



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 15 OF 2016

(Before D. K. N. Marete)

ANTHONY KELLY MUEMA CLAIMANT

VERSUS

AIRTEL NETWORK KENYA LIMITED RESPONDENT

RULING

This is an application by way of Notice of Motion dated 11th April, 2017 seeking the following orders of court.

1. *This Application be certified as urgent and heard ex parte at first instance.*
2. *Pending the hearing and determination of the Application, this Honourable Court be pleased to grant interim ex-parte orders of stay of execution of its Judgement delivered on 21 February 2017.*
3. *Pending the hearing and determination of the Respondent's intended appeal, this Honourable Court be pleased to issue orders for stay of execution against the Judgement dated 21 February, 2017 and any resultant decree arising therefrom.*
4. *The costs of this Application be in the cause of the intended appeal.*

This is grounded as follows;

- a) *This Honourable Court, by its judgement dated 21st February 2017 awarded the Claimant 12 months's salary as compensation for unfair termination of employment, one months's pay in lieu of notice and 17 days' pay being payment for the untaken leave all amounting to Kshs. 1,237,387.00. The Claimant was also awarded costs of the suit.*
- b) *The Respondent is aggrieved by the said Judgement and has filed a notice of appeal, requested for typed proceedings and a certified copy of the Judgement to enable it to ledge an appeal to the Court of Appeal as soon as possible.*
- c) *During the delivery of the Judgment, the Respondent made an oral application for temporary stay of execution pending the filing of a formal application but the same was not granted.*
- d) *The Respondent is apprehensive that the Claimant may commence execution proceedings at any*

time having already filed a Bill of Costs which is coming up for taxation on 12th April, 2017.

e) *The Respondent has reviewed the Judgement of the Court, the pleadings and evidence, consulted its legal team and wishes to file an appeal where it will be asking the Court of Appeal to determine the following weighty questions of law and facts:-*

i. *Whether the Respondent had valid and justifiable reasons to terminate the Claimant's employment;*

ii. *Whether the disciplinary process employed by the Claimant in this case was adequate;*

iii. *Whether in awarding the Claimant the maximum permissible compensation, this Honourable Court acted judiciously;*

iv. *Whether this Honourable Court was right to award the Claimant one month salary in lieu of notice and 17 days' pay for the untaken leave; What are the considerations that this Honourable Court ought to apply in determining the quantum of the award;*

v. *Whether this Honourable Court arrived at a fair and justified award considering the evidence before it.*

f) *The Respondent is equally apprehensive that the Claimant has no known assets in Kenya and if the funds are released to him, the same may be irrecoverable in the event the Respondent succeeds in its appeal hence it shall suffer a substantial loss.*

g) *The Respondent is ready and willing to abide by any conditions that this Honourable Court may impose in granting this stay.*

h) *This application has been filed within reasonable time considering the fact after the Judgment was delivered on 21st February, 2017 it took more than two weeks to obtain a copy of the Judgment as the same was getting typed.*

i) *Unless this application is heard forthwith and Interim Orders granted in the first instance, the Respondent/Application stands to suffer substantial financial loss and/or damage that may eventually render its intended appeal nugatory should the same succeed.*

j) *The intended appeal discloses significantly legal and factual issues to be tried by the Appellate Court and is therefore arguable with a high chance of success.*

The Claimant/Respondent in his Grounds of Opposition enlists the following grounds;

1. *THAT the respondent has not demonstrated that the claimant is a man of straw with no capacity to refund the proceeds of the judgment intended to be appealed against if the said appeal succeeds thus is not deserving of stay orders.*

2. *THAT Notice of the intended appeal does not stand as the same was served out of time as required by the Court of Appeal Rules and an application to strike the same out has been filed and is pending before the court of appeal.*

3. *THAT the respondent has not demonstrated that they have an arguable appeal with probability of success hence there is no justification for granting stay orders to them.*

4. *THAT the claimant is an adult Kenyan male citizen and a businessman who continues to ably take care of his family even after he lost his job following the respondent's termination of the same.*

5. *THAT stay orders are discretionary in nature and are only granted where the applicant satisfies*

the conditions contained in Order 42(6) of the Civil Procedure Rules.

6. *THAT having failed to satisfy the said conditions, the respondent is not deserving of orders of stay of execution.*

The Respondent/Applicant in her written submissions dated 16th October, 2017 sought to rely on the authority of Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 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 as may ultimately be binding on him has been given by the applicant.

This also tallies with Order 42 rule 6 (1).

She further seeks to rely on the authority of **Elena Doudoladova Korir v. Kenyatta University, Industrial Cause No.1715 of 2011 (2014) eKLR**, Nzioki wa Makau, J. held thus;

*“It is trite law that an application for stay of execution pending appeal is to be made timeously. The Application must meet the criteria set out in precedent and the criteria is best captured in the case of **Halai & Another v. Thornton & Tupin (1963) Ltd (1990) KLR 365** where the court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they then were) held that;-*

The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

It is the respondents/applicants further submission that she has complied with the law aforesaid and also offered security ahead of this determination by depositing the decretal amount in an interest earning account with the consent of the claimant/respondent.

The claimant/respondent opposes and discounts with a submission that the application does not meet the threshold of order 42 rule 6 which provides 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 day; and

b) such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant.

It is his further submission that the respondent/applicant has not in any way demonstrated that substantial loss would be occasioned in the event of not granting the application. It is his position that he is a person of means, working for his livelihood and supporting his family and therefore not a man of straw as is suggested by the applicant. He would therefore be in a position to offset the decretal amount in the event of success by the applicant on appeal.

On these, the claimant respondent seeks to rely on the authority **James Wangalwa & Another vs. Agnes Naliaka Cheseto, High Court Misc Application No. 42 of 2011** where the court observed as follows;

“The applicant must establish other factors which show that the execution will create a state of

affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail..”

Further, in the authority of **Antoine Ndiaye v African Virtual University (2015) eKLR** Gikonyo, J. observed thus;

So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back.

Again, Gikonyo, J. in **Anotine Ndiaye v African Virtual University** above went further to state that the onus of proving such inability on the part of the respondent lies with the applicant. This is as follows;

The onus of proving substantial loss and in effect that the Respondent cannot repay the decretal sum if the appeal is successful lies with the Applicant; follows after the long age legal adage that he who alleges must prove. Real and cogent evidence must be placed before the court to show that the Respondent is not able to refund the decretal sum should the appeal succeed. It is not, therefore, enough for a party to just allege as is the case here that the Respondent resides out of Kenya and his means is unknown.

The claimant/respondent's case overwhelms that of the applicant. I would agree that parties to a judgment should under all circumstances be afforded an opportunity to enjoy its fruits. It is only in exceptional and demonstrable circumstances that this should be curtailed. This is not the situation in this case and the application must therefore fail.

I am therefore inclined to dismiss this application with costs to the claimant/applicant.

Delivered, dated and signed this 15th day of November 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Juma instructed by Julius Juma & Company Advocates for the Claimant/Respondent.
2. Mr. Owiti instructed by Coulson Harney Advocates for the Respondent/Applicant.