



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 229 OF 2013

PAUL THUKU GACHORA

CLAIMANT

v

NAIVAS COMPANY LIMITED

RESPONDENT

RULING

1. In a judgment delivered on 6 May 2016, the Court found and held that the dismissal of the Claimant was procedurally unfair and awarded him a total of Kshs 260,300/-, being 1 month pay in lieu of notice, wages for January 2012 and compensation.
2. Being aggrieved with the judgment, the Respondent moved Court on 3 July 2016 seeking
 1. **THAT** this matter be certified urgent and heard ex-parte in this first instance.
 2. **THAT** this Honourable Court be pleased to grant an order for stay of execution of the judgment issued herein on the 6th day of May 2016 pending the interparties hearing and determination of this application.
 3. **THAT** there be stay of execution of the decree herein pending hearing and determination of the appeal against the Judgment herein, delivered on the 6th day of May, 2016.
 4. **THAT** the costs of this Application be provided for.
3. The motion was placed before the Court in Kericho, the Court directed that it be determined in the ordinary course of business (file was therefore brought back to Nakuru).
4. The motion was eventually served and the Claimant filed a replying affidavit in opposition on 9 October 2016 and arguments were taken on 6 December 2016.
5. Proposed orders 1 and 2 have been overtaken by events and the only substantive issue remaining for determination is whether a stay of execution pending appeal ought to be granted.
6. A Notice of Appeal was lodged on 19 May 2016 well within the prescribed time.
7. The motion was equally lodged inside of a month after delivery of judgment, and therefore question of inordinate delay does not arise.

8. The other relevant issues raised by the Respondent are that the Claimant is a person of straw and would not be able to refund the decretal sum were it to be paid out to him, and that the Respondent stands to suffer irreparable loss and damages in the event the decretal sum is paid out.

9. The Claimant on his part contended that stay of execution could not be granted because no appeal had been lodged; that satisfaction of a decree by itself does not amount to substantial loss and that the Respondent failed to lead any evidence during the hearing.

10. The legal principles applicable to the determination of an application such as the present one are legion and have been referred to in authorities such as *Vishram Ravji Halai & Ar v Thornton & Turpin (1963) Limited*, Civil Application No. NAI. 15 of 1990 cited in *Carter & Sons Ltd v Deposit Protection Fund Board*, Nairobi Civil Appeal No. 291 of 1997 (relied on by the Claimant).

11. As already adverted to herein above, the anchor grounds advanced by the Respondent are that the Claimant is a man of straw and that it stands to suffer substantial loss.

12. In my view, the mere fact that a decree holder may not be able to refund the decretal sum were an appeal to succeed, is not a good enough reason without more for granting stay of execution pending appeal. And I would endorse the dicta by Emukule J in *Cosmas Kipkoech Sigei v Madrugada Ltd & Ar* (2010) eKLR that a stay will not be made on the ground that the decree holder is a pauper, and will therefore be unable to refund the decretal sum if paid to him....

13. In the instant case, the Respondent has not shown it would suffer substantial loss were the stay order be declined. As Odunga J held in *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR, and which I endorse, the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit....it is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

14. Despite the Respondent offering to abide by any conditions set out by the Court, it is my considered view that the present motion is unmerited and the Court orders that it be dismissed with costs to the Claimant.

Delivered, dated and signed in Nakuru on this 27th day of January 2017.

Radido Stephen

Judge

Appearances

For Claimant Mr. Makori instructed by Wambua Kigamwa & Co. Advocates

For Respondent Mr. Njenga instructed by Thuita Kiiru & Co. Advocates

Court Assistants Nixon/Daisy