



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1913 OF 2011

ALEX MUSEMBI MULILI.....CLAIMANT

VERSUS

JACOB NZIOKI KWESI

SIMON IRUNGU KARIUKI

EZEKIEL KIRIMA MUNYAGIA

STEPHEN NDAMBUKI NGUGU JOINTLY T/A

AL-RAHMED CLINIC LAB AND PHARMACY.....RESPONDENTS

RULING

1. The Respondent's application brought by Notice of Motion dated 27th February 2017 seeks stay of execution of the judgment of the Court (**Nduma J**) delivered on 18th March 2016, pending appeal.
2. The application which is supported by the affidavit of the 1st Respondent, Jacob Nzioki Kwesi is based on the following grounds:
 - a) The Respondents have an arguable appeal with a good probability of success and if the orders sought do not issue the appeal will be rendered nugatory;
 - b) The Claimant has instructed Mbusera Auctioneers who have proclaimed the Respondents' goods;
 - c) Unless the Court orders stay of execution, the Respondents will be gravely prejudiced.
3. In his supporting affidavit sworn on 27th February 2012, the 1st Respondent, Jacob Nzioki Kwesi depones that being dissatisfied with the judgment of the Court, the Respondents instructed their Advocate to file a Notice of Appeal on 30th March 2016.
4. Kwesi further depones that the Respondents filed an application for stay of execution on 1st August 2016 which was scheduled for hearing on 17th August 2016 but the court file went missing and the application was not heard.
5. In his replying affidavit sworn on 13th March 2017, the Claimant depones that the Respondents'

application is an attempt to prevent him from accessing the fruits of the judgment. He adds that the application has been filed almost a year since delivery of judgment and the Respondents are guilty of unreasonable delay.

6. The Claimant further depones that he filed his claim in the year 2011 and has since been waiting to enjoy the fruits of his judgment. He states that he is now employed by AAR and is therefore able and willing to refund any monies paid to him in the event that the Respondents' appeal succeeds.

7. The Claimant states that the Respondents are in the process of concealing their assets to avoid execution.

8. Order 42 Rule 6(2) of the Civil Procedure Rules sets out the following conditions for granting of an order for stay of execution:

- a) That the applicant has shown that they will suffer substantial loss if the order sought is not granted;
- b) That the application has been made without unreasonable delay;
- c) That the applicant has given adequate security for the due performance of such order as may be binding on them.

9. Additionally, there is the well-established condition developed under case law that the applicant has an arguable appeal which will be rendered nugatory if the order sought is not granted (see ***Banking Insurance & Finance Union (Kenya) v Murata Sacco Society Limited [2015] eKLR***).

10. From the record, the Respondent filed a similar application on 1st August 2016 which was not prosecuted. The Respondents aver that soon after filing of this application the court file went missing. There was however no evidence to support this averment nor did the Respondents pursue the option of reconstruction, if indeed the file was missing.

11. In his oral submissions, Counsel appearing for the Respondents admitted that this particular application was not even served on the Claimant. The delay in bringing the current application which the Court considers unreasonable has therefore not been explained.

12. Additionally, the Respondents have not demonstrated substantial loss to be sustained if the orders sought are not granted nor have they offered any security. The Claimant himself depones that he is able and willing to refund the decretal sum in the event that the Respondents' appeal succeeds.

13. As held by **Madan JA** (as he then was) in ***Butt v Rent Restriction Tribunal [1982] KLR 417*** in exercising its discretion to grant or decline a stay of execution the Court must consider the particular circumstances of each case.

14. In the case now before me, all the Respondents have done is to throw an application at the face of the Court, I might add rather late in the day. They have made no effort to comply with any of the conditions for granting of the orders sought. Execution is a lawful process that can only be halted within the confines of the law. The Court will not be moved by the mere fact that an attachment has occurred.

15. For this reason the Court considers it unnecessary to address itself to the other issues raised in this application which fails and is dismissed with costs to the Claimant. The interim orders granted on 28th February 2017 are hereby vacated.

16. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 13TH DAY OF APRIL 2017

LINNET NDOLO

JUDGE

Appearance:

Mr. Mungai for the Claimant

Mr. Njoroge for the Respondent