



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1991 OF 2011**

**COSMAS KAWELU ..... CLAIMANT**

**VERSUS**

**KABUITO CONSTRUCTORS ..... RESPONDENT**

**RULING**

1. On 24<sup>th</sup> July 2013 the respondent filed their application under Notice of Motion and under the provisions of Order 42 Rule 6(1) and (2) of the civil Procedure Rules and section 3A of the Civil Procedure Act seeking stay of execution of the court judgement delivered on 16<sup>th</sup> July 2013 pending hearing and final determination of the Appeal filed by the respondent against the judgement. The application is supported by the annexed affidavit of Amip Patel. In reply the Claimant filed the Replying Affidavit sworn and dated 20<sup>th</sup> August 2013.
2. The application by the respondent is based on the grounds that the respondent being aggrieved by the judgement of this court delivered on 16<sup>th</sup> July 2013 has filed an appeal; it is arguable with overwhelming chances of success and will suffer substantial loss if stay is not granted. The claimant is a party of straw and may not be able to reconstitute the decretal sum if paid to him thus rendering the appeal nugatory. The respondent is prepared to abide by any order for the furnishing of security as may be made by the court.
3. In support of the application Amip Patel in his affidavit states that he is a Director of the respondent. judgement herein was given in favour of the claimant on 16<sup>th</sup> July 2013 for the sum of kshs.506, 680.00 together with costs and the respondent was dissatisfied and has filed an appeal which is arguable and with high chances of success and will therefore suffer substantial loss if stay is not granted the decree will be executed with no likelihood of ever recovering any monies paid to the claimant rendering the appeal nugatory. The claimant will not be in a position to refund the decretal amount should he be paid to him as he is not in any gainful employment or any source of income. It is imperative that an order of stay of execution be granted so as to facilitate the conclusion of the appeal herein without rendering the same nugatory by the process of execution. The respondent is prepared to abide by any terms issued by the court in the deposit of security pending hearing of the appeal.
4. In reply the claimant states in his affidavit that the respondent's applications n abuse of the court process and ought to be dismissed. The judgement as issued has no errors or mistakes in fact or in law and the respondent has not made any submission that the court erred in law so as to warrant the respondent lodge an appeal. Section 37 of the Employment Act was properly applied by this court. It is not enough for an applicant to plead that an appeal has overwhelming chances of success there ought to be a demonstration the basis of this appeal which is not applicable in the respondent's case. The application is therefore meant to frustrate the claimant from enjoying the fruits of his judgement. Execution is a lawful process that does not amount to substantial loss under Order 42 rule 6. The respondent has failed to issue

the claimant with a Certificate of Service within 14 days as directed by the court on 16<sup>th</sup> July 2013 and thus not entitled to discretionary orders as the Certificate issued by the respondent on 18<sup>th</sup> July 2013 was conditional in blatant disregard of the court orders. The claimant further stated that he has assets that can offset any money decree and can be applied in the event the appeal succeeds.

5. In submissions, the respondent stated that they have filed a Notice of Appeal and seek stay pending the appeal. In evidence the claimant stated that since he left the respondent employment in 2011 he has not been able to secure a job and thus with no means he will not be able to refund the decretal amount if this is released to him pending the determination of the respondent appeal. The claimant has stated that he has land but there is no evidence to this effect to warrant the decretal amount being released to him pending appeal and by any release, the respondent will suffer substantial loss if stay is not granted. That there is an arguable appeal where the court made a finding there was continuous employment of the claimant by the respondent; leave allowance granted will be challenged, the award for unfair termination was excessive and the respondent will address this issue seeking to find out if the court extended its mandate. These are matters of law that will be addressed at the appeal. Stay before the Industrial Court can be granted where an applicant is able to establish special circumstances and in this case, the special circumstance is that the claimant cannot refund the decretal amount if this is released to him before the appeal is determined.

6. The claimant on the other hand submitted that the law under which the respondent has invoked to make the application before court does not give the Industrial Court jurisdiction as a party dissatisfied with the decision of the Industrial Court, an appeal lies to the Court of Appeal and the court of Appeal only allow the application of Rules 5(2) (b) for stay pending Appeal. In this case the application of Order 42 applies to appeals to the High Court and the Court of Appeal Rules thus making the respondent application incompetent and should be dismissed.

7. The claimant also submitted that the conditions set for a stay is strict as a party must demonstrate an arguable case and that the appeal will be negated if stay is not allowed. Substantial loss does not mean where there is execution a party will be prejudiced as this is a money decree and cannot be lost and to say the claimant will not be able to refund is not enough. There is no arguable appeal in this case, the court determined all the issues before it and applied the law to arrive at the final judgement. Matters before the industrial court are largely between employers and employees and were employers to always be allowed to argue that a terminated employee is not able to refund a money decree, this would be an unjust process as the employers will take advantage by failing to settle decretal amount by deposit to court so as to frustrate a terminated employee. If the respondent is able to deposit the decretal amount in court, then it goes they are able to deposit the same with the claimant pending the appeal.

8. The respondent application should therefore be dismissed. Costs awarded to the claimant to be allowed to enjoy the fruits of his judgement.

**In considering the issues raised in the application by the respondent, the following questions emerge that will be addressed thus;**

**Applicable procedure for appeal against decisions of the Industrial Court**

**Should stay be granted in this case?**

9. Section 17 of the Industrial Court Act allows parties aggrieved by decisions on this Court to proceed to the Court of Appeal on matters of law only;

*17. (1) Appeals from the Court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.*

*(2) An appeal from a judgement, award, decision, decree or order of the Court shall lie only on matters of law.*

10. The Industrial Court (Procedure) Rules do not speak directly to the procedure applicable in seeking stay of execution pending appeal. Where there is such a gap in the Rules of the Industrial court, the practice is to rely on any other written law as applicable to the High Court as this is a Superior Court of Record. Thus the Civil Procedure Act and the Rules thereto become applicable as to the procedure to be applied by a party seeking stay of execution pending appeal. The submission by the claimant that the Rules of the Court of Appeal Rules 5(2)(b) apply, it is the view of this Court that these Rules only apply before the Court of Appeal where a party commences their appeal before that court or in seeking to commence such proceedings.

11. The application by the respondent is seeking;

*That there be a stay of execution of the judgement and consequential decree issued on 16<sup>th</sup> July 2013 pending the hearing and final determination of the Appeal filed by the respondent against the judgement*

11. I have keenly perused through the entire record, the application presented by the respondent and the annexed affidavit in support sworn by Amip Patel. There is no *Appeal* on the record, attached to the application or the affidavit in support. There are no draft memoranda or an outline as to the nature of such an *Appeal*. This is imperative for consideration noting the provisions of section 17 of the Industrial Court Act. An appeal from a decision of the Industrial Court can only lie on matters of law only. So what is the purpose of the stay that the respondent is seeking herein?

12. The application is based on the grounds that there is an arguable appeal with overwhelming chances of success and the respondent will suffer substantial loss if stay is not granted, the claimant is a party of straw and may not be able to reconstitute the decretal sum if paid to him thus rendering the appeal nugatory. However there is no such appeal.

13. Looking at the other substantive issues raised by the respondent in seeking stay herein I note the granting of stay of execution pending appeal by the High Court is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is grantable at the discretion of the court on sufficient cause being established by the applicant. The incidence of the legal burden of proof on matters which the applicant must prove lies with the Applicant. See the Halsbury's Law of England, vol.17, paragraph 14:

***Incidence of the legal burden ..... in respect of a particular allegation, the burden lies upon the party for whom the substantiation of the particular allegation is an essential of his case.***

14. Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:

***a) Substantial loss may result to the applicant unless the order is made,***

***b) The application has been made without unreasonable delay, and***

***c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.***

15. These conditions are the essence of Order 42 Rule 6 Civil Procedure Rules. The conditions share an inseparable bond such that the absence of one will affect the exercise of the discretion of the court in granting stay of execution. The Court of Appeal in ***Mukuma versus Abuoga (1988) KLR 645*** reinforced this position. I will therefore give a deep consideration of each condition and see whether the circumstances of this case neatly fit those scales.

16. With regard to Substantial loss occurring in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, does not

in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma versus Abuoga* noted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the Civil Procedure Rules and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

***The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.***

17. With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the High Court should not base the exercise of its discretion under order 42 Rule 6 of the Civil Procedure Rules only on the chances of the success of the appeal. Much more is needed in accordance with the test above. The issues outlined in the Appeal or draft memoranda of appeal. This does not exist in this case. There is no appeal lying before any Court that outline the legal issue to be addressed. I will say no more in this regard save that there is a valid judgement issued by this court. Even in a case where the right of appeal is a constitutional right, there is no appeal lodged in this case that can tilt the court discretion towards the grant of stay. In this case the respondent submitted that the claimant is a man of straw and will not be able to refund the decretal sum in the event the appeal is successful. However being indigent, a man of straw or poor looked at alone is not an enough sufficient reason for an applicant to base an application for stay on. The man of straw, that indigent person and poor respondent, in this case being the claimant has a judgement of this court. This remains a valid judgment until overturned by a court on appeal, which is not the case here.

18. The other limbs set out under Order 42 rule 6 is that of security deposit and in this case the respondent offers to deposit the entire decretal amount in court. The other issue for consideration is whether there has been delay in presentation of this application. It is the court that orders the kind of security the applicant should give as may ultimately be binding on such applicant in an application for stay so as to ensure the discretion of the court is not fettered. Even where a party has acted expeditiously, all the aspects with regard to stay must be looked at together and none in exclusion of the other. However where there is no appeal to seek a deposit of any security or direct that there be stay as the applicant has acted without undue delay would be to defeat the fundamental provision that the stay requested herein is with regard to a stay pending the hearing and determination of the appeal lodged by the respondent herein. There no appeal to be negated in the event stay is not granted.

**Accordingly, the application by the respondent dated 23<sup>rd</sup> July 2013 is hereby dismissed. Costs to the claimant.**

These are the orders of the Court.

Dated and delivered in open court this **12th** Day of **March 2014**.

**M. Mbaru**

**Judge**

In the presence of:

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