtain and prepare the necessary documents for the application including the Notice of Appeal and the copy of judgment.

7. They state that they demonstrated during the trial that they have been facing financial challenges, which subsequently led to the subject matter of the suit. Further, the decretal sum awarded to the Claimant in the judgment is substantial and during the current tough economic climate, payment of the same would not only impact the running of their business but would render the appeal nugatory. They relied on the case of **Antione Ndaiye Vs African Virtual University [2015] eKLR.**

8. They aver that they are willing to comply with whatever conditions the Court shall give for stay of execution of judgment. They aver that they applied for typed and certified copies of the proceedings as well as a copy of the judgment to enable them prepare for the intended appeal on 23<sup>rd</sup> March 2018 which they submit that the grounds of appeal disclosed before this Court are arguable and have good prospects of success. They therefore submit that the Claimant will not be prejudiced in the event that the orders sought are granted.

9. The Claimant filed her submissions where she submits that the Respondents have not established a prima facie evidence before this Honourable Court that it will suffer any substantial loss if stay of execution is not granted. The Respondents have merely stated that they will suffer substantial loss and failed to provide any evidence in support of this, thus the evidentiary burden did not shift to the Claimant.

10. She avers that the Respondents stated that they took 22 days to obtain relevant documents for purposes of filling the present Application yet there is no document that has been attached to the supporting affidavit to the Application or the further affidavit meaning that the reason advanced by the Respondent is false and urge this Court to disregard it. She submits that the Respondent's Application was only intended to delay the process of taxation of her Bill of costs and her right to the fruits of her judgment which was a lawful process under the law.

11. She further avers that the Respondents have failed to attach a draft Memorandum of Appeal and hence there is no basis upon which the Court can make a determination on whether or not the Respondent's intended appeal is arguable. Further in the Applicant's purported grounds of appeal, the Respondents have failed to show that reliefs or prayers they would be asking from the Court of Appeal, making it impossible for this Court to make a determination on whether the intended appeal will succeed.

12. She submits that for the Court to establish the reasonable success of the appeal it can only do so by looking at the itemized award of the judgment against the draft Memorandum of Appeal which has not been attached and on this ground alone the Application of stay sought by the Applicant fails. She relied on the case of **Edward Kamau & another Vs Hannah Mukui Gichuki & another [2015] eKLR.**

13. In conclusion, she submits that the Respondents have not shown that they will suffer substantially, or that the intended appeal has overwhelming chances of success, justice will be denied to both parties if the Respondent's application is dismissed.

14. I have examined all the averments of both Parties. The Applicant seeks stay orders. The law governing stay is Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:-

**“(2) No order for stay of execution shall be made under subrule (1) unless:**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

15. From the submissions of the Parties, the Applicants filed this Application within 22 days from the date of judgement which is reasonable time.

16. The Applicants have not however demonstrated the substantial loss they stand to suffer if the Application is not allowed as there is no indication that the Respondent/Claimant cannot pay them back the decretal sum if the appeal is allowed.

17. The Applicants however submitted that they are ready to abide by any condition that the Court may set.

18. Based on the above undertaking, I exercise my discretion and allow the Application for stay on the condition that the Respondent pay ½ the decretal sum to the Claimant/Respondent within 60 days and the other ½ be deposited in an interest earning account held in the joint names of Counsels on record within 60 days. In default execution to proceed.

**Dated and delivered in open Court this 1<sup>st</sup> day of October, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Okwe Achiando for Claimant – Present

Koech holding brief for Mr. Kimathi for Respondent – Present