



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.240 OF 2015

(Before D. K. N. Marete)

JOHN WAFULA SIMIYU.....CLAIMANT

VERSUS

THE STAR PUBLICATIONS LIMITED.....RESPONDENT

RULING

This is an application by way of Notice of Motion dated 15th August, 2016 and seeks the following orders of court;

1. *This application be certified urgent and be heard ex parte at the first instance.*
2. *Pending inter partes hearing of this application, this Honourable Court be pleased to grant a stay of execution of the judgment;*
3. *Pending the lodging, hearing and determination of an intended appeal from the judgement of Honourable Justice D.K. Njagi Marete dated 17th June 2016, this Honourable Court be pleased to grant a stay of execution of the said judgment and orders and of any decree that may ensue from the said judgement;*
4. *Costs of this application be provided.*

It is grounded on the following;

- a) *On 17th June 2016, this Honourable Court delivered judgment in favour of the claimant amounting to Kshs.660,000.00. This comprised one month's salary in lieu of notice (Kshs.60,000.00) and ten months' salary as compensation for unlawful termination of employment (Kshs.600,000.00). Additionally, the respondent was ordered to issue a certificate of service;*
- b) *However, the claimant acknowledged in cross examination that he was in fact paid a month's salary in lieu of notice for which reason that particular claim was abandoned in his submissions. The award of the same in spite of that, together with other grounds particularized in the memorandum of appeal, forms an arguable ground of appeal;*
- c) *Since the judgment, the claimant quickly had his bills of costs taxed in the sum of Kshs.*

205,615.00 on 19th July 2016 and proceeded to levy execution through the issuance of a proclamation dated 26th July 2016. This was in spite of the existence of a thirty (30) day stay of execution from 19th July 2016;

d) Additionally, in spite of the respondent's advocates requesting for a copy of the decree from the claimant's advocates, none has been forthcoming;

e) Apart from seeking to recover the decretal sum and costs, the claimant's auctioneers have included an exorbitant and manifestly excessive computation of their fees contrary to the auctioneer's act;

f) Through the intervention of the applicant's advocates, the execution process was temporarily halted in view of the subsistence of the stay of execution order. However, the threat of resuming the same remains when the order lapses on 19th August 2016;

g) The Applicant is apprehensive that it shall suffer substantial loss unless an order for stay of execution is made by this Honourable Court;

h) The Applicant has brought this application without unreasonable delay;

i) The Applicant is ready, able and willing to furnish to the Honourable Court such security as shall be deemed fit by this Honourable Court.

j) It is the interests of justice and fairness that this Honourable Court do grant the prayers sought.

The application came to court on 24th August, 2016 where the court granted a further stay of the orders of the Deputy Registrar made on 17th August, 2016 execution for fifteen (15) days pending hearing and determination of the application for such stay.

Ultimately, the matter came for hearing on 22nd September, 2016 when Mr. Mwangi, Counsel for the respondent submitted that the respondent would suffer substantial loss in the event of an issue of the orders sought.

The respondent/applicant's other case is that the claimant commenced execution vide a proclamation dated 26th July, 2016 which process was premature as it was done within the period of stay of execution. The respondent further submits and posits that the execution was done without a decree and this is contrary to the Civil Procedure Rules. They had requested for a decree from the claimants but this was not forthcoming.

The respondent's further submission is that as a consequence of this irregularity, there is now an imposition of exorbitant auctioneer charges levied in execution thereof with an element of a commission of Kshs.86,711.00 that is overwhelming and contrary to the statutory limitation on this. The cost of transport also comes out as unreasonable in the circumstances of execution occurring within their jurisdiction.

The Claimant/Respondent in opposition and answer submits that ordinarily stay of execution is sought on grounds that there is a pending appeal. This is not the case here as no appeal is evidentiary on record. He also submits that appeals are on matters of law and in the circumstances the applicant has only filed a draft appeal that is undated and unsigned. This does not disclose a ground of appeal based on law. The only ground of appeal is on the award of one month's pay in lieu of notice which he submits is a matter of fact that can be remedied by way of review under rules 32 and 33 of this court's rules. Again, there is no demonstration of possible loss or even offer of security.

The claimant further submits that the Deputy Registrar has no jurisdiction to stay a judgment of this court and in such occurrence, the order would be invalid. He therefore prays that the application be dismissed

with costs.

The claimant/respondent at paragraph 15 of the Replying Affidavit further enumerates and submits the following as principle for grant of stay of execution;

a) *That substantial loss may result to the applicant unless orders of stay of execution are made;*

b) *That the applicant has an arguable case on appeal to warrant stay of execution;*

c) *That the application has been made by the applicant without unreasonable delay*

and

d) *That the applicant has furnished court with sufficient security as ordered by court for due performance of the decree and judgment of the court as may ultimately be binding on the applicant has been given by the applicant.*

It is his submission that the applicant does not meet these requirements and therefore this application must fail. It is his further submission that this application is brought out in bad faith and out of time and is therefore untenable. It is intended to frustrate his realization of the fruits of judgement.

He further seeks to rely on the authority of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No.43/200** cited in **Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokabi (2014)eKlr**

“...In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those factors, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether (it is an arguable one the optimum utilization of judicial time.....” (Emphasis on underline ours).”

He also seeks to rely on the authority of **Carter & Sons Ltd V. Deposit Protection Fund Board & Two Others Civil Appeal No. 291 of 1997**, at page 4 as cited in **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another (2015) eKLR** as follows;

“... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay...the applicant must establish a sufficient cause;

Again, he relies on **John Mwangi Ndiritu vs Joseph Ndiritu Wamathai (2016) eKLR** where the court in adopting the decision in **Global Tours and Travel Ltd** stated that;

“Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion: it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms should it be granted. In deciding whether to order a stay the court essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously”

The claimant’s submissions that bearing in mind the authorities aforesaid and relied on, stay of execution should be denied and not issue whatsoever.

The respondent/applicant submits a case of substantial loss on her part in the event of non issue of stay of execution. She relies on the authority of **Antoine Ndiaye vs African Virtual University (2015) eKLR**

stated that;

There is ample judicial authority on this issue but I need not multiply them except to cite the case of Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1KAR 1018 where the court of appeal stated that:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for granting stay”

Further,

And substantial loss in the sense of Order 42 rule 6 has been described; see the following rendition in a work of Ogola J in Tropical Commodities Suppliers Ltd & others vs. International Credit Bank Ltd (in liquidation) (supra) that- Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is or real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

Again,

And also in the case of Bungoma HC Misc Application No 42 of 2011 James Wangalwa & Another vs Agnes Naliaka Chesoto that:

“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...”

The Respondent/Applicant in conclusion emphasized his offer of security and founded this on the authority of **John Mwangi Ndiritu vs Joseph Ndiritu Wamathai (2016) eKLR** where the court held as follows;

“It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the applicant as a price for stay.

Two issues clearly come out of the conduct of this matter and application. The first is the conduct of the claimant in the course of execution whereas the second is the conduct the Deputy Registrar in granting an order for stay of execution during taxation proceedings. Whereas both affect the direction of proceedings at this level, I choose to address the later due to its implications and impact now.

I agree with the submissions of the Claimant/Respondent that the Deputy Registrar lacks jurisdiction and competency in issuing orders for stay in these proceedings or at all. These orders were not even extendable, as in the instant case. The same having been *void ab initio*. This matter is clearly elucidated in the authority of **Francis Kimutai Bii Vs. Kaisugu (Kenya) Ltd 2016 eKLR** – that a Registrar or Deputy Registrar of this court is only mandated to undertake administrative function only. Not any more. This is as follows;

“It is notable that the tone of the provisions of the law, particularly at Section 9 (1) (a), (b) (c) and (d) clearly spells out that the function of the office of the registrar is only to undertake the administrative functions of the court. Indeed, this has been and still remains the practice in the Kenya judicial system.”

Further the court observed as follows;

“In the instant case, the consent judgement now in contention was entered and recorded by, one, George Ong’ondo, Senior Principal Magistrate, a judicial officer in his own right. The short of this, however, is that Hon. Ong’ondo is not an appointed registrar or deputy registrar of this court in accordance with Section 9 of the Act. He is not a designated officer or even a member of staff of this court as established. Even if he was, and indeed a deputy registrar of this court, he still would not have the power, authority and competence to enter a judgement of this court. This is strictly the province of the judges of court.”

The law on the subject subsists and any deviation can only forment unfortunate situations like in the instant case. This is sadistic and unsustainable legal practice.

This court must now direct itself on its discretionary powers for grant of stay of execution in the circumstances. The claimant/respondent opposes a grant of stay of execution on grounds that the Applicant/Respondent does not meet the four tire criteria for grant of stay. The respondent/applicant goes out of her way to demonstrate a case for grant of stay.

I have considered the submissions by the parties and come out with a case of grant of stay of execution. This is because in my estimation, the respondent/applicant not only displays an arguable case but also makes an offer for security as directed by court. Again, no undue delay is demonstrated in the presentation of this application. The application for stay of execution qualifies in the entirety of the four limbs set out for such purpose and therefore passes.

I am therefore inclined to allow this application and order that the respondent/applicant deposits in court Kshs. 660,000.000 being security pending hearing and determination of the intended appeal. The costs of this application shall be borne by the parties in equality.

Delivered, dated and signed this 28th day of September 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mwangi instructed by Mohammed Muigai Advocates for the Respondent/Applicant.
2. Mr. Kirwa instructed by Mwakio Kirwa & Company Advocates for the Claimant/Respondent.