



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT KISUMU**  
**CAUSE NO. 312 OF 2013**

**(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO ON 10<sup>TH</sup> JUNE, 2015)**

**LYDIA CHEPKOSGEI MUTAI ..... CLAIMANT**

**-VERSUS-**

**KENYA POWER LIMITED ..... RESPONDENT**

**R U L I N G**

The application before me for determination is a notice of motion dated 19th February 2015. It is filed by the respondent on 23rd February 2015 under certificate of urgency. It is made under Article 159, 162(2), and 164(3) of the Constitution, Sections 12(3)(i) and (viii), 17(1) and (2) of the Industrial Court Act Rule 16 and 27 of the Industrial Court (Procedure) Rules and all enabling provisions of the law and inherent powers of the court.

The application seeks the following orders:-

1. That the application be certified as urgent and be heard *ex parte* in the first instance.
2. That pending the hearing and determination of this application *inter partes*, this honourable court be pleased to issue a temporary stay of execution of the judgment delivered on 12th January 2015 in Industrial Cause No. 312 and all consequential orders thereto.
3. That pending the lodging, hearing and determination of an intended appeal herein, there be a stay of execution of the judgment delivered on 12th January 2015 in Industrial Cause No. 312 of 2013 all all consequential orders thereto.
4. That the costs of this application follow the results of the intended appeal.

It is supported by the affidavit of Ms. Ruth Kariuki, the respondent's Human Resource Officer and on the grounds on the face thereof. Among the grounds and in the supporting affidavit is that the applicant is dissatisfied with the judgment rendered by this court on 12th January 2015 and intends to appeal against the whole judgment, that the applicant has applied for typed copies of proceedings, and that the claimant has commenced execution process which if not stayed will render the appeal nugatory as the claimant will not be able to refund the decretal sum of Kshs 1,129,920 awarded by the court should the appeal succeed.

The application was heard *ex parte* on 23rd February 2015 and temporary stay of execution granted.

The claimant filed a replying affidavit on 16th March 2015. In the affidavit she depones that the draft Memorandum of Appeal has no merit, is unlikely to succeed and adds no value to the application for

stay. That the application is pre-mature as the claimant's bill has not been taxed and no execution can take place before taxation. She depones that she has the ability to refund the decretal sum should the appeal succeed as she owns a timber business and supplies timber to Bomet County Government, generating an income of Kshs 400,000 a month.

The application was argued on 19th March 2015. Ms. Oyombe appeared for respondent/applicant and Mr. Kasamani for claimant.

Ms. Oyombe submitted that judgment was delivered on 12th January 2015 wherein the claimant was granted maximum compensation of 12 months in the sum of Kshs 1,129,920/=. The respondent is aggrieved and has exercised its right to appeal by filing a notice of appeal and applying for proceedings. She submitted that unless stay of execution orders are granted the appeal will be rendered nugatory should it succeed. She submitted that the respondent has arguable grounds of appeal as set out in the draft Memorandum of Appeal exhibited in the supporting affidavit of Ruth Kariuki. Ms. Oyombe submitted that if stay is not granted the respondent will suffer irreparable loss as it will not be able to recover the decretal sum from the claimant. She relied on the list of authorities filed by the respondent. She submitted that in the case of **Kenya Hotel Properties Ltd Vs Willisden Investments Ltd & 4 Others** the court stated that where there is doubt as to recovery of the decretal sum the burden shifts to the respondent in the appeal. She submitted that the claimant has not shown that she will be able to refund the decretal sum should the appeal succeed. That the documents annexed to the claimant's affidavit does not bear any proof that Flyspin Enterprises Ltd belongs to her and her husband.

That the claimant's assertion in the replying affidavit to the effect that she is entitled to pension is not acceptable as proof of ability to pay decretal sum as pension can by law not be alienated and is not recoverable by the respondent should the appeal succeed. That in any event the pension will only be available when the claimant reaches 50 years.

Ms. Oyombe further submitted that the respondent is entitled to an order of stay even if only one ground of appeal is arguable. She submitted that the respondent is ready to comply with any conditions set by the court. She prayed that the application be granted.

Mr. Kasamani for the claimant submitted that the respondent is a large organization and payment of Kshs 1.2 million cannot prejudice its operations. That the respondent having rendered the claimant jobless has no reason not to satisfy the judgment. He submitted that the application for stay is premature and is intended to stop taxation of the claimant's bill of costs.

Mr. Kasamani submitted that the claimant has not admitted being impecunious, that on the contrary the claimant has demonstrated that she has a pension and sometime in the future she will have the money. That the claimant had further demonstrated that she has a timber business that earns more than Kshs 400,000/= a month and she has ability to pay the decretal sum should the appeal be successful.

On the authorities cited by the respondent Mr. Kasamani submitted that they are not binding on this court, that the arguability of an appeal can only be determined by the appeal court and the draft Memorandum of Appeal is not proof of arguability of the appeal.

Mr. Kasamani submitted that the respondent is not offering to deposit the decretal sum.

He prayed that the application be dismissed.

I have considered the application and the grounds in support thereof as well as the supporting affidavit. I have also considered the replying affidavit, authorities cited, documents attached to the affidavits and submissions by the parties.

The issues for consideration in an application for stay of execution are well covered in numerous decisions of court and by the law.

The applicant needs to establish that:-

1. Substantial loss may result to the applicant unless the orders of stay are granted.
2. The application has been made without undue delay, and
3. Such security as the court orders has been given by the applicant.

In the case of this court there is a further principle set out in Section 17(2) of the Industrial Court Act; that appeals can only be on grounds of law. This means that the applicant must prove that it has an arguable appeal based on grounds of law.

Taking into account the pleadings and submissions of the parties, I agree with the respondent that the claimant has not proved that she would be in a position to refund the decretal sum should the appeal succeed. She has not submitted any evidence to show that she and her husband own Flyspin Enterprises Limited. Furthermore what was presented to court is from the claimant, not Bomet County Government so there is no proof that Bomet County Government transacts any business with the said Flyspin Enterprises Limited. Thirdly what was submitted is just a list of invoices with dates and amounts. This is not proof of any funds transfers from Bomet County Government to the said Flyspin Enterprises Limited.

The other security offered by the claimant is her pension which by law can not be used as security as it is inalienable.

The claimant did not show that she has any other income apart from the pension and Flyspin Enterprises Limited that would enable her to refund the decretal sum should the appeal succeed.

On the second ground I note that the judgment was delivered on 12th January 2015 and Notice of Appeal filed on 22nd January 2015. The applicant applied for proceedings letter dated 22nd January 2015. Considering that the applicant was not present in court and as stated in claimant's replying affidavit, learnt about the judgment on 16th January 2015 by letter from claimant's advocates, there was no delay in filing the application.

The respondent has in the application stated it is ready to comply with directions of the court.

On the 4th principle the applicant has attached a draft Memorandum of Appeal. In my opinion they have an arguable appeal.

Right of appeal is provided for in Section 17 of the Industrial Court Act. Having found that the applicant meets all the principles for grant of orders for stay, I allow the application and order as follows:-

1. There is hereby granted a stay of execution of the judgment herein dated 12th January 2015 pending the hearing and determination of the intended appeal.
2. The respondent shall deposit the entire decretal sum of Kshs 1,129,920/= in a joint interest earning account in the names of the advocate for claimant and advocate for respondent within 14 days in a bank acceptable to the two parties.
3. The costs of this application shall be costs in the appeal.

**Dated and delivered in Kisumu this 10th day of June, 2015.**

**MAUREEN ONYANGO**

**JUDGE**

**Appearances:-**

..... for the claimant(s)

..... for the respondent(s)

CC. Wamache