

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 459(N) OF 2009

SAMUEL MOYAKI.....CLAIMANT

VERSUS

CATERING & TOURISM DEVELOPMENT LEVY TRUSTEES..RESPONDENT

RULING

1. The application before me is the one dated 12th March 2015 by the Claimant/Applicant. In the application, the Claimant seeks to stay decree and judgment of the Court delivered on 29th January 2015 pending the hearing and determination of the intended Appeal the Claimant intends to file. The Claimant relied on the grounds on the face of the motion and sought to stay the matter as the Respondent/Decree Holder is keen to execute and has already issued and filed a bill of costs. The Claimant asserts that execution imminent as evidenced by the steps taken by the Respondent towards realization of the costs ordered by the Court and that unless a stay is granted the Appeal which has great chance of succeeding shall be rendered nugatory. The Claimant/Applicant's motion was supported on the affidavit of Lucas Lemperes Naikuni. The affidavit had annexures attached to it and these included a draft memorandum of appeal which had 8 grounds of appeal.
2. There was no grounds of opposition or replying affidavit in respect of the Application by the Respondent at the time of penning the Ruling.
3. It is trite law that an application for stay of execution pending appeal is to be made timeously. The Application must meet a criteria set out in precedent and the criteria is best captured in the case of **Halai & Another v Thorton & Turpin (1963) Ltd [1990] KLR 365** where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that :-

The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.

4. In addition, whether the intended appeal will be rendered nugatory is critical as was held in the case of **Hassan Guyo Wakalo v Straman East Africa Ltd [2013] eKLR**. The Court held as follows:-

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”

5. In the case of **Butt v Rent Restriction Tribunal** Madan JA (as he then was) held as follows:-

“It is the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general Rule ought to exercise its best discretion in a way so as not to prevent the Appeal if successful being nugatory.”

6. The Claimant/Applicant made the application on 12th March 2015 while judgment was given on 29th January 2015. That is not inordinate or undue delay. The other considerations that are taken into account are that firstly, the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The draft memorandum of appeal gives a glimpse of the sufficiency or otherwise of the cause. The draft appeal is touted as raising issues of law but fails to bring out those issues. There is mention of the Court using words that are not in statute for the finding that there was cause to terminate the Claimant/Applicant. These do not connote grounds for an appeal. The Industrial Court Act and the Rules of the Court make provision on the parameters for an appeal. Language is clearly not one of them. In addition the Claimant has not made any offer on security.
7. The Application fails the test and is thus not merited. The order that commends itself for me to make is one dismissing the Application but I will make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of June 2015

Nzioki wa Makau

JUDGE