



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1088 OF 2011

DANIEL GITHINJI WAIGANJO CLAIMANT/RESPONDENT

VERSUS

KENPIPE CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED RESPONDENT/APPLICANT

M/S Lwila for respondent/applicant

Mr. Ombati for claimant/respondent

RULING

1. The respondent/applicant filed a notice of motion application on 5th May 2016 seeking stay of execution of the judgment of Lady Justice Maureen Onyango delivered on 30th September 2014 pending hearing and determination of an appeal.

2. The application is premised on the grounds set out on the face of the notice of motion that may be summarized as follows:

That the respondent has noted an appeal which appeal may be rendered nugatory if the judgment is executed.

That the claimant has already extracted a decree in the sum of Kshs.2,365,312 a colossal amount which the applicant may be unable to recover from the claimant once it is paid out.

That the respondent has brought the application without unreasonable delay and is willing to furnish such reasonable security and abide by such terms and conditions as may be ordered by the court.

That the respondent will suffer substantial loss if the decree is executed.

3. The application is supported also by the affidavit of Joyce Owuor, chairperson of the respondent.

Response

4. the application is opposed vide a replying affidavit of the claimant filed on 17th May 2016.

5. The crux of the opposition is that the application has been brought over seven months after the judgment was delivered and only when the claimant was about to execute the decree of the court.
6. That the delay in bringing the application is inordinate and the application is only meant to delay justice.
7. That the applicant has not demonstrated that it has an arguable appeal nor has it shown that it will suffer substantial loss by paying the decretal sum.
8. That the appeal would not be rendered nugatory if payment is made.

Determination

9. In the **Court of Appeal Civil Application No. NAI 6 of 1979, Butt –Vs- Rent Restriction Tribunal, Madan, Miller and Potter JJA** had this to say;

*“it is in the discretion of the court to grant or refuse a stay but what has to be judged in every cause is whether there are or not particular circumstances in the case to make an order staying execution. it has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal if successful from being nugatory, per **Breth, LJ in Wilson Vs. Church (No.2) 12 chD [1979] 454 at p.459.** In the same case, **Cotton LJ said at p.458:***

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal if successful, is not nugatory.”

10. Having considered the facts of the case and the law applicable, the court is of the considered view that there was inordinate delay in bringing this application. However, balancing the right of the applicant to appeal decision of the court and the overriding obligation for justice to be done without inordinate delay, the court also having considered that the decretal amount is substantial and the claimant may be unable to refund the same if the appeal was successful, the court allows the application for stay of execution on the following conditions:

- i. The applicant pay one quarter of the decretal sum to the claimant within fourteen (14) days of this ruling.
- ii. The balance be deposited in an interest earning joint account of the advocate for the applicant and the advocate for the claimant within thirty (30) days;
- iii. In default of either (i) or (ii) above, the order for stay of execution will automatically lapse and execution to issue.

Dated and delivered at Nairobi this 27th day of January 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE