



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 21 OF 2017

(Before D. K. N. Marete)

JULIUS KIBET KOGO & 13 OTHERS.....CLAIMANT

VERSUS

ELDORET MATTRESSES LIMITED.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 30th May, 2017 and seeks orders as follows;

- a) This application be certified as urgent and service be dispensed with and heard ex parte in the 1st instance.*
- b) The Honourable court be pleased to stay the execution of the ruling delivered on the 23rd May, 2017 and its consequential orders or further proceedings to this Honourable Court pending the interpartes hearing and determination of this application.*
- c) The Honourable court be pleased to stay the execution of the ruling delivered on the 23rd May, 2017 and its consequential orders or further proceedings in this matter pending the hearing and determination of the intended appeal.*
- d) Costs of this application.*

It is grounded thus;

- i) Ruling was delivered by this Honourable Court on the 23rd May, 2017 in favour of the claimants against the Respondent.*
- ii) The Respondent/Applicant intendeds to appeal against the ruling of the court being dissatisfied with it.*
- iii) Unless the application is allowed the applicant's intended appeal will rendered nugatory and the applicant shall suffer substantial loss.*
- iv) The applicant has a good arguable appeal which has a high chance of success.*

v) *It is in the best interest of justice that this application be allowed.*

vi) *This application has been filed without undue delay.*

The Claimants/Respondents in their Replying Affidavit sworn on 3rd July, 2017 opposes the application and prays that the same be dismissed with costs.

By agreement of the parties, this application was canvassed by way of written submissions.

The Respondent/Applicant in her written submissions dated 31st August, 2017 basis her application on rule 17 of the Employment and Labour Relations (Procedure) Rules, 2016 and Order 42 rule 6 of the Civil Procedure Rules besides section 3 of the Employment and Labour Relations Court Act, 2014.

She seeks to rely on the authority of Order 42 rule 6 as follows;

Order 42 rule 6 (2) provides that no order for stay of execution shall be made under sub rule (i) unless (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay. And (b) such security as the court may order for due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

Further, she relies on the authority of **Butt-Vs- Rent Restriction Tribunal (4), Civil Application No. Nai 6 of 1979** where the Court of Appeal, Madan, Miller and Porter JJA, when considering an application for stay had this to say;

(i) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

(ii) The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's direction.

(iii) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings.

(iv) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

She in the penultimate submits thus;

It is clear from the wording of order 42 rule 6 (i), for an applicant to succeed in an application for stay, he must satisfy the following conditions;

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

b) The application had been made without undue delay.

c) Such security as to costs has been given by the applicant.

The Claimants/Respondents in their written submissions dated 16th September, 2017 oppose the application and call for its dismissal with costs. They raise various questions for determination of the application as follows;

a) What is the legal merit if any of the application?

b) *Is the application before court brought with clean hands?*

(i) Were the orders obtain exparte were they obtained after full disclosure of the material facts of the suit?

(ii) Does the Applicant deserve the audience of this honourable court with regards to the application?

c) *Whether substantial loss may result to the applicant unless stay of execution is ordered.*

d) *Whether the security the court ordered may ultimately be binding on the applicant.*

e) *The interest of the Claimants herein Respondents with regards to the status quo created by this application, an there interest of this application is allowed?*

It is the Claimants/Respondent's submission that the application before court is not merited for positive consideration. They rely on the authority of **Trust Bank Limited and Another V. Investech Bank Limited and 3 others Civil Application No.258 of 1999** (unreported) where the tests to consider when a court is faced with such an application as the one before court seeking stay of execution of orders and/or judgement made by a trial court pending hearing and determination of appeal against such orders and/or judgement was that;

"The jurisdiction of the court under Rule 5(2)(b) is original and disordnary and it is trite law that such an applicant has to show firstly that his appeal is arguable, put it in another way, it is frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guideline principles."

Further, they sought to rely on the authority of **Patriotic Guards Limited v James Kipchirchir Sambu (2017) eKLR** as follows;

"It has not been demonstrated to us to the required standard that there is any arguable point in the appeal. Having found we need not go into the second limb of the requirement on whether the appeal would be rendered nugatory."

The respondents further submit the application before court is not brought out with clean hands. This is because the applicant is in defiance of the court orders made on 23rd May, 2017 and this amounts to ridicule and contempt of the same court that she seeks assistance.

Again, this contravenes the spirit of negotiation and settlement initiated by the applicants at the onset of these court orders which attempt has now been scuttled by the same applicants. This is mischief and illustrated as follows;

Here we are forced with a canning, tricamous and ill motivated move by an application seeking to deny the Respondents their just acquired income due to them by post justice with an application to stay the execution of the orders given by this just court on 23rd May, 2017.

We submit that the Applicant have proves to be trechurous by first, immediately after the orders were given by this court, the Applicants moved with their advocates to visit the offices of M/s. Nyairotand Company Advocates to have this suit settled out of court on 12th June, 2017 annexed is a copy of the consent entered and a letter communication the consent with regard execution on their part to the Applicant's advocates (marked "JKK 1 (a) – "JKK 1 (b)").

... the amount ordered by this Honourable Court is Kshs.11,897,302.05 whereas upon the approach of the Applicant to the Respondents worked willing to enter a consent to the sum of Kshs.7,463,363.75 which was agreed by both parties in our offices. Your Honour, this proves that the Applicants herein were playing mischievous so as to delay the execution of the orders given by

this Honourable Court, as they trample on and crush the good intentions of the Respondents to settle this suit amicably out of court. Your honour this was the first strike against this honourable courts order causing suffering to the Respondents.

The second strike against this honourable court is when the replay to our letter requesting execution of the consent which we entered on the 12th July, 2017 served on us filed in this court, seeking that the very court while dispensing it's honourable duty of justice to all by the rule of law, to stay execution of its own orders. This is a spit on the face of this honourable court, a scone and spit of the orders given under seal by you may lord (please)

The Applicant's third strike was to move the learned judges in Nairobi with an application dated 8th June, 2017 seeking stay of execution of orders given on 23rd May, 2017 pending the hearing of this application.

It is trite law that the grant of stay of execution is a discretionary power of the court. It must be exercised judiciously and not whimsically. In so doing the court is called upon to look at the special circumstances and unique requirements of the case. This is the situation here. Through and through, this cause has been a cat and mouse game between the parties. The respondent/applicant has clearly demonstrated their distaste for pursuing the ends of justice and always been out to scuttle the interest of the claimants/respondents herein. This then should be a consideration in a determination of this application.

I agree with the submissions of the Claimants/Applicants. This is an application lacking merit from the onset. The applicants, being dissatisfied with orders of court have preferred an appeal against the same. However, they have not in any way demonstrated the arguability of the said appeal. Besides, the respondent demonstrates a case of massive bad faith in the actions of the applicants as above cited. This is another blow to the viability and success of the application.

This is an opportune case for dismissal of the application at the onset as set out in the authorities of **Trust Bank Limited and Another v Investech Bank Limited and 3 others** and **Patriotic Guards Limited v James Kipchirchir Sambu**, supra. The application falls on the basis of arguability and therefore is not worth of consideration on the other fronts for a case for stay of execution.

I am therefore inclined to dismiss the claim with costs to the Claimants/Respondents.

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

D. K. Njagi Marete

JUDGE

Appearances

1. Miss. Chelimo holding brief for Mathai instructed by Mathai & Company Advocates for the respondent/applicant.
2. Mr. Nyairo instructed by Nyairo & Company Advocates for the claimants/respondents.