



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 129 OF 2015**

**MICHEAL NG'ANG'A GATUA.....CLAIMANT**

**VERSUS**

**EQUITORIAL NUT PROCESSORS LTD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 23<sup>rd</sup> June, 2017)

**RULING**

The judgment was entered on 17.03.2017 for the claimant against the respondent for dismissal of the counterclaim, the respondent to pay Kshs.3, 550, 000.00 by 01.05.2017 failing interest to be payable at court rates till full payment, and the respondent to pay costs of the suit.

The respondent filed a notice of motion on 22.05.2017 through C.N. Kihara & Company Advocates. The application was said to be under section 12 (1) and (5) of the Labour Institutions Act, Section 17 of the Industrial Court Act, 2011, rule 16(1) of the Industrial Court (Procedure) Rules, 2010, sections 1A, 1B, 3A of the Civil Procedure Act, Order 42 rule 6 and Order 50 rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of law. The substantive prayer was that the honourable court be pleased to grant stay of execution of the judgment of the court delivered on 17.03.2017 pending the hearing and determination of the appeal here from.

The application was supported with the attached affidavit of John Gitogo, the respondent's Finance Director. It was urged as follows:

- a. The judgment of 17.03.2017 awarded a sum of Kshs.3, 550,000.00 plus interest.
- b. The notice of appeal dated 20.03.2017 against the judgment was lodged as filed on 21.03.2017 and by letter dated 20.03.2017 the respondent applied for typed and certified proceedings of the suit.
- c. A draft memo of appeal has been prepared.
- d. The respondent's goods were proclaimed and undervalued.
- e. The execution proceedings will take place any time.
- f. The applicant is willing to abide by conditions set by the court for stay of execution pending

appeal. The supporting affidavit does not make any specific proposal in that regard.

The claimant opposed the application by filing on 29.05.2017 the replying affidavit of Michael Ng'ang'a Gatua through Kamende D.C & Company Advocates. The grounds of opposition as stated in the affidavit were as follows:

- a. The application was incurably defective in view of the provisions of law that were invoked.
- b. The exhibits on the supporting affidavit were not marked as required in law.
- c. There was inordinate delay in filing the application on 22.05.2017, the judgment having been delivered on 17.03.2017.
- d. The court gave the judgment debtor up to 02.05.2017 to pay up failing the decretal sum would attract interest at court rate.
- e. The intended appeal would not be a bar to the claimant executing the decree.
- f. The grounds of appeal have not been exhibited.
- g. The applicant has not demonstrated the loss it will suffer if the decretal sum were paid.
- h. Thus the application should be dismissed with costs.

Applications for stay of execution pending appeal will be tested by this court against the provisions of Order 46 Rule 6 of the Civil Procedure Rules. The judgment was delivered on 17.03.2017 and the application filed on 22.05.2017 long after 01.05.2017, the date the court had fixed for payment of the judgment debt without interest. In such circumstances, the court finds that there was delay in filing the application as it was prompted with the claimant's initiation of the execution process.

The applicant has not offered security for due and prompt satisfaction of the decretal sum should the appeal fail.

The remaining condition for stay of execution to be granted is whether the respondent has established substantial loss if the orders are denied. As submitted for the claimant, it is not sufficient for the applicant to say that execution has issued or will soon issue and therefore the applicant will suffer loss. The court has considered the supporting affidavit. The applicant has not demonstrated any substantial loss that will ensue if the orders as prayed for are not granted.

The court returns that the applicant has failed to satisfy the prescribed conditions for stay of execution pending appeal. As submitted for the claimant, the respondent cited rules of the court that have since been revoked and that will serve as an impetus to dismissing the application.

In conclusion, the notice of motion filed for the respondent on 22.05.2017 and dated the same date is hereby dismissed with costs.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 23<sup>rd</sup> June, 2017.**

**BYRAM ONGAYA**

**JUDGE**