



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 470 OF 2015**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 12<sup>th</sup> October, 2016)**

**JAMES KABINGA .....1<sup>ST</sup> CLAIMANT/RESPONDENT**

**PAUL NGARI NGUGI .....2<sup>ND</sup> CLAIMANT/RESPONDENT**

**VERSUS**

**CENTRAL BANK OF KENYA ..... RESPONDENT/APPLICANT**

**RULING**

1. The Application before Court is dated 17<sup>th</sup> August, 2016, brought under Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 42 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the law seeking for Orders that:

- 1. The Court be pleased to grant interim exparte orders of stay of execution of its judgment delivered on 20.7.2106 pending hearing and determination of this Application.***
- 2. The execution of the Judgment delivered on 20.7.2016 and any resultant decree therefrom, be stayed pending the hearing and determination of the Applicant's intended Appeal.***
- 3. Costs of and occasioned by this Application be costs in the intended appeal.***

2. The Application is made on the following grounds:-

- a. By judgment of this Honourable Court delivered on 20.7.2016, the Honourable Court awarded the Claimants/Respondents herein damages for unlawful termination of employment at Shs. 2,000,000.00 each.***
- b. The Defendant/Applicant disputes the said award and has filed a notice of appeal, requested for typed proceedings and a certified copy of the Decree to enable it file an appeal from the same to the Court of Appeal as soon as possible.***
- c. The Honourable Court did on application of the Applicant's counsel at the time of delivering judgment, grant a 30 day temporary stay of execution of the Judgment and decree in these proceedings pending a formal application for stay.***
- d. The temporary stay is set to lapse on 20.8.2016, and the Applicant is apprehensive that the Respondents may commence execution proceedings soon thereafter.***

*e. The Applicant is also apprehensive that the Respondents have no known assets in Kenya and the funds decreed are quite substantial and if released to them may be irrecoverable by the time the Appeal is heard and determined.*

*f. The Applicant, the central Bank of Kenya, is ready and willing to provide security/undertaking for satisfaction of the judgment and decree in the event that the Appeal does not succeed.*

*g. Unless this application is heard forthwith and interim Orders granted in the first instance, the Applicant stands to suffer substantial financial loss and/or damage that may eventually render the appeal nugatory should the same succeed.*

*h. The appeal discloses a significant legal issue to be tried and is arguable with a high chance of success to wit: The legal basis upon which the Respondents were awarded damages at Shs. 2,000,000.00 each or at all, when the applicable law at the material time merely required payment of one month's salary in lieu of termination which requirement the Applicant complied with.*

3. The Application is also supported by the Affidavit of Neala Wanjala, the Legal Manager of the Applicant wherein she states that an Appeal was lodged by the Applicant on 26<sup>th</sup> July, 2016, the Applicant being dissatisfied with the Judgment of the Court delivered on 20.7.2016.

4. They aver that the appeal raises triable issues which may be rendered nugatory if the Orders sought are not granted. They aver that they are ready and willing to provide such reasonable security as may be ordered by the Honourable Court for payment of the Judgment sum pending the hearing and determination of the Appeal.

5. The Claimant/Respondent did not file any response to the Application dated 17.8.2016. At the Hearing thereof, the Applicant stated thus, that the appeal is arguable on the grounds that, where the Court finds that a dismissal was wrongful then the award of damages should be equivalent to the period of notice which ought to have been given.

6. They also aver that should the appeal be successful they may not be able to recover the decretal amount since the Claimants are not in any gainful employment and they have not proven how they will pay back the money in the event the appeal succeeds.

7. It is also the Applicant's contention that the instant application was filed timeously and they are willing to deposit the decretal sum in a joint interest earning account in the names of the Advocates on record. They pray for the Application to be allowed as prayed.

8. Under Order 42 Rule 6 of the Civil Procedure Act:

**6.“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

**(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.

**(3) Notwithstanding anything contained in subrule (2), the Court shall have power without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

**(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.**

**(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.**

9. The grounds to be satisfied are as set up above before orders sought are granted. It is apparent that the Applicant has satisfied the 1<sup>st</sup> ground by moving Court with haste without any delay.

10. On the issue of the Appeal being rendered nugatory, the Applicants state that the Respondents have no known source of income or property in Court and if the Appeal succeeds, the Respondents will be unable to recover any moneys paid out to the Claimant.

11. I agree that the purpose of such an application is to preserve the substratum of the Appeal and in so doing it will be important that this Court safeguards anything that would render the Appeal useless.

12. The Respondents did not file a reply to this Application to counter the submissions of the Applicant and state that contrary to what the Applicants have submitted, they are capable of satisfying the decree should the Court of Appeal decide otherwise.

13. That however does not mean that the Respondent should be denied the right to enjoy fruits of his judgment.

14. That being the position, I find that this application has merit and I allow it but on condition that the half of the decretal sum be released to the Respondent Claimant and the other half be deposited in an interest earning account held on the joint names of Counsel on record within the next 30 days. In default execution to issue.

Read in open Court this 12<sup>th</sup> day of October, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Amele holding brief for Applicant

No Appearance for Respondent