



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 45 OF 2014

DANIEL MAINA WANYOIKE

CLAIMANT

v

KENYA POWER & LIGHTING CO. LTD

RESPONDENT

RULING NO. 2

1. On 24 July 2015, the Court dismissed an application by the Respondent seeking stay of execution and setting aside of a judgment delivered on 20 February 2015.
2. On 26 August 2015, the Respondent brought another application which is the subject of this ruling.
3. The application sought

2. THAT this Honourable Court be pleased to grant an order of stay of execution of the judgment delivered by the Honourable Justice Radido on 20th February, 2015 and all consequential Orders arising therefrom pending the hearing and determination of the Application herein.

3. THAT the time within which to lodge an appeal against the Judgment and Ruling of the Honourable *Justice Rika* delivered on 20th February, 2015 and 24th July, 2015 respectively be extended.

4. THAT this Honourable Court be pleased to grant an order of stay of execution of the Judgment of the Honourable Mr. Stephen Radido delivered on 20th February, 2015 and all consequential Orders arising therefrom pending the lodgment, hearing and determination of the intended Appeal by the Applicant herein.

5.

4. The Claimant filed Grounds of Opposition to the application and parties addressed the Court on the application on 24 November 2015.
5. The prayers warranting the Court's consideration are prayers 3 and 4, though prayer 3 appears to be a compound prayer as it relates to 2 distinct judicial determinations.

Appeal against ruling of 24 July 2015

6. A notice of appeal against the ruling should have been lodged within 30 days, i.e. on or before 23 August 2015, if there was an express right of appeal.
7. The Respondent now seeks extension of time to file the notice of appeal against the ruling.

8. The reason given for not filing a notice of appeal against the ruling in time is that this was occasioned by change of representation from the Federation of Kenya Employers to the Respondent's advocates presently on record, Robson Harris & Co. Advocates.
9. The Respondent also contends that the intended appeal against the ruling has high chances of success and failure to extend time would prejudice and subvert the ends of justice.
10. The Respondent further asserts that the application has been brought expeditiously.
11. The Respondent did not disclose when the change of advocate occurred or when the new advocates were instructed. Consent to come on record was only filed in Court on 24 November 2015 when the motion came up for hearing. It should have been filed with the application but the Court deems such as a technical irregularity.
12. In the view of the Court, without full and candid disclosure as to when the instructions were given, the Respondent has not demonstrated nor given sufficient reasons to be granted an extension to appeal against the ruling of 24 July 2015.

Appeal against judgment of 20 February 2015.

13. The Respondent had a right to appeal against the judgment delivered on 20 February 2015. Notice of Appeal should have been filed on or before 19 March 2015. No such notice was filed, but instead the Respondent moved the Court on 23 March 2015 to have the judgment set aside, which application was dismissed.
14. By the time the Respondent was seeking to have the judgment set aside, the 30 day window had just lapsed.
15. Among the reasons given by the Respondent for not filing a notice of appeal against the judgment was that it was awaiting the delivery of the ruling. The ruling on the setting aside of judgment was delivered on 24 July 2015.
16. The reasons given by the Respondent on why it did not move expeditiously appear weak but the Court has duly considered the submissions by the parties and come to the conclusion that the time to file a notice of appeal be extended upto 18 January 2016.

Stay of execution

17. The Respondent further sought stay of execution of the judgment pending appeal. The main grounds advanced were that the intended appeal raises triable issues with high chances of success; the Claimant would not be able to repay the decretal sum in the event the appeal was successful; the Respondent and general public stand to suffer substantial loss and that the Respondent was willing to deposit security.
18. The legal principles applicable to applications seeking stay pending appeal are now legion. The existence of a triable issue is not one of the considerations in an application such as this. That would be a consideration in an application seeking to set aside ex parte judgment/grant of leave to defend.
19. Such application was dealt with and was dismissed.
20. I will therefore address the questions posed that the Claimant would not be able to refund the decretal sum and the substantial loss to be suffered by the Respondent and the public at large. The questions are closely intertwined.
21. In *Cosmas Kipkoech Sigei v Madrugada Ltd & Ar* (2010) eKLR Emukule J held that

a stay will not be made on the ground that the decree holder is a pauper, and will therefore be unable to refund the decretal sum if paid to him....

22. In the present proceedings, apart from the bare assertions that the Claimant would not be able to repay the decretal sum, no tangible evidence was offered.
23. In another case, *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR, Odunga J observed that, and I endorse the holding,

the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit....it is therefore not sufficient to merely state that the

decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

24.The Respondent with all due respect did not demonstrate that it would suffer any substantial loss were it to pay to the Claimant the decretal sum which by the stretch of the imagination is just but a drop in the ocean compared with its balance sheets/financial statement.

25.The Court has considered the legal principles enunciated in the 2 cited cases and also being mindful that the Claimant has a regular judgment in his favour inspite and despite the circumstances of his dismissal by the Respondent wherein a precious and innocent life was lost but declines the invitation by the Respondent to grant stay of execution pending appeal.

26.The Claimant to have costs of the motion as the Respondent has only succeeded on the technical issue of extension of time to appeal.

Delivered, dated and signed in Nakuru on this 15th day of December 2015.

Radido Stephen

Judge

Appearances

For Claimant

Mr. Onyony instructed by Onyony & Co. Advocates

For Respondent
Co. Advocates

Mr. Otieno/Mr. Gichangi instructed by Robson Harris &

Court Assistant

Nixon