



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 1156 OF 2012**

**RASHID JENEBY.....CLAIMANT**

**VS**

**PRIME BANK LIMITED.....RESPONDENT**

**RULING**

**Introduction**

1. On 15<sup>th</sup> May 2015, I delivered an award in favour of the Claimant in the following terms:

- a. 6 months' salary in compensation for unfair termination.....Kshs. 1,200,000
- b. 3 months' salary in lieu of notice.....Kshs. 600,000
- c. 11 months' half pay salary withheld from  
1.9.2010-30.7.2011.....Kshs.1,100,000
- d. 20 days' leave pay (200,000/30x20).....**Kshs. 133,333**

**Total.....Kshs. 3,033,333**

2. Being dissatisfied with the award, the Respondent filed a notice of appeal on 21<sup>st</sup> May 2015. Following an application for stay of execution filed by the Respondent under certificate of urgency on 15<sup>th</sup> June 2015, my sister **Wasilwa J** granted interim orders on 16<sup>th</sup> June 2015.

**The Application**

3. The Respondent's application brought by way of Notice of Motion dated 12<sup>th</sup> June 2015 is supported by the affidavit of Josephine Macharia. It is based on the following grounds:

- a. That the Respondent has lodged a notice of appeal against the award of the Court delivered on 15<sup>th</sup> May 2015;
- b. That the Respondent has written to the Deputy Registrar requesting for typed proceedings and a certified copy of the decree for purposes of filing the intended appeal;

- c. That the intended appeal raises serious questions of law and fact;
- d. That the Claimant has already commenced the process of execution by extracting the decree and the Respondent is apprehensive that the Claimant may execute the decree at any time;
- e. That the Respondent is apprehensive that it will suffer substantial loss owing to the uncertainty of the Claimant's ability to refund the decretal amount should the intended appeal succeed;
- f. That the Respondent is ready, able and willing to provide such security for the due performance of such decree or order as may ultimately be binding on it as the Court may order including but not limited to a bank guarantee.

### **The Claimant's Reply**

4. In a replying affidavit sworn by the Claimant, Rashid Jeneby on 22<sup>nd</sup> July 2015, he depones that it is not in order for the Respondent to challenge the amount of the award having failed to address the issue of quantum at the trial. He adds that the Respondent's application is aimed at denying him the fruits of his award.

5. Jeneby further depones that it would be unfair for the Respondent who dismissed him from employment without affording him a hearing and having kept him on half pay for 11 months to be allowed to withhold the fruits of his award.

6. The Claimant's concedes to a conditional stay of execution in the following terms:

- a. 50% of the decretal sum to be paid to him;
- b. 50% to be paid into an interest earning account in the joint names of the parties' Advocates

### **Determination**

7. The single issue for determination in this application is whether the Respondent has made out a case for granting of stay of execution pending appeal.

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

- 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 them.

9. Additionally, there is the well established condition developed under case law that the applicant has an arguable appeal which will be rendered nugatory if the order sought is not granted (see ***Banking Insurance & Finance Union (Kenya) v Murata Sacco Society Limited [2015] eKLR***).

10. From the record, the Respondent filed this application in good time and has demonstrated its willingness and ability to provide adequate security. On the question whether the Respondent has an arguable appeal that would be rendered nugatory if the orders sought are not granted, I am guided by the decision of the Court of Appeal in ***Syner-Med Pharmaceuticals Ltd v Glaxo Group Limited [2010] eKLR***, to the effect that an arguable point does not in any way mean a point that will succeed once fully ventilated.

11. The only question I need to answer is whether the intended appeal is frivolous and having examined the draft memorandum of appeal, I find that the Respondent raises substantive issues meriting the attention of the Court of Appeal.

12. The final question is whether the Respondent has shown that it would suffer substantial loss if the orders sought are not granted. In **Butt v Rent Restriction Tribunal [1982] KLR 417 Madan JA** (as he then was) held that in exercising its discretion to grant or decline a stay of execution the Court must consider the particular circumstances of each case. This is a cash award and the Claimant's ability to repay the award amount is a significant question. The Respondent has expressed doubt as to the Claimant's ability to repay the decretal sum in the event that the appeal succeeds but there is no evidence that the Claimant is a man of straw.

13. As held by **Radido J** in **David Mbugua v Keroche Breweries Ltd [2015] eKLR** it is not enough for a judgment debtor to state that a decree holder will not be able to repay the decretal sum if the appeal succeeds. Furthermore, as held by **Mbaru J** in **Michael Kiboi Gatumia v Mastermind Tobacco (K) Limited [2013] eKLR** 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.

14. To my mind, 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. In balancing the rights of the parties now before me 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 21<sup>ST</sup> DAY OF AUGUST 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Miss Ouma for the Claimant

Mr. Mwangi for the Respondent