



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 100 OF 2012

COLLINS OSORO LUKHALE CLAIMANT

VERSUS

AAA GROWERS LIMITED RESPONDENT

RULING

On 3rd November 2014 the respondents herein, AAA Growers Limited filed application through Notice of Motion brought under the provisions of article 159, 162(2) and 164(3) of the Constitution, section 1A, 1B and 3A of the Civil Procedure Act, section 12(3)(i) and (viii), 17 (1) and (2) of the Industrial Court Act and Rule 16 and 27 of the Industrial Court (Procedure) Rules and seeking for orders the court do grant stay of execution of the judgement delivered on 25th September 2014 and all consequential orders pending the lodging, hearing and determination of the intended appeal and that there be a stay of execution.

This application is based on the annexed affidavit of Farah Shamji and on the grounds that the respondent has filed a notice of appeal, there is a strong and arguable appeal that challenge the finding of the court that the employment of the claimant was unfairly terminated and is entitled to Kshs.720, 000.00 compensation and that he is also entitled to kshs.600, 000.00 for loss of office and this finding on both heads is erroneous. That the intended appeal will be rendered nugatory is the judgement herein is not stayed. The total judgement amount of kshs.1, 320.00.00 if paid to the claimant, he may not be able to pay back where the intended appeal is a success and in the interests of justice, stay of execution should be granted pending hearing and determination of the appeal against the award. The respondent is willing to deposit security and abide by any other orders herein.

In the affidavit of Farah Shamji who states that as the Finance Manager of the respondent has capacity to make the affidavit. That on 25th September 2014 the court judgement gave the claimant both Kshs.720,000 as compensation for unfair termination and Kshs.600,000.00 for loss of office and after consideration of the same and being aggrieved the respondent wishes to prefer an appeal and has filed a notice of appeal. The respondent has also requested for certified copies of the proceedings. The respondent was granted 14 days stay and has since lapsed hence this application seeking stay of execution pending hearing and determination of the intended appeal. The intended appeal has arguable grounds challenged the award of both compensation for unfair termination and loss of office and the respondent has a constitutional right to appeal unless the intended execution is stayed the appeal will be rendered nugatory. Every party who comes to the court should be heard fairly and not be prejudiced and thus seek just and equitable orders of stay of execution.

In submissions and in support of the application, the respondent relied on various cited authorities, the

case of **Kenya Kazi Security Service Limited versus Kenya National Private Security Workers Union, Court of Appeal Civil Application No. 108 of 2013 [2013] eKLR**, where there is an arguable appeal the court should grant stay and in **Abraham Gumba versus Kenya Medical Supplies Authority, Cause No. 1073 of 2012 [2014] eKLR** noting that the claimant is not a person of means and if the judgement amount is paid he may not be able to pay back if the appeal is successful. The property title attached to the replying affidavit has no indication as to what encumbrances it has so as to be a good security.

In reply, the claimant filed his Replying Affidavit on 18th November 2014 and opposed the application by the respondent noting that the award was delivered on 25th September 2014 and the application file don 3rd November 2014 is brought with delay and without an explanation. Upon delivery of judgement, the court granted a stay of 14 days and no step was taken by the respondent to apply as herein or seek an extension of the stay.

The claimant also states that he is now employed by the Parliamentary Service Commission earning kshs.122,600.00 per month and thus not impecunious as alleged and where the intended appeal is head and determined he is able to repay any monies so adjudged. He also own real property in Mavoko valued at over 1 million and in the unlikely event that the appeal is a success, he is in a position to repay any judgement amount.

An application of this nature must establish the following;

- (a) Substantial loss may result to the Applicant unless the order is made;
- (b) The application has been made without unreasonable delay and
- (c) Such security as the Court orders for the due performance of the decree has been given by the Applicant.

Sufficient cause being a technical as well as a legal requirement will depend entirely on the Applicant satisfying the Court that ***Substantial loss may result to the applicant unless the order is made***, and therefore the Court may direct for the deposit of ***Such security for the due performance of the decree or order as may ultimately be binding on the applicant*** where an applicant has been able to satisfy to the Court that ***the application has been made without unreasonable delay***. The conditions share an inextricable bond such that the absence of one will affect the exercise of the discretion of the Court in granting stay of execution. The Court of Appeal in ***Mukuma V Abuoga (1988) KLR 645*** reinforced this position.

Execution is a lawful process. 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, a question that was aptly discussed in the case of ***Silverstein versus Chesoni [2002] 1KLR 867*** it was held;

...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

The question is; whether the Respondent as the applicant herein has demonstrated that substantial loss will occur unless an order for stay of execution is issued. The Respondent in answer to the above question say that substantial loss will result as their appeal will be rendered nugatory, that the claimant does not have sufficient means to be able to refund the judgement amount and that the property attached has no statement on the encumbrances to it. The claimant on the other hand, says the Respondent s have not established that substantial loss will occur unless an order for stay is made and he is in gainful employment and has property that can secure any judgement amount.

After considering all the rival arguments herein, I am of the view that indigence, being persons of straw

or lack of a party who has a good judgement to outline what assets they possess is not a bar to their enjoyment of the fruits of the judgement. To the contrary, such a party holds a valid order of the Court that they should be made to enjoy. There is a money decree herein, the Claimant gave evidence that he is in gainful employment and that notwithstanding, has a judgement of this court.

The application by the Respondent though brought after the 14 days stay were granted in court was brought within two months from the date of judgement, and despite this going over and above the 14 days, it is not inordinate delay. The respondents are also willing to deposit security and abide by any orders given by the court to enable them pursue their intended appeal.

In the interests of justice and noting the orders now sought by the respondent and the analysis of the issue as above, the application by the respondent is allowed in the following terms that there will be a conditional stay of execution in the following terms;

- (a) Stay of execution is granted subject to the respondent releasing compensation for unfair termination awarded to the claimant and amounting to Kshs.720,000.00 forthwith;**
- (b) The amounts of kshs.600, 000.00 awarded as loss of office shall be deposited in joint interest earning account of both advocates for the parties herein, that is Ojiambo & Co. Advocates and Nyaundi Tuiyot & Co. Advocates within 14 days from the date hereof.**
- (c) No orders on costs.**

Delivered in open court at Nairobi this 2nd Day of March 2015.

M. Mbaru
Judge

In the presence of:

Lilian Njenga: Court Assistant

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