



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1146 OF 2013

TIMOTHY ASUDI MALWA.....
CLAIMANT

VERSUS

E-GAP SOLUTIONS LIMITED.....
.....RESPONDENT

RULING

1. By a Notice of Motion dated 1st July 2016 and filed in Court on even date, the Respondent seeks an order to stay execution of the Judgment of this Court delivered on 27th May 2016, pending an intended appeal.
2. The application which is supported by the affidavit of the Respondent's Director, Gibbon Akifuma sworn on 1st July 2016 is based on the following grounds:
 - a) That the Court rendered its judgment on 27th May 2016 in favour of the Claimant;
 - b) That the Respondent has since filed a Notice of Appeal;
 - c) That the Respondent has an arguable appeal with chances of success which will be rendered nugatory if the order of stay is not granted;
 - d) That the Respondent is apprehensive that if the order sought is not granted it will suffer irreparable harm;
 - e) That the application has been brought without inordinate delay and it is in the interest of justice that it be allowed.
3. In the supporting affidavit sworn by Gibbon Akifuma on 1st July 2016, he depones that the Claimant will not suffer prejudice that cannot be redeemed by an award of costs. Akifuma further depones that the Respondent is willing to deposit reasonable security as the Court may direct.
4. In response to the application, the Claimant swore an affidavit on 8th July 2016. He depones that no steps have been taken to execute the Judgment. The Claimant further states that the Respondent has not demonstrated that it has an arguable appeal that will be rendered nugatory if an order for stay of execution is not granted
5. The Claimant maintains that he is entitled to enjoy the fruits of the decision by the Court which was

delivered after both parties were heard. He depones that he would be in a position to refund the decretal sum in the event that the Respondent's appeal succeeds.

6. Order 42 Rule 6(2) of the Civil Procedure Rules sets the following conditions upon which an order for stay of execution may be granted:

- a) That the applicant has demonstrated that they will suffer substantial loss if the order sought is not granted;
- b) That the application has been made without unreasonable delay;
- c) That the applicant has given adequate security for the due performance of such order as may be binding on them.

7. Additionally, there is the condition developed under case law that the applicant has an arguable appeal which would be rendered nugatory if the order sought is not granted (see ***Banking Insurance & Finance Union (Kenya) v Murata Sacco Society Limited [2015] eKLR***).

8. An arguable appeal was defined by the Court of Appeal in ***Syner-Med Pharmaceuticals Ltd v Glaxo Group Limited [2010] eKLR*** as one which raises a substantive point and not necessarily one that will succeed when fully ventilated.

9. With regard to the question of time and security, the Respondent filed the application in good time and has expressed its willingness to provide adequate security.

10. The only other question is whether the Respondent would suffer substantial loss if the order sought is not granted. In ***Butt v Rent Restriction Tribunal [1982] KLR 417 Madan JA*** (as he then was) held that in exercising its discretion to grant or decline a stay of execution the Court must consider the particular circumstances of each case.

11. This is a cash award and the Claimant's ability to repay the award amount is a significant question. The Respondent has expressed doubt as to the Claimant's ability to repay the decretal sum in the event that the appeal succeeds but there is no evidence that the Claimant is a man of straw.

12. As held by **Radio J** in ***David Mbugua v Keroche Breweries Ltd [2015] eKLR*** it is not enough for a judgment debtor to state that a decree holder will not be able to repay the decretal sum if the appeal succeeds. Furthermore, as held by **Mbaru J** in ***Michael Kiboi Gatumia v Mastermind Tobacco (K) Limited [2013] eKLR*** the purpose of an application for stay of execution pending appeal is to preserve the subject matter and not to prevent a successful litigant from accessing the fruits of litigation.

13. In my view, in determining whether or not to grant a stay of execution pending appeal, the Court must strike a balance between the Applicant's right of appeal and the Claimant's right to enjoy the fruits of a judgment in their favour. In balancing the rights of the parties now before me I make the following orders:

- a) The Respondent shall release to the Claimant the equivalent of 50% of the decretal sum within the next 14 days from the date of this ruling;
- b) The balance, being the equivalent of 50% of the decretal sum shall be deposited in an interest earning account in the joint names of Counsel for the Claimant and Counsel for the Respondent within the next 30 days from the date of this ruling;
- c) Failure to observe any of the conditions of stay set out above shall lead to an automatic lapse of the stay hereby granted;
- d) The costs of this application will be costs in the appeal.

14. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF
SEPTEMBER 2016**

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JUDGE

Appearance:

Mr. Khalwale for the Claimant

Mr. Otongo for the Respondent