



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 1715 OF 2011

ELENA DOUDOLADOVA KORIR.....CLAIMANT/RESPONDENT

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant's Notice of Motion Application dated 27th May 2014 seeks the following orders:-
 1. The Application be certified as urgent, heard on priority basis and service thereof be dispensed with in the first instance.
 2. Pending hearing and determination of this application *inter partes* there be an order of stay of execution of the judgment and decree of the Hon. Mr. Justice Nzioki wa Makau delivered on 19/5/2014.
 3. Pending hearing and determination of the intended appeal there be an order of stay of execution of the judgment and decree of the Hon. Mr. Justice Nzioki wa Makau delivered on 19/5/2014.
 4. The costs of this application be provided for.

The Motion was supported by grounds on the face of the Motion and the affidavit of Prof. Paul K. Wainaina sworn on 27th May 2014.
2. The Claimant is opposed to the grant of the orders sought and filed a Replying Affidavit which was sworn on 4th June 2014. In it she deposes that the appeal intended by the Respondent does not demonstrate good faith on the part of the Respondent. She deposed that the rough guide applied by the Court in awarding her Kshs. 18,766,344/- was an interim figure covering the period up to 5th October 2011 when the suit was filed and that a further figure of 9,050,020/- has been calculated covering the period between 6th October 2011 and 19th May 2014 when the judgment was entered. She deposed that the Claimant is entitled to further emoluments by way of allowances and salary increments. In addition it was deposed that the judgment debt was a paltry figure compared to the sums generated by the Claimant for the Respondent and services rendered.
3. Mr. Wetangula for the Respondent/Applicant urged the Motion before me on 5th June 2014 and submitted that the Respondent/Applicant intends to Appeal against the decision of this Court made on 19th May 2014 and a Notice of Appeal has been duly filed and a letter bespeaking typed

proceedings lodged. The crux of appeal is that the sum of Kshs. 18,766,344 is an astronomical sum of money and should execution proceed it will firstly be unable to recover the funds from the Claimant and secondly it will render the intended appeal nugatory. He relied on the case of **Butt v Rent Restriction Tribunal [1982] KLR 417**. He submitted that the power of Court to grant stay is a discretionary power. It should however be exercised so as not to prevent an appeal. Additionally the Claimant's Affidavit reveals that she is not satisfied with the award and decree of this Court and this to Mr. Wetangula is the best indication that both parties are aggrieved by the decision of the Court and the Respondent seeks to appeal against the judgment while the Claimant seeks to have the award enhanced. On the issue of security he submitted that the Respondent is a public institution set up by an Act of Parliament and it will be in a position to satisfy the decree of this Court once appeal is determined. He also submitted that as part of the consideration of security the Respondent/Applicant proposes to deposit part of the decretal sum either in Court or in joint name of the respondent and Claimant in a joint interest earning account. He thus urged that the application by the Respondent be allowed on such terms as justice of the case will allow.

4. The Claimant/Respondent opposed the Notice of Motion and stated that she was happy with the decision of this Court and has even sought promotion and will pursue her dream as professor. She submitted that the sum of Kshs. 18,766,344 is not an astronomical figure and that it did not come from the ceiling but was from unpaid allowances. The Claimant submitted that she had seen the affidavit of the Respondent that it could pay. There is an appeal and there is experience that appeals delay and she had strong reservation on Court of Appeal. She submitted that she had waited for 22 years and is not immortal and that she should be allowed to have her remuneration. She sought 9 million more calculated on the basis of loss of income, promotions and other allowances such as commuter allowances. She submitted that the sums are not astronomical but reasonable. The delay will affect her research and urged the Court to allow the release of her money so that she can proceed with her life. She urged the Court to determine that there was a request for stay and it was declined.
5. In his reprise Mr. Wetangula submitted that as much as the Claimant had a right to enjoy the fruits of her judgment on the one hand, the Constitution and Industrial Court Act grant an aggrieved party the right to prefer and appeal. The reason for this is to grant parties the opportunity to balance the rights of the parties. The Court is at liberty to grant the stay sought on terms.
6. The Respondent/Applicant rightly sets out the factors to be considered before grant of stay. In the case of **Butt v Rent Restriction Tribunal** cited by the Respondent/Applicant, Madan JA (as he then was) held as follows:-

“It is the discretion of the Court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general Rule ought to exercise its best discretion in a way so as not to prevent the Appeal if successful being nugatory.”

7. In this case the Claimant was successful and was awarded a sum of 18,766,344/- which inclusive of costs would tip the scales at slightly over 19 million. This is definitely not a small amount though of course it pales in significance to hundreds of millions of shillings. The Respondent/Applicant states that the Claimant may not be able to refund the sums once execution proceeds and the Court of Appeal reverses the decision of this Court. It is trite law that an application for stay of execution pending appeal is to be made timeously. The Application must meet a criteria set out in precedent and the criteria is best captured in the case of **Halai & Another v Thornton & Turpin (1963) Ltd [1990] KLR 365** where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that :-

The High Court's discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable

delay.

An addition the issue of whether the intended appeal will be rendered nugatory is critical as was held in the case of **Hassan Guyo Wakalo v Straman East Africa Ltd [2013] eKLR** as follows:-

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other”

8. The informal stay sought orally in Court is not one that preclude the Respondent/Applicant from approaching this Court with a formal application as has been done. In the premises the objection taken to the present Application is not merited. Both the Claimant/Respondent and the Respondent/Applicant have been dissatisfied by my decision. The parties are in keeping with constitutional dictates permitted to seek redress either by way of appeal or review. The Respondent has elected to Appeal.
9. From the facts before me and on the basis of decided cases, the Respondent/Applicant has met the threshold in **Halai & Anor v. Thornton & Turpin** and **Hassan Wakalo v Straman** above. The amount is significant and failing to stay the execution may render any intended appeal nugatory. On the strength of the dicta of Madan JA in **Butt v Rent Tribunal** the Court should not impede the appeal. I will grant stay pending Appeal on terms. The Respondent/Applicant is to deposit half the decretal sum in a joint interest earning account in the name of the Claimant and the Respondent at a reputable bank within 14 days of this Ruling. I make no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of June 2014

Nzioki wa Makau

JUDGE