



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

**CAUSE NO. 309 OF 2012**

**ROSEMARY WAMBUI MBOGO ..... CLAIMANT**

**VERSUS**

**RED LANDS ROSES LIMITED ..... RESPONDENT**

**RULING**

On 20<sup>th</sup> December 2013 the respondent filed Notice of Motion under section 12 of the Industrial Court Act and Rule 16, 27, 31 of the industrial Court procedure Rules seeking stay of execution of the Judgement delivered on 4<sup>th</sup> December 2013 pending hearing and determination of the intended appeal. The application is supported by the annexed affidavit of Aldric Spindler. The claimant filed Grounds of Opposition to the application and filed on 21<sup>st</sup> January 2014 noting that the Notice of Appeal filed by the respondent was defective and in breach of Rule 17 of the Industrial Court procedure Rules.

The application by the respondent is based on the grounds that they have lodged a Notice of Appeal against the judgement herein and will suffer considerable loss if stay is not granted and there is reasonable apprehension that the claimant will execute judgement causing them great injustice as they intend to appeal. That there are no known assets of the claimant that can be attached if the decretal sum is paid and the respondent succeed on appeal while they are ready to deposit a security as the court may direct.

In support to the application Aldric Spindler states that as the director of the respondent they are aggrieved by the judgment of the court and have filed a notice of appeal with intent to go to the Court of Appeal and have chances that their appeal will succeed as they have a draft of the issues to be raised attached to the application and in support. They therefore seek stay of execution of the judgement herein pending receipt of proceedings herein to approach the Court of Appeal.

In opposition, the claimant's states that the Notice of Appeal and memorandum of appeal filed by the respondent are defective as no appeal can lie at the Industrial Court on its own judgement as this is in breach of Rule 17 of the court rules and thus the application before court is misconceived. That the respondent will not suffer any loss if they comply with the judgement and should not be allowed to place untenable conditions on a party who has a valid judgment pending an appeal before the same court as filing of any appeal cannot be a good ground to getting stay.

Section 17 of the Industrial Court Act, a party that is dissatisfied with any judgement, award, order or decree issued by this Court has an inherent right of appeal to the Court of Appeal in accordance with Article 164(3) of the Constitution. That right does not abet simply because a party has party executed a judgement for the others' stay of execution application to be declined. That right subsists before the same Court upon good grounds advanced in a formal application giving grounds as to why the Court should consider granting such a stay of its orders pending an appeal. The right of appeal is a constitutional right

that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal.

The granting of stay of execution pending appeal is also governed by Under 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.***

Other grounds that must be established by an applicant are;

- (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 has been given by the Applicant.

Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that ***Substantial loss may result to the applicant unless the order is made***, and therefore the court may direct for the deposit of ***Such security for the due performance of the decree or order as may ultimately be binding on the applicant*** where an applicant has been able to satisfy the Court that ***The application has been made without unreasonable delay.***

These conditions are the essence of Order 42 Rule 6 CPR which I need not recite in verbatim. The conditions share an inextricable 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 V 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.

**On the issue of substantial loss occurring**, no doubt, 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, or Certificate of Registration issued to the Appellant, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR and Rule 17 of the Industrial Court 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 V Abuoga*** quoted 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 CPR 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.***

With this observation, of course, a frivolous appeal cannot in practical terms be rendered nugatory. The only admonition however, is that the Court should not base the exercise of its discretion under order 42 Rule 6 of the CPR and Rule 17 of the Industrial Court Procedure rules only on the chances of the success of the appeal. Much more is needed in accordance with the test I have set out above. I find the respondent have attached their draft memorandum of appeal but that is not for this court to determine; rather such holding, judgement and finding must be before the Higher Court, Court of Appeal.

The question is; whether the respondent has demonstrated that substantial loss will occur unless an order for stay of execution is issued? The respondent as the applicants in answer to the above question say that substantial loss will result as their appeal will be rendered nugatory. The Appellant on the other hand, says the respondents have not established that substantial loss will occur unless an order for stay is made.

After considering all the rival arguments herein, I am of the view that indigence or lack of a party who has a good judgement to outline what assets they possess is not a bar to their enjoyment of the fruits of the judgement. To the contrary, such a party holds a valid order of the court that they should be made to enjoy. There is a money decree herein, the claimant gave evidence that she is in gainful employment and that notwithstanding, has a judgement of this court.

**The application herein was filed without undue delay soon after the judgment herein was delivered. In light thereof, the Applicants shall have stay of 30 days from the date of this ruling, if no appeal is filed and served upon the claimant, the same will terminate.**

Dated at Nairobi this 7<sup>th</sup> day of May 2014.

**M. Mbaru**

**Judge**

In the presence of:

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