



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

**AT MOMBASA**

**CAUSE NO. 93 OF 2013**

**JAPHETH MOGAKA ONYARU .....CLAIMANT**

**VERSUS**

**ALPHA DAIRY PRODUCTS LTD .....RESPONDENT**

**RULING**

**INTRODUCTION**

The Motion before the court is dated 12/5/2014 and was filed by the respondent in the main suit (hereinafter called "applicant"). The Motion basically seeks stay of execution pending appeal. In addition, it seeks to have the decretal sum deposited in court transferred to an interest earning account to be opened in the joint names of the parties advocates as security for the stay pending appeal. The Motion is supported by the affidavit of Fahim Fiaz Kurji sworn on 12/5/2014.

The gist of the Motion is that the applicant has lodged an appeal which may be rendered nugatory unless stay is granted.

The claimant has opposed the Motion by filing a Preliminary Objection (P.O.) and replying affidavit sworn on 16/5/2014. The gist of the reply and the P.O. is that the Motion is **resjudicata** and only serving the purpose of delaying justice.

**BACKGROUND**

The claimant filed this claim on 25/4/2013 claiming employment terminal benefits and compensation for unfair termination of employment. Upon service of summons and hearing notice, the applicant never filed any defence and never attended hearing. An ex parte judgment was therefore entered on 30/8/2013 after **ex parte** hearing and the claimant executed in November 2013.

The applicant applied for stay of execution and setting aside of the ex parte judgment by Motion dated 5/12/2013. Stay was granted pending hearing of the Motion **inter partes** on condition that the decretal sum was deposited in the Court. The Motion was finally dismissed on 25/4/2014 after **inter partes** hearing. The applicant was however not satisfied and lodged a Notice of Appeal on 7/5/2014 and brought the present Motion on 12/5/2014. The Motion was heard inter partes in 14/5/2014 and 21/5/2014

**APPLICANT'S SUBMISSIONS**

Mr. Onyango advocate held brief for Mr. Masinde learned counsel for the applicant in prosecuting the

Motion. He relied on the supporting affidavit sworn by Fahim Kurji sworn on 12/5/2014. He confirmed that the applicant lodged and served Notice of Appeal on 7/5/2014 challenging the entire ruling of this court dated 25/4/2014 and was now seeking stay of execution pending appeal under Order 42 of the Civil Procedure Rules (CPR).

According to Mr. Onyango, the duty of the applicant in this Motion is threefold including demonstration that the application is without unreasonable delay, that substantial loss will be suffered if stay is denied and security.

On the issue of delay, Mr. Onyango submitted that the Motion was filed without unreasonable delay especially considering that the applicant was based in Nairobi.

As regards substantial loss, he submitted that the right to appeal is guaranteed by Article 50 and 159 of the constitution and a party should never be denied that right by his appeal being rendered nugatory. He cited **HC MISC. APPL. NO. 42 OF 2011 JOSEPH SIMIYU MUKENYA -vs- AGNES NALIAKA CHESETO** where the court held that the right to appeal actualizes the right to Access to Justice and the right to Protection of the law and as such stay should issue unless the appeal is frivolous.

Lastly the counsel submitted that security had already been deposited in court. He however requested that the same be transferred into an interest earning account.

### **CLAIMANT'S SUBMISSIONS**

Mr. Okwema advocate opposed the Motion and relied on the replying affidavit sworn by the claimant on 16/5/2014. His submissions were on four grounds namely undue delay, the applicable law, substantial loss and security. He submitted that the law applicable to the Motion herein is Order 42 rule 6 of the CPR. According to Mr. Okwemwa advocate, the said provision demand that the applicant must prove that he has an arguable appeal which is not frivolous but one which is arguable and which will succeed.

On the issue of delay, the counsel submitted that filing the Motion on 12/5/2014 was after undue delay considering that it was brought after the 15 days informal stay had lapsed on 9/5/2014. As regards the issue of substantial loss, Mr. Okwema contended that the same was not proved. He maintained that it was the claimant who was suffering loss due to the delayed settlement of the decretal sum.

Lastly, he submitted that he did not wish to submit on the security because substantial loss was not demonstrated by the applicant. He cited **C. APPL. NO 116 OF 1985 MADHU PAPER INTERNATIONAL LTD -vs- KERR** where the court allegedly held that stay pending appeal is a discretion and it must be exercised judicially.

He concluded by urging the court to dismiss the Motion and order for release of the decretal sum to the claimant because any stay ordered will occasion hardship to the claimant.

### **APPLICANT'S REPLY**

Mr. Onyango submitted that the **Madhu Paper Case** cited by the claimant was distinguishable from the present Motion because that cited case dealt with injunction and not stay as is the case herein. He also submitted that in the **Madhu Paper Case** the law applicable was the court of Appeal rules while the present case is governed by Order 42 of the CPR's.

In conclusion Mr. Onyango submitted that at this level, the applicant is not required to prove that he has an arguable appeal. On this point he cited Eldoret **ELC NO. 1 OF 202, PETER SAMOEI -vs- ISAAC K. RUTO**

### **ANALYSIS AND DETERMINATION**

After perusing the Motion and the affidavits and upon carefully considering the submissions made by the

counsel for the parties, the following issues arise for determination

- 1. Whether the applicant has met the threshold for the grant of stay pending appeal.**
- 2. Which orders should issue.**

**Threshold for granting stay pending appeal**

The relevant law as submitted by both parties is order 42 rule 6 which provides that the applicant must satisfy the court:

- a. That applicant will suffer substantial loss if stay is declined.**
- b. That the application was filed without inordinate delay.**
- c. The applicant is willing to comply with any condition for the stay imposed by the court with respect to security for performance if the appeal fails.**

On the first ground the applicant contended that the decretal sum of about ksh.800,000 is substantial and if execution proceeds the sum may not be recovered from the claimant whose source of income was unknown to the Applicant. According to the applicant if stay is denied the appeal will be rendered nugatory and his right to fair trial and protection of the law under Article 50 and 159 of the constitution will have been contravened and that is also a substantial loss.

The claimant did not dispute the allegation that he will not be able to repay the decretal sum if the appeal succeeds. The court however will not shift the burden of proof from the applicant to the claimant on the alleged substantial loss. The court will however believe the evidence of the claimant tendered during the ex parte hearing that, he is now employed by Arkson Quarries Ltd as an accountant to prove he has a known income . The applicant did not dispute that evidence which was given under oath.

The applicant had employed the claimant as an accountant for a monthly salary of Ksh.51957. It follows therefore that a person of such income is capable of repaying the decretal sum if stay is declined. It is not enough for the applicant to make unconfirmed allegation that the claimant has no known income. He must prove the claimant's inability to repay the decretal sum if execution proceeds and the appeal eventually succeeds. Consequently the court finds and holds that the applicant has not demonstrated that substantial loss will be occasioned to her if stay is declined.

In view of the foregoing finding the court needs not consider the other grounds required for the grant stay under Order 42 rule 6 of the CPR.

**DISPOSITION**

As a consequence of the matters and findings above, stay of execution is declined and the Motion dated 12/5/2014 dismissed with costs to the claimant.

**Signed Dated and delivered this 27<sup>th</sup> June 2014.**

**O. N. Makau**

**Judge**