



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 413 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 5th July, 2016)

PREMIER BAG & CARDAGE LIMITEDAPPLICANT

VERSUS

PETER WAKABU WACHIERESPONDENT

RULING

1. The Applicants filed their Notice of Motion dated 31st of March 2015 where they seek orders that:
 1. *This application be certified urgent, its service be dispensed with in the first instance and it be admitted to hearing on priority basis in view of its urgency;*
 2. *The Honorable Court be pleased to grant the Applicant an order for stay of execution of the decree passed on the 21st of January 2013 pending the hearing and determination of this application.*
 3. *The Honorable Court be pleased to grant the Applicant an order for stay of execution of the decree passed on the 21st of January 2013 pending the hearing and determination of Civil Appeal Number 43 of 2016;*
 4. *That the Honorable Court be pleased to grant the Applicant leave to deposit a decretal amount as security in court and/or join interest earning account in the names of advocates for parties, pending hearing and determination of this appeal;*
 5. *That costs of this application be provided for.*
2. The application is grounded on the annexed affidavit of Ibrahim Abdalah and on the following further grounds:
 - a. *That the Honorable Court entered judgment on the 21st of January 2015 in favour of the Respondent in the sum of Kshs 130,654.00 plus costs and interests;*
 - b. *That the Applicant was aggrieved by the Honorable Court's findings on unlawful termination and the award of Kshs 130,654/-;*
 - c. *That the Applicant has lodged an appeal against the judgment in the Court of Appeal being Civil Appeal Number 43 of 2016 and its appeal would be rendered nugatory if the decretal amount is*

- paid over to the Respondent at this juncture;*
- d. *That if the decretal amount is paid over to the Respondent at this stage, it will be impossible to recover it from him in the event that the appeal is successful because in his own evidence during the hearing of the case, the Respondent stated that he is unemployed and had no known source of income;*
 - e. *That the Applicant is prepared to deposit the decretal amount in Court and/or in a joint earning account in the names of the advocates for the parties to secure the interest of the party that will eventually succeed in the appeal.*
3. The application is opposed and the Respondent has filed a replying affidavit dated on the 15th of April 2016.
 4. In the affidavit, the Respondent depones that the award granted is just and fair, and the application before Court is merely one that is intended to frustrate and punish the Respondent after they failed to pay him his terminal rights.
 5. He states that the amount granted is small and that he will suffer grave and irreparable damage should the application be granted. Moreover, the Applicant statement that he would in no way be able to repay the decretal sum is inordinate. The Applicant has not in any way demonstrated that the appeal is arguable and that they would suffer any injustice should the application not be granted.
 6. The Respondent states that the Applicant would not suffer at all and that this application is just but a delay in the delivery of justice.
 7. The Applicant in Court submitted that they rely on their pleadings and restate that this was an arguable appeal.
 8. They relied on **Tea Board of Kenya vs. Gideon Asirigwa Mbagaya Civil Application No Nai 115 of 2009**, where it was stated:

“.. on the second point of whether the appeal will be rendered nugatory unless we grant a stay, we are satisfied that if we do not grant the stay sought, the respondent might not be in a position to refund to the applicant the sum of KShs. 941,708 were he to be required to do so. It is true he retired from civil service as senior officer and though in paragraph 7 of his replying affidavit he says he owns several properties in Vihiga District and Kakamega town, he does not state what the properties are and their approximate valuation(s).

The Applicant, on the other hand, has already offered security in the superior court and weighing one thing against the other we have come to the conclusion that we must grant to the applicant the order of stay sought....”

9. They also rely on the case of **Kenya Ports Authority vs. Kustrom (K) Limited** where it was stated that:

“.....the next point for determination is whether if stay is not granted, the intended appeal if successful, will be rendered nugatory. No doubt the amount of the decree is quite substantial. We have not been given the capital base of the respondent and we cannot say for certain that it is the company of substance and one to which if the decretal sum is paid over, it will not be beyond the reach and control of the applicant. On the other hand, the capability of the applicant to pay any decretal sum is beyond doubt.

For these reasons we allow the application and grant the stay of execution without conditions pending the hearing and final determination of the intended appeal.”

10.They pray for the application be allowed.

11.In their submissions, the Respondents rely on his replying affidavit and reiterate his statement therein. They submit that they have not shown substantial loss would be suffered if they pay out the decretal sum.

12.The Respondent who agrees that he is unemployed states that he has assets which can be liquidated if the appeal does not go his way, further the Respondent states that he has a right to the sums of the judgment and if the Court allows, ½ of the sum should be released to him. They pray for the application be dismissed.

13.Having considered the submissions of the parties here, I rely on Order 42 Rule 6 (2) of the Civil Procedure Act which states 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.**

14.As per Rule 6(2) (a), I am convinced that it is the duty of this Court in determining this application to ensure that no substantial loss may result if the orders sought are not granted.

15.As to 6 (2)(b) above since the Applicants are willing to give security on the decretal amount, I will allow the application for stay so that the appeal is not rendered nugatory on the condition that ½ decretal amount is released to the Respondent Claimant within 14 days and the balance to be deposited in an interest earning account held in the joint names of the Counsels/Parties on record within 30 days. In default execution to issue.

Read in open Court this 5th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Sanku for Applicant - Present

No appearance for Respondent