



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1339 OF 2011

IRENE ATIENO.....CLAIMANT

VERSUS

HENRY DE'SOUZA.....1ST RESPONDENT

ANNETTE DE'SOUZA.....2ND RESPONDENT

RULING

Introduction

1. The Application before the Court is the Notice of Motion dated **13th August, 2018** and is brought by the 1st and 2nd Respondents seeking for the following Orders **THAT:-**

- a) This Application be certified urgent and heard in priority basis.
- b) The Judgment and orders issued by the Honourable Court on 31st July 2018 be stayed pending the hearing and determination of this Application.
- c) Pending the lodging, hearing and determination of the Applicants intended appeal, the execution of the decision of this Honourable Court issued on 31st July 2018 be stayed.
- d) Costs and incidentals to the application be provided for.

2. The Motion is brought under Order 42 Rule 6 and 7 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 12 of the Employment and Labour Relations Court Act and it is supported by the affidavit sworn by Peter C. Onyango Advocate, on 13th August, 2018. It is premised on the following grounds as set out on the body of the Motion:

- a) That the Applicants being dissatisfied with the Judgment delivered on 31st July, 2018 intends to file an appeal at the Court of Appeal.
- b) That the Applicants have an arguable appeal with good prospects of success.
- c) That the Appeal will be rendered nugatory if the stay is not granted.
- d) That the Applicants intend to raise fundamental issues of law in the intended appeal.
- e) That the Claimant/Respondent will suffer no prejudice if stay is granted
- f) That the Applicants are willing to comply with any conditions that the Honourable Court shall give for stay of execution of the Judgment.
- g) That the application has been brought without unreasonable delay and in good faith.
- h) That it is in the interest of justice that there be stay pending hearing of the application and the intended appeal.

Respondents'/Applicants' Case

3. The main ground for the Application is that the Respondents being dissatisfied with the Court's Judgment intends to file an appeal at the Court of Appeal. That the intended appeal is arguable appeal and it has good prospects of success and if stay orders are not granted as prayed the Appeal would be rendered nugatory.

4. The Respondents'/Applicants' further aver that they are willing to comply with any conditions that the Honourable Court shall give for stay of execution of the judgment.

Claimant/Respondent's Case

5. The Claimant/Respondent has opposed the application by filing her Grounds of Opposition dated 1st October, 2018 in which she raises the following grounds:

- a) That the said Application lacks merit is hopelessly incompetent and ought to be dismissed with costs.
- b) That the Honourable Court is "*functus officio*" and incapable of granting orders as sought by the Applicant in the aforesaid application.
- c) That the Applicant has failed to satisfy the essential requirements necessary for the grant of orders of stay.
- d) That the Applicant does not have an arguable appeal capable of success since there is no draft Memorandum of Appeal attached onto the said Application that would show the arguability of any intended Appeal or at all.
- e) That the Applicants cannot honestly allege to have any arguable Appeal after failing to submit themselves before the Court and testify in favour of any plausible Defence that they may have felt they possessed. The trial was closed without the Respondents testifying and that issue isn't the subject of any challenge.

Respondents' submissions

6. The Respondents have submitted that they have satisfied the conditions necessary for the Court to grant them stay orders and relied on **Kiplagat Kotut Versus Rose Jebor Kipngok (2015) eKLR**, where the Honourable Court held:-

"The common thread was that a stay of execution will not be granted unless the conditions in Order 42 Rule

6(2) of the Civil Procedure Rules, 2010 provides that an applicant who is seeking a stay of execution pending appeal must demonstrate the following:-

- 1. Substantial loss may result to the applicant unless the order was made*
- 2. The application was made without unreasonable delay; and*
- 3. 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."*

7. On the issue of substantial loss the Respondents'/ Applicants' submitted that Judgment having been entered in favour of the Claimant for a sum of Kshs. 267,864 plus costs and interest and that execution of the decree by the Claimant/ Respondent shall cause substantial loss unless the stay orders are granted.

8. The Respondents'/Applicants further submitted that the Appeal would be rendered nugatory in the event it is successful thus their wish is to maintain the status quo pending hearing and determination of the intended Appeal. The Applicants relied on the case of **Equity Bank Ltd Versus Taiga Adams Company Limited**, where the Court stated as follows:

"In the Application before me, the applicant has 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 the decretal sum is paid to the respondent- that is execution is carried out- in event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means."

9. On the issue of the Application being brought within reasonable time the Respondents submitted that they have satisfied this condition because the Application was filed 15 days after the delivery of the Judgement.

10. Finally, on the issue of security, the Applicants submitted that they are willing to offer such security as the court may deem fit, proper and just in the circumstances. They have relied on the authority of **Focin Motorcycle Co. Limited Versus Ann Wambui Wangui & Another (2018) eKLR**, where the learned Judge L. W. Gitari stated:-

"The applicant has deponed that he is ready to provide security. It is the Court which determines the security upon ordering stay

to ensure the due performance of the obligations by the applicant as to costs and to satisfy the decree. It is therefore sufficient to depose that he is ready to provide security. The applicant has submitted that he has ability to provide security as will be ordered by the court as it is a company with substantial investments in the Country and once called upon by the Court will avail such security.”

11. The Respondents'/Applicants further submitted that the Honourable Judge erred in law and in fact by failing to use the undisputed amount of Kshs. 6,000/= to calculate quantum and instead used a figure of Kshs. 7,754.45/= a figure which the appellants are not sure how the Honourable Judge decided on. For emphasis the Respondents'/Applicants relied on the case of **Kangethe Kinyanjui Versus Tony Ketter & 5 Others (2013) eKLR (Civil Application 31 of 2012)**

12. The Respondents/Applicants submitted that the Claimant/Respondent did not state in her grounds of opposition that she has the means to repay by showing the Court what resources she has to refund the judgment amount in the event the appeal is successful. For emphasis the Respondents'/Applicants' relied on the case of **Kenya Wildlife Service Versus Lake Jipe Safari Lodge Limited (2018) eKLR**, where Justice P. N Waki held that:-

“As to whether the appeal will be rendered nugatory unless the stay is granted, the applicant asserted that the Respondent does not have the means to refund the judgment amount in the event that the appeal succeeds. Beyond stating in the replying affidavit that the respondent is an established entity, it did not controvert, the assertion that it does not have the means to repay by showing what resources it has.”

13. On the issue of jurisdiction of this Court to entertain the instant application the Respondents'/Applicants' have submitted that the Court is not *functus officio*. They relied on Order 42 Rule 6 and the case of **Speaker of the National Assembly versus Karume (2008) KLR 425** and urged the Court to allow their application.

Claimant's submissions

14. The Claimant submitted that the Respondents have failed to satisfy all the requirements for an order for stay to be granted and urged the Court to dismiss the instant application with costs. He submitted that the applicants have not failed their draft memorandum of appeal to prove that they have an arguable appeal.

15. In addition, he submitted that the applicant has failed to demonstrate the substantial loss they will suffer if stay order is withheld and the decree settled in favour of the Claimant. He on **Equity Bank Limited Versus Taiga Adams Company Limited**.

Analysis and determination

16. After careful consideration of the application, affidavits and the written submissions the only issues for determination is Whether the Application meets threshold for the grant of stay pending appeal.

17. **Order 42 Rule 6(2)** of the Civil Procedure Rules bars this Court from ordering stay of execution pending appeal unless

a) The Application is brought without inordinate delay.

b) The Applicant demonstrates that he will suffer substantial loss unless stay is ordered, and

c) The Applicant is willing to give security as the Court may deems fit to order.

Inordinate delay

18. Judgment in this cause was delivered on 31st July 2018. The Applicants being dissatisfied with the Judgment filed a Notice of Appeal on 14th August 2018 which is 14 days from the date of Judgment. The instant Application was filed on 13th August 2018 which is about 13 days from the date of Judgment. In my view there is no delay in filing the instant Application.

Substantial Loss

19. Substantial loss occurs where the decree holder is unable to refund the decretal sum in the event the Appellant succeeds in his Appeal thus rendering the Appeal nugatory. In order to protect the substratum of the appeal, Courts grant Order stay pending Appeal. The burden of proving the alleged inability to repay the decreed sum in the unlikely event of the appeal succeeding is on the applicants.

20. After careful perusal of the affidavit in support of the application, I did not see any averment that the claimant is a man of straw who will not be able to refund the decreed sum if the appeal succeeds after the decree is executed. In **Equity Bank Ltd Versus Taiga Adams Company Limited**, the Court held that:

“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 event the appeal succeeds, the respondent would not be in a position to pay- reimburse- as /he is a

person of no means.”

21. It is appreciated that the Claimant lost her employment however that does not mean she has become a pauper who cannot refund the decreed sum if the appeal is successful. Consequently, I return that the respondents have failed to prove that they will suffer substantial loss if stay is withheld.

Security

22. The Applicants have undertaken to comply with any conditions for stay ordered by the court as security for the decreed sum. This is however not necessary because the applicants have not proved substantial loss which would have necessitated grant of stay of execution.

23. In view of the finding herein above that the Applicants have not proved that substantial loss will be occasioned on them if stay is withheld, I return that the application does not meet the threshold for grant of stay pending appeal.

Conclusion and disposition

24. The Application dated **13th August, 2018** lacks merits and it is dismissed with costs.

Dated, Signed and Delivered at Nairobi this 20th day of December, 2018

ONESMUS MAKAU JUDGE