



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 3 OF 2015

(Before Hon. Lady Justice Hellen S. Wasilwa on 12th May 2016)

DAVID G. WARWATHE 1ST APPLICANT

JOSEPH KIRAI NDUNG’U 2ND APPLICANT

VERSUS

KIAMBU UNITY FINANCE

CO-OPERATIVE UNION RESPONDENT

RULING

1. The Application before Court is one dated 13.1.2016, where the Applicants seeks the following Orders:

1. **That this Honourable Court deem it fit to stay execution of the decree given on 5th June 2015, pending the hearing of an appeal to the Court of Appeal.**

2. **That this Honourable Court do make such other or alternative preservations Orders as it deems fit.**

2. The Application is premised on the grounds that:

1. ***A ruling was delivered on 29th June, 2015, giving the Appellants Kshs. 436,074 and Kshs. 323,298 respectively for unfair termination.***

2. ***The Applicant was dissatisfied with the award and has exercised their undoubted right of appeal.***

3. ***The Applicants are apprehensive that if the decretal sum is paid out to the Appellants, the same will not be recovered on completion of the appeal hence it will lose the sum and thus incur substantial loss.***

4. ***The Applicant is ready to abide by any conditions the Court may impose so as to grant the Orders.***

3. The Application is supported by the Affidavit of Simon Njenga the Chief Executive Officer of the Applicant where he admits that the Respondents were former employees of the Respondent who

were terminated before the Employment Act 2007 came into force and filed a claim in the Nairobi Chief Magistrates Court which claim was dismissed leading to the current Appeal.

4. That the Respondents' appeal was allowed and they were each awarded Kshs. 436,074 and Kshs. 323,298 respectively as damages for unfair termination. The Applicant was dissatisfied with the Ruling and exercised its right of Appeal. A copy of the Notice of Appeal is annexed to the Application as SN1 and the draft Memorandum of Appeal as SN2.
5. The Applicant states that they are apprehensive that if they are compelled to pay the decretal sum, the Respondents who are no longer in employment are likely to use the money and have no viable means of readily retuning the money once the appeal succeeds. In the circumstances the Applicant contends will suffer substantial loss by losing the money.
6. The Applicant is also of the view that the execution is imminent as the Respondents have moved the Court for assessment of its costs. They state that they are ready to deposit the decretal sum in an interest earning account or comply with such other condition the Court would impose as a condition.
7. The Application is opposed and the Respondents have filed a Replying Affidavit sworn by David Gichuhi Warwathe where he states that the Applicant have not demonstrated that they are not men of means and the Court should not rely on a mere allegations.
8. The Respondents are of the view that the Applicant will not suffer substantial loss if ordered to comply with the Decree of the Court whereas if the Orders sought are granted the Respondents will be denied enjoyment of the fruits of judgment.
9. The Respondents contend that there is unexplained undue delay in filing the instant application as the Judgment of the Court was delivered in June 2015 whereas the application was filed in January, 2016. They are also of the view that the Appeal is only intended to deny the Respondents enjoyment of the fruits of judgment as the Applicants have not satisfied the conditions precedent to the granting of the Orders sought. The pray that the application be disallowed.
10. The Applicants submit that there has not been inordinate delay as immediately they were served with a taxation notice they moved the Court for stay since it is at this point that execution became imminent.
11. The Applicant also submit that the Respondents on their own admission state that they are no longer in employment and they have not shown what assets they own that would be sufficient to refund the decretal sum should the Appeal be successful. They refer to the case of **S Mehta & Sons Vs Stephen Ndungu Mwaura & Another (2007)eKLR** where the Court states that:

“the burden of proving that the Respondent is a man of straw rests with the Applicant but on the other hand it is within the Respondent’s peculiar knowledge what assets he has that would be sufficient to cover the decretal amount should the appeal be successful”.
12. They conclude their submissions by stating that they are ready to abide by any conditions of stay that the Court may issue for the due performance of the decree.
13. The Respondents in their submissions state that the Applicant has not demonstrated with specific details and particulars that they will suffer substantial loss as was the case in **Machira t/a Machira & Co. Advocates Vs East African Standard (2002)2KLR 63.**
14. They submit that the Application be dismissed on the following grounds:

1. ***No substantial loss will result if the orders sought are not granted.***

2. ***The Application was brought after an inordinate delay of six months.***

3. ***The Applicants have not shown sufficient cause why the Orders sought should be granted.***

15.They further submit that if the Court be inclined to grant the Orders sought then they would not be opposed for the Decretal sum to be deposited in a joint interest earning account in the names of the Advocates on record as proposed by the Applicant.

16.Having considered submissions of both parties, this Court refers to Order 42 Rule 6 (2) of the Criminal Procedure Rules 2010 which state circumstances under which stay orders can be granted 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 order as may ultimately be binding on him has been given by the applicant”.**

17.The conditions set herein are twofold.

18.The Respondents have submitted that the Applicants have come to Court late coming 6 months after the Judgment was delivered. They are of the view that the Application is meant to deny them the fruits of the Judgment. It is true that Judgment in this Court was delivered in this Court on 29.6.2015.

19.This Application was file don 13.1.2016, over 6 months after the judgment of the Court was rendered.

20.Under Order 42 rule 6 delay in filing such an Application would be a condition that may fetter the Court’s discretion in allowing such a prayer coming to file this Application after 6 months is definitely coming too late in time and with a delay of great magnitude.

21.However, an order such as one sought is usually granted by Court that the appeal is not rendered nugatory should such an Application be denied. The Court’s therefore exercise discretion to give delay to preserve the substratum of the appeal.

22.In exercising my discretion therefore and so that the appeal is not rendered nugatory, I will allow orders of stay sought on condition that the entire decretal sum is deposited in a joint interest earning account held in the joint names of counsels on record within 30 days. In default execution to issue.

Read in open Court this 12th day of May, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Applicants

No appearance for Applicants Respondent