



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1583 OF 2013

KOKI MUIA.....CLAIMANT

VS

SAMSUNG ELECTRONICS EAST AFRICA LTD.....RESPONDENT

RULING

Introduction

1. On 23rd July 2015, my brother **Nzioki wa Makau J** delivered a judgment in favour of the Claimant in the following terms:
 - a. One month's salary in lieu of notice Kshs. 596,000,
 - b. Payment for the 22 days she was still in employment in August 2013 Kshs. 437,066.60,
 - c. Bonus payment duly earned in the first quarter of 2013 being equivalent to her monthly salary Kshs. 596,000/-,
 - d. 12 months compensation for sexual and racial discrimination as well as unlawful termination Kshs. 7,152,000/-,
 - e. Costs of the suit,
 - f. Interest at court rates on the sums in a), b), c) and d) above from the date of filing suit till payment in full.
2. Being dissatisfied with part of the judgment, the Respondent filed a notice of appeal on 30th July 2015. The Respondent then filed the present application seeking stay of execution pending appeal.

The Application

3. The application which is brought by way of Notice of Motion dated 31st July 2015 and supported by the affidavit of Robert Ngeru sworn on the same day is based on the following grounds:
 - a. That the Court delivered its judgment in this matter on 23rd July 2015;
 - b. That the Respondent being dissatisfied with part of the judgment of the Court filed a notice of appeal on 30th July 2015;
 - c. That by a letter dated 30th July 2015, the Respondent wrote to the Court requesting for typed proceedings;
 - d. That there is the risk of execution being taken out by the Claimant before the hearing and determination of the intended appeal;

- e. That if the Claimant proceeds with the execution, the Respondent will be greatly prejudiced and will suffer substantial loss and its intended appeal will be rendered nugatory;
 - f. That the Respondent is ready to provide security for the performance of the judgment and resultant decree as may be ordered by the Court.
4. In the supporting affidavit sworn by Robert Ngeru on 31st July 2015, he depones that the means and assets of the Claimant are unknown and if the intended appeal is successful, it would render recovery difficult and the Respondent was at risk of suffering substantial loss if the orders sought are not granted.

The Respondent's Submissions

5. At the hearing of the application, Mr. Echesa for the Respondent submitted that the Respondent had satisfied the conditions for granting of stay of execution set out in Order 42 Rule 6 of the Civil Procedure Rules.
6. First, the application had been brought without delay. Second, the Respondent had already demonstrated its willingness to post adequate security and had settled the part of the judgment that was not in dispute.
7. Third, the Respondent stood to suffer substantial loss if the orders sought are not granted. On this score, Counsel made reference to the principal objective of this Court as set out in Section 3 of the Industrial Court Act; being to facilitate the just, expeditious and proportionate resolution of disputes that come before it. Counsel asked the Court to bear this principal objective in mind in exercising its discretion in the application.
8. Mr. Echesa pointed out that the portion of the judgment which the Respondent was contesting was in excess of Kshs 7 Million, a colossal sum of money by any standard. In the supporting affidavit, the Respondent expressed reasonable apprehension that if this money is paid out to the Claimant, recovery would be difficult or even impossible in the event that the appeal succeeds. Counsel challenged the Claimant's assertion in her supporting affidavit that she indeed has means to refund the decretal sum since no figures were assigned to her salary or dividends.
9. Mr. Echesa also took issue with the position taken by the Claimant that because the Respondent's financial statements show a healthy financial position, then the Respondent is not exposed to any substantial loss. Counsel told the Court that the anticipated loss did not have to affect the operations of an applicant for it to be substantial.

The Claimant's Reply

10. In a replying affidavit sworn by the Claimant, Koki Muia on 10th August 2015, she depones that the Respondent had not satisfied the conditions for granting of stay of execution. The Claimant adds that she has a valid and legitimate judgment in her favour and the burden now falls on the Respondent to demonstrate why she should not be allowed to access the fruits of her judgment.
11. Koki further depones that the allegation by the Respondent that her assets and means are unknown is without basis as she had bought shares in a going concern in the name of *Rainbow Adpoint Limited* where she served as Managing Director. She states that her salary and dividend payments are sufficient to meet a refund of the decretal sum if the intended appeal is successful.

The Claimant's Submissions

12. In opposing the Respondent's application, Mr. Ogembo for the Claimant submitted that for an application for stay of execution to succeed, all the conditions set out under Order 42 Rule 6 must be met. On the issue of substantial loss, Counsel told the Court that the Claimant had demonstrated that she was a woman of means with known income.

13. According to Counsel, in considering the question of a claimant's means, the Court ought to look at known means not necessarily sufficient means. Additionally, in addressing the issue of substantial loss, the Court should not confine itself into inquiring whether the Claimant is in a position to refund the decretal sum but the loss the Respondent is likely to experience if the decretal sum is paid out.

Determination

14. The single issue for determination before the Court is whether the Respondent has made out a case for granting of stay of execution pending appeal.

15. Order 42 Rule 6(2) of the Civil Procedure Rules sets out the following conditions for granting an order for stay of execution:

a) That the applicant has shown that they will suffer substantial loss if the order sought is not granted;

b) That the application has been made without unreasonable delay;

c) That the applicant has given adequate security for the due performance of such order as may be binding on him.

16. Under case law, there is the additional condition that the applicant has an arguable appeal which will be rendered nugatory if the order sought is not granted (see **Reliance Bank Limited Vs Noriaka Investments Limited [2002] 1EA 227 (CAK)227 Case No. 937 of 2002**) and **Abel Okoth Okello Vs Kenya Medical Research Institute (Kemri) [2014] eKLR**).

17. As held by the Court of Appeal in **Syner-Med Pharmaceuticals Ltd v Glaxo Group Limited [2010] eKLR**, an arguable point does not in any way mean a point that will succeed once fully ventilated. It follows therefore that all the trial court is called upon to do is to examine whether the intended appeal is frivolous. It is not expected to delve into the merits of the appeal under this head; that is the responsibility of the appellate court. I have examined the draft memorandum of appeal presented by the Respondent in this light and have formed the opinion that it raises substantive issues meriting judicial time at the Court of Appeal.

18. Moreover, it is not in contest that the Respondent's application has been brought without delay and willingness and ability to post adequate security has been demonstrated.

19. That leaves the issue as to whether the Respondent has demonstrated that it would suffer substantial loss if the orders sought are not granted, as the only one pending determination. The Respondent argues that the Claimant will not be able to refund the sum of Kshs. 7,152,000 in the event that the intended appeal succeeds.

20. In **Butt v Rent Restriction Tribunal [1982] KLR 417 Madan JA** (as he then was) rendered himself 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.”

21. This remains good law and in cases where the subject of the appeal is a cash award, the Claimant's ability to repay the award amount becomes a significant question. It is true that the Claimant has not given figures that constitute her salary as Managing Director and dividends as a shareholder of

Rainbow Adpoint Limited. However that by itself does not mean that she is a woman of straw.

22. More importantly, in determining whether or not to grant a stay of execution pending appeal, the Court must strike a balance between the Applicant's right of appeal and the Claimant's right to enjoy the fruits of a judgment in their favour. To this extent, I agree with the holding of my sister **Mbaru J** in ***Michael Kiboi Gatumia v Mastermind Tobacco (K) Limited [2013] eKLR*** that the purpose of an application for stay of execution pending appeal is to preserve the subject matter and not to prevent a successful litigant from accessing the fruits of litigation.

23. Ultimately balancing the Claimant's right to realise the fruits of the judgment she holds in her hands with the Respondent's right of appeal I make the following orders:

- a. The Respondent shall release to the Claimant the equivalent of 50% of the decretal sum within the next 14 days from the date of this ruling;
- b. The balance, being the equivalent of 50% of the decretal sum shall be secured by a bank guarantee to be perfected within the next 30 days from the date of this ruling;
- c. Failure to observe any of the conditions of stay set out above shall lead to an automatic lapse of the stay hereby granted;
- d. The costs of this application shall be costs in the appeal.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF AUGUST 2015

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JUDGE

Appearance:

Mr. Ogembo for the Claimant

Mr. Echesa for the Respondent