



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT**  
**OF KENYA AT NAIROBI**  
**CAUSE NO. 2391 OF 2012**

**(BEFORE HON. LADY JUSTICE HELLEN S. WASILWA ON 14<sup>TH</sup> FEBRUARY, 2017)**

**FREDRICK KIBWANA ELABONGA.....CLAIMANT**

**VERSUS**

**BUILD AFRICA KENYA..... RESPONDENT**

**RULING**

**(Stay Application)**

1. Before the Court is a Notice of Motion Application dated 11<sup>th</sup> October 2016 where the Respondent/Applicant seeks for Orders:

- 1. That this application be certified urgent and be heard ex-parte in the first instance.***
- 2. That there be a temporary stay of execution of the decree emanating from the judgment that was delivered on the 21<sup>st</sup> September 2016 pending inter parties hearing of this application.***
- 3. That there be a temporary stay of execution of the decree emanating from the judgment that was delivered on the 21<sup>st</sup> September 2016 pending the hearing and determination of this application.***
- 4. That there be a stay of execution of the decree emanating from the judgment that was delivered on the 21<sup>st</sup> September 2016 pending the hearing and determination of the Appeal.***
- 5. That this Honourable Court do issue such further orders or directions that it may deem fit to grant in the interest of justice.***
- 6. That the costs of this application be in the cause.***

2. The application is supported by the annexed affidavit of Annah Kyoya and on the following grounds as well as other to be adduced at the hearing.

- 1. That the Honourable Court delivered a judgment against the Respondent/Applicant on the 21<sup>st</sup> September 2016.***

**2. That the Respondent/Applicant lodged a Notice of Appeal against the said judgment and intends to lodge an appeal at the Court of Appeal once the typed and certified proceedings and judgement are supplied.**

**3. This Application seeks a stay of execution of the judgment pending appeal.**

**4. The Claimant/Respondent will proceed with execution and thus rendering this application and the whole appeal nugatory, if orders of stay of execution are not granted.**

**5. The Respondent/Applicant is willing to provide security for due performance by depositing such portion of the decretal sum as may be directed by the Honourable Court either in Court or in a joint interest account between the firms of the Advocates on record and/or provide such security for due performance as ordered by the Court.**

**6. This application has been made without undue delay.**

**7. It shall be just to grant the orders herein in the interest of justice.**

3. The Claimant/Respondent has filed a Replying Affidavit deponed to by Fredrick Kibwana Elabonga in response to the application filed herein.

4. They aver that the application is ill conceived, an abuse of the Court process and lacks merit with limited chances of success.

5. They aver that there are no grounds known to law in the Appeal as it is weak and shallow, and meant to frustrate the Claimant.

6. They aver that the termination was unfair and awards given are just, further; the Claimant/Respondent is now employed and capable of refunding the decretal sum, in the very unlikely event that the intended Appeal in its current form was to succeed.

7. They aver that the Respondent/Applicant is a foreign organisation whose continuation in Kenya is not guaranteed as informed by the recent redundancies and imminent exit of their Country Director. Granting stay would therefore render the judgment of 21<sup>st</sup> September 2016 nugatory and an academic exercise which would be prejudicial to the Claimant.

8. They aver that the current application should be dismissed with costs.

9. The Parties proceeded by way of written submissions.

10. The Respondent/Applicants submit that the Claimant confirmed during the hearing that he is unemployed but does casual contracts, and they fear that he may not be able to refund the decretal sums should the intended appeal succeed. They submit that evidence to the contrary has yet to be supplied.

11. They cite the case of Malindi Civil Appeal Number 18 of 2015 **Engen (K) Limited vs. Kenya Petroleum Workers Union & Sarman Energy Limited** where the Court stated that:

***“The 13 Grievants, it is admitted on oath, are unemployed and have no other source of income. The Applicant’s apprehension that it may not recover the decretal sum should it be paid to the 13 and subsequently the appeal it to succeed is not without justification. The appeal in those circumstances will be rendered nugatory”.***

***The purpose of the Court’s power under Rule 52 (b) is to ensure that no party is occasioned any substantial loss and the status quo preserved if such loss is likely to render the appeal or intended appeal nugatory.***

***In the matter before us, the 1<sup>st</sup> Respondent has obtained a lawful judgment on behalf of its 13 members who are presently impecunious having lost employment. The Applicant on the other hand has a right to challenge the judgement on appeal to this Court.”***

12. They submit that the decretal sum is substantial being Kshs. 4 million and a person of limited means like the Claimant would not be able to repay it. They cite the case of **Equity Bank vs. Taiga Adams Company Limited [2006] eKLR** where the Court stated:

***“In the application before me, the Applicant has not shown or established 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 will not be in a position to pay – reimburse as he is a person of no means.”***

13. They further submit that undue hardships will result to the Respondent in the event that it is required to pay the decretal sum. To this end they rely on the case of **Kenya Hotel Properties Limited vs. Willesden Properties Limited** where the Court stated that:

***“the decree is a money decree and normally Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the Respondent is not a ‘man of straw’ but is a person who, on the success of the appeal would not be able to repay the decretal amount plus any interest to the Applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the Applicants if stay is refused purely on grounds that the decree is a money decree.”***

14. They submit that they have been operating in Kenya for 15 years and are ready to provide security. They submit that the Claimant has failed to prove that the standard required is that he is capable of refunding the sum.

15. They ask the Court to grant the stay.

16. The Claimant Respondents who have also filed written submission submit, the application was based on the joblessness and perceived incapability of refund of funds of the Claimant, but this has been overtaken by events.

17. They submit that they are now gainfully employed as the Head of Finance & Administration at Cordaid and have attached his payslip and business card.

18. He submits that he should enjoy the fruits of his judgment. He relies on **Civil Appeal No. 63 of 1997 M/S Portreitz Maternity vs. James Karanga Kabia** where the Court states that:

***“That right of Appeal must be balanced against the equally weighty right of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be just cause for depriving the Plaintiff of that right”.***

19. They submit that it is at the discretion of the Court to grant stay but that this should be judged in every case whether there are or not in particular circumstances in the case to make an order staying execution. The Court should use its discretion to refuse stay.

20. In conclusion they submit that they have financial muscle and the application should be dismissed.

21. Having considered the Application before Court and submissions of both parties, I refer to Order 42 Rule 6(2) of the Civil Procedure Regulations which state 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.**

22. In line with the above provisions, I find the Applicant's came to Court without any delay. On the issue of substantial loss, I find that this is a monetary award.

23. The Applicants have submitted that the Respondent is currently unemployed and in the event of the Appeal succeeding, he will be unable to refund the decretal sum already paid.

24. In answer to this, the Respondent has submitted that he is currently employed and he annexed his payslip to show he is employed by Cordaid Emergency Drought Programme and so he is capable of refunding the decretal sum if the Appeal is allowed.

25. In line with Order 42 rule 6(2), there is therefore no reason why the execution should be stayed. I decline to grant stay order stay and order the execution to proceed.

**Read in open Court this 14<sup>th</sup> day of February, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Gatore for Claimant

Nderitu for Respondent Applicant