



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**CAUSE NO. 531 OF 2014**

**MARY MUTHONI.....CLAIMANT**

**v**

**KENYA NUT COMPANY LTD.....RESPONDENT**

**RULING**

1. In a judgment delivered on 8 March 2016, the Court found and held that the termination of the Claimant's employment was unfair and awarded her compensation equivalent to 10 months gross wages, earned wages and pay in lieu of notice, all totalling Kshs 86,655/-.

2. The Respondent was aggrieved with the judgment, and it lodged a Notice of Appeal with the Court on 22 March 2016.

3. On 4 April 2016, the Respondent filed a motion under certificate of urgency seeking

1. .... (*spent*)

2. .... (*spent*)

3. *THAT there be a stay of execution of the Judgment of the Honourable Stephen Radido delivered on 8<sup>th</sup> March 2016 pending the lodging, hearing and determination of the Applicant's intended appeal against the said judgment.*

4. *THAT the costs of this application be costs in the cause.*

4. The Court certified the motion urgent and also directed the Respondent to deposit the decretal sum in Court before 12 April 2016 (although the Respondent showed the Court a deposit receipt from the bar, there is no receipt in the file to indicate the payment).

5. The Claimant filed a replying affidavit opposing the motion on 26 April 2016, and the motion was urged on 6 September 2016.

6. The Respondent, in support of the motion contends that if execution proceeded, it would occasion it great injustice; *the intended appeal raises substantive and arguable points of law and fact and has high chances of success and would be rendered nugatory if stay is not granted*; that it would not be able to recover any part of the decretal sum if paid; that it was ready to furnish security and that the application

was brought without delay.

7. The Claimant, in opposing the application urged that she could refund the decretal sum if the appeal were to succeed; that she had assets and was not a person of straw; that the Respondent had not demonstrated substantial loss; that there was no arguable appeal and that the motion was a tactic to delay her from enjoying the fruits of the judgment.

### **Applicable law**

8. The legal principles while determining applications for stay of execution pending appeal are so numerous and known that sometimes it may appear unnecessary to repeat them.

9. The principles are derivatives of Order 42 Rule 6 of the Civil Procedure Rules.

10. These legal principles have been discussed and distilled in cases such *Mukuma v Abuoga* (1988) KLR 645, *Jotham Simiyu Wasike & another v Jackson Ongeru & 4 others* (2013) eKLR, *Tabro Transporters Ltd v Absalom Dova Lumba* (2012) eKLR and *Anthony Kiberenge Kamau v Kibuchi Wamunyi & 3 others* (2010) eKLR and *Antoine Ndiaye v African Virtual University* (2015) eKLR.

11. Before examining whether the Respondent has met the test for grant of stay of execution pending appeal, it is necessary to make an observation to clarify the remit of the stay pending appeal jurisdiction.

12. The Respondent made much of the contention that it had an arguable appeal with a possibility of success and reference was made to several Court of Appeal cases such as *Kenya Commercial Bank Ltd v Hon. Nicholas Ombija* (2009) eKLR, *Republic v Kenya Anti-Corruption Commission & 2 others* and *International Laboratory for Research on Animal Diseases v Kinyua* (1990) 403.

13. With respect to the Respondent, these authorities speak to stay of execution under Rule 5(2)(b) of the Court of Appeal Rules.

14. Whether a party has an arguable appeal is not one of the factors or principles for consideration in an application for stay of execution pending appeal in the High Court or this Court for that matter.

### *Whether the Respondent has met the test for grant of orders sought*

15. This Court will therefore not consider whether the Respondent has demonstrated that it's got an arguable appeal with high chances of success.

16. The Court will now proceed to examine the Respondent's application on the basis of the applicable legal principles

### *Security*

17. The Respondent had offered and the Court had ordered it at the *ex parte* stage to deposit the decretal sum in Court and therefore nothing substantial turns on this aspect of the principles.

### *Delay*

18. The motion was brought to Court within about a month after the delivery of the judgment and in the view of the Court that was not an undue time within the circumstances of this case.

### *Substantial loss*

19. What constitutes substantial loss has been explained in several decisions by the High Court.

20. Odunga J held in *Republic v The Commissioner for Investigations and Enforcement ex parte*

*Wananchi Group Kenya Ltd* (2014) eKLR, and which I endorse, the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit...it is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

21. Similar approach was taken by the Courts in the cases of Nairobi Civil Case No. 224 of 2001, *Andrew Kuria Njuguna v Rose Kuria; Machira t/a Machira & Co. Advocates v East African Standard (No. 2)* (2002) KLR 63 which are referred to in *Antoine Ndiaye v African Virtual University* (2015) eKLR cited and relied on by the Respondent (see paragraph 8 of the decision).

22. The Court has keenly perused the Respondent's supporting affidavit sworn by Jacqueline Chele and nowhere has the deponent attempted to demonstrate the substantial loss it would be occasioned were the application for stay of execution pending appeal be denied.

*Decree holder a person of straw*

23. In my view, the fact that a decree holder may not be able to refund the decretal sum were an appeal to succeed, is not a good enough reason without more for granting stay of execution pending appeal.

24. And I would endorse the dicta by Emukule J in *Cosmas Kipkoech Sigei v Madrugada Ltd & Ar* (2010) eKLR that a stay will not be made on the ground that the decree holder is a pauper, and will therefore be unable to refund the decretal sum if paid to him....

### **Conclusion and Orders**

25. From the foregoing, the Court comes to the conclusion that although the Respondent has satisfied some of the principles for grant of stay of execution pending appeal, it has not demonstrated that it would suffer substantial loss.

26. The Court therefore declines to grant the orders sought in the motion dated 31 March 2016 and dismisses it with costs to the Claimant.

**Delivered, dated and signed in Nakuru on this 7<sup>th</sup> day of October 2016.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant                      Mr. Opar instructed by Muthanwa & Co. Advocates

For Respondent                    Mr. Ngeno instructed by Kaplan & Stratton Advocates

Court Assistant                    Nixon