



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1021 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 29th June, 2017)

MARY ATIENO ORUOCH CLAIMANT

VERSUS

BANK OF BARODA (KENYA) LIMITEDRESPONDENT

RULING

1. The Application before Court is dated 2nd November, 2016, wherein the Respondent/Applicant seeks for orders:

- 1. That this Application be certified urgent.***
- 2. That there be a stay of execution of Judgment given on 3rd October, 2016, pending the hearing and determination of this application interpartes.***
- 3. That there be a stay of execution of Judgment given on 3rd October, 2016, pending hearing and determination of the intended appeal.***
- 4. That costs of this application be provided for.***

2. The Application is premised on the grounds that:

- 1. Judgment in favour of the Claimant in this matter was entered on 3rd October, 2016, for Kshs. 4,368,510/=.***
- 2. The Respondent, being dissatisfied with the said judgment has filed a notice of appeal.***
- 3. The Respondent will suffer substantial loss if execution of the awarded amount proceeds.***
- 4. The Respondent has good grounds of appeal which include:-***
 - i. The Learned Trial Judge erred in law in finding that the Claimant was not negligent in her handling of the safe keys and that the summary dismissal was not justified.***
 - ii. The Learned Trial Judge erred in law in finding that Fathia (the 2nd Accused in Kibera CMCC Criminal Case No. 2441 of 2009) had signed for the keys in the key register contrary to the evidence adduced in the said criminal matter and in this matter.***

iii. The learned Trial Judge erred in finding that he Respondent found the Claimant negligent apparently for no reason.

iv. The learned trial judge erred in finding that the Respondent did not follow procedure laid down in section 41 of the employment act in summarily dismissing the Claimant.

v. The learned trial judge erred in finding that the Claimant was not given any fair hearing and that rules of natural justice were not followed contrary to the evidence adduced in support of the Respondent's defence.

vi. The learned trial judge erred in finding that the dismissal of the Claimant was unfair and unjustified.

vii. The learned trial judge erred in awarding the Claimant gratuity, award of which has no basis in law or precedent as it is given at the discretion of the employer and is therefore not enforceable.

The learned trial judge erred in awarding the Claimant the equivalent of 30 months salary in gratuity contrary to the Respondent's human resource manual which was the stated basis of the said award.

5. The intended appeal has high chances of success and will be rendered nugatory if stay of execution is not granted.

6. In the event that the intended appeal is unsuccessful, the Respondent, which is an international bank with a total equity in 2015 in excess of Kshs. 11 Billion will be able to satisfy the decree herein.

3. The Application is supported by the affidavit of Yogendra Singh Saini the head of operations of the Respondent Bank wherein he restates the grounds on the face of the application and state that if the orders sought are not granted they stand to suffer substantial loss.

4. The Claimant/Respondent has opposed the application by filing a replying affidavit in which she states that the Applicant has not satisfied all the elements that would justify the grant of stay of execution. That the Respondent has not established that they have an arguable appeal, that if the stay is not granted the intended appeal will be rendered nugatory and that they have not demonstrated the willingness to abide by conditions of stay that the Honourable Court may give for due performance of the decree. They pray for the application to be dismissed with costs.

5. In submissions the Applicant states that the application has been made without undue delay as the application was made within one month from the date of judgment with the notice of appeal having been filed on 11th October, 2016.

6. The Applicant further submits that they stand to suffer substantial loss should the orders sought not be granted and their appeal be rendered nugatory. They cite the case of **Tropical Commodities Suppliers Ltd and Others Vs. International Credit Bank Limited (in liquidation) (2204) E.A. 331** where the Court held that:

“Substantial loss does not represent any particular size or amount but refers to any loss great or small that is of real worth or value as distinguished from loss that is merely nominal”.

7. They state that the decretal sum is for a substantial sum and payment before determination of the appeal would be substantial loss to the Applicant and a refund in the event the appeal is successful would not suffice as the sum would not include interest.

8. That the intended appeal has merit which have been elucidated in the application and as such the Applicant is of the view that their appeal is arguable and has high chances of success. That the appeal is not intended to delay the Claimant/Respondent from enjoying the fruits of judgment.

9. The Applicant states that in the event that the orders of stay are granted, they are willing to deposit the decretal sum in an interest earning account.

10. The Applicant pray for the application to be allowed and cite the case of **Oceanic View Ltd vs. Kenya Commercial Bank (2002) 2KLR 338** where it was stated:

“if an applicant has a right to appeal on the amount of money involved in a dispute, this constitutes special circumstances meriting a stay of execution pending appeal.”

11. The Claimant/Respondent in submissions states that the discretion to grant the orders sought should be exercised judiciously and not whimsically or capriciously. They cite the case of **Machira t/a Machira & Co. Advocates Vs East Africa Standard (no.2)(2002) KLR 63** where the Court observed that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.”

12. The Applicant further submits that, in order for the Court to allow the orders sought it must be satisfied that:

a. Substantial loss may result to the Applicant unless the order is made.

b. The application has been made without unreasonable delay.

c. The applicant has furnished security for the due performance of the decree being appealed from.

13. They also cite the case of **Tropical Commodities Suppliers Ltd Vs International Credit Bank (in Liquidation) Kampala Miscellaneous Application No. 379 of 2003** where Justice Ogoola held:

“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that it merely nominal...”

14. The Claimant/Respondent also submits that the Applicant ought to establish other factors which show that execution will create a state of affairs that will negate the very essential core of the Applicant as the successful party in the appeal. This principle they state as was submitted in the case of **James Wangalwa & Another vs. Agnes Naliaka Cheseto Bungom HC Misc. Application No. 42 of 2011.**

15. The Claimant/Respondent states that the Respondent has not established to the Court why the prayers sought should be granted and as such the Application should be dismissed with costs.

16. Under Order 42 Rule (6) of Civil Procedure Rule:

“(1) No appeal or second appeal shall operate as a stay of

execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

17. It is imperative that the Respondent/Applicants establishes the substantial loss that he may suffer unless the order sought is made. In this regard, the Applicant should convince the Court that he merits an order of stay based on facts he presents before Court. The demonstration in factual and is not merely imagined.

18. The Applicants have stated that their appeal has high chances of success and their averments are merely statements made by the final Court without stating why their view is contrary.

19. In Bungoma HC Miss App. No. 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto the Court explained that:

“the Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably effect or negate the very essential core of Applicant as the successful party in the appeal. This is what substantial loss would avail”.

20. This position was also echoed in Machira t/a Machira & Company Advocates vs. East African Standards (No 2) (2002) eKLR 63 where the Court held as follows:

“In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particularswhere no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay”.

21. The Applicants have not really demonstrated the substantial loss by placing before this Court substantial material or facts that the Court would consider and make a real finding of such a loss.

22. However in exercising its discretion in this case, the discretion should be exercised judiciously. It is therefore my position based on the law and facts that a stay on certain conditions would be apt.

23. The Applicants have not even stated that they would consider a stay based on certain conditions as envisaged under Order 42 Rule (6) of Civil Procedure Rules. I will exercise my discretion and allow stay on condition that the Respondent/applicants release ½ the decretal sum to the Claimant and the other ½ be deposited in an interest earning account held in the joint names of the Counsels on record within 30 days. In default execution to proceed.

24. Costs in the cause.

Read in open Court this 29th day of June, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ongoro holding brief for Muywa Claimant – Present

Egesa holding brief for Kiora for Applicant Respondent – Present