



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

**CAUSE NO.203 OF 2011**

ENG. FRANCIS N. GACHURI .....CLAIMANT

**VERSUS**

ENERGY REGULATORY COMMISSION ..... RESPONDENT

**RULING**

The application before me for determination is the notice of motion dated 11<sup>th</sup> March 2014 filed by the Respondent/Applicant under certificate of urgency or 12<sup>th</sup> March 2014. The application seeks stay of execution of the decree herein pending the hearing and determination of the applicant's intended appeal to the Court of Appeal. The application is supported by the affidavit of MUENI MUTUNGA the Commission Secretary of the Respondent/Applicant sworn on 11<sup>th</sup> March 2014 and on the grounds on the face of the application.

The Claimant (Respondent in the application) opposed the application and on 3<sup>rd</sup> April, 2014 filed both grounds of opposition dated 1<sup>st</sup> April 2014 and a replying affidavit of ENG. FRANCIS N. GACHURI sworn on 1<sup>st</sup> April 2014.

The applicant was granted interim stay of execution pending the hearing and determination of its application.

The parties appeared before me for hearing of the application interpartes on 8<sup>th</sup> April 2014 and agreed to canvass the same by way of written submissions.

The background to this case is that the Claimant's employment was terminated by the Respondent on 29<sup>th</sup> September 2008. He filed a claim in the High Court at Nairobi on 4<sup>th</sup> December 2008 alleging that the termination of his employment was in breach of his employment contract, labour laws and regulations and the Respondent's Human Resources Policy. He prayed for special damages in the sum of Kshs. 42,588/-, general damages, costs and interest.

The case was transferred to the Industrial Court by letter dated 28th January 2011 following a consent by the parties recorded by Justice Maraga on the same date.

I heard the case and delivered judgment on 8<sup>th</sup> July 2013. In the judgment I found the termination unfair and awarded the Claimant 12 months salary as compensation in the sum of Kshs. 4,083,129 and Kshs 340,232.40 on account of 31 pending leave days making a total of Kshs 4,423,361.40. Being dissatisfied by the judgment the Applicant lodged a notice of appeal on 10<sup>th</sup> July 2013. The Applicant also wrote to the Deputy Registrar on 9<sup>th</sup> July 2014 seeking copies of proceedings and certified copy of judgment for

purposes of appeal.

The applicants position is that the judgment raises serious points of law which the Court of Appeal must address exhaustively, that the Claimant shall not be prejudiced by the grant of orders sought and that the applicant is willing to comply with any terms and condition issued by the court. The applicant has submitted that the decree was issued on 10<sup>th</sup> December 2013 and the Claimant has demanded payment of the decretal sum. The applicant has further submitted that it acted swiftly to issue notice of appeal and apply for proceedings, that the proceedings have not been supplied to them, that this is the administrative responsibility of the court registry. The applicant further submitted that it fulfills all the conditions applicable for grant of stay orders being first, that it will suffer substantial loss unless the order is granted. Secondly, that the application has been made without delay and thirdly, that the applicant is willing to comply with conditions for security as the court may set. Finally, the applicant submitted that this court has jurisdiction to grant the orders of stay pending appeal.

The applicant relied on the cases of *Mary Kina V Menengai Oil Refineries & Another [2010]eKLR*, *Andrew Kuria Njuguna V Wambui Kuria [2010] eKLR*, *In ReEstate of Kipsang Kandie (Deceased) [210]eKLR*, *James Wangalwa & Another V Agnes Naliaka Cheseto{2012] eKLR* and *African Safari Club Limited V Safe Rentals Limited [2010] eKLR*. The applicant prays that the court grants the orders as prayed.

The Claimant opposed the application on the grounds that there has been inordinate delay on the part of the applicant having been served with the draft decree on 4th November 2013 and the decree on 19<sup>th</sup> December 2013. That there is no reminder to the Deputy Registrar regarding proceedings after the letter dated 9th July 2013 reflecting lack of seriousness in filing the appeal and further that no deposit has been paid for the proceedings. That no reason has been given for the inordinate delay. The Claimant in his affidavit stated he is not a man of straw and is capable of refunding the decretal sum should the appeal succeed.

It is further submitted that the judgment is based on a discretionary power and there is little chance of interference with this courts order by the appellate court, that the Claimant will suffer great prejudice taking into account the period that this case has taken since it was filed. It was further submitted that this court is *functus officio* and lacks jurisdiction to grant the orders sought and that the application is an abuse of court process. The Claimant prays that the application be dismissed with costs.

The law relating to stay of execution is provided for in Rule 41 of the Court of Appeal Rules. The rule provides that stay of execution be made in the superior court in the first instance, but does not bar the applicant from making the application directly to the Court of Appeal.

In the present case the applicant has made the application to this court in the first instance. The Claimant's argument that this court has no jurisdiction therefore has no basis as the Court of Appeal Rules donates the jurisdiction to this court.

In the case of *Esther Wanjiru vs Jackline Arege [2014] eKLR Justice H. A. Omondi sitting in Nakuru* stated that an order of stay of execution will be granted where the court is satisfied that substantial loss may result to the applicant if the order is not made, and the application for stay has been brought without unreasonable delay.

The applicant in this case has submitted that this application was brought without delay while the Claimants counsel argued that the applicant has delayed in bringing the application. The Applicant's counsel also submitted that the Applicant will suffer irreparable loss if the orders are not granted as the Claimant has no means of refunding the decretal sum. To counter this argument the Claimant deposed in his replying affidavit that he is not a man of straw and he will be in a position to refund the money should the appeal succeed.

In the case of *Equity Bank Limited vs West Link MBO Limited [2013] eKLR* the Court of Appeal held that an appeal does not operate as a bar to execution of judgment and a party seeking stay of

execution pending appeal must therefore demonstrate that they are not using the appeal to delay justice. They must not only show that they have an arguable appeal but also that they have come to court without undue delay.

In this case I have to determine whether the application was brought without delay, whether the applicant will suffer irreparable harm should the orders of stay not be granted and whether there is an arguable appeal.

The judgment herein was delivered on 8<sup>th</sup> July, 2013. On 10<sup>th</sup> July, 2011, the applicant lodged a notice of appeal and wrote a letter requesting for copies of proceedings and certified copy of judgment. The Applicant thereafter went into a deep slumber and was not even woken up when the Claimant sent it a draft decree on 4<sup>th</sup> November, 2013 or when the applicant was served with the decree on 19<sup>th</sup> December 2013. Even the Claimant's letter dated 19<sup>th</sup> December 2013 threatening to execute the decree should the decretal sum not be paid within 14 days did not elicit any reaction from the applicant.

It was only when the Claimant filed a bill of costs on 5<sup>th</sup> March, 2014 and the Applicant was invited for the taxing of the bill on 19<sup>th</sup> March 2014 that the applicant moved to file this application.

The Applicant has not explained the delay. It never took any action to follow up the proceedings. Indeed at paragraph 16 of the written submissions the Applicant submits that it's job ended after delivering the letter to the Deputy Registrar on 10<sup>th</sup> July, 2013 and "*The remainder was administrative on the part of the court registry.*" The Applicant has not even paid deposit for typing of the proceedings which as a practice is done before the proceedings are typed.

Unfortunately for the Applicant the proceedings were actually typed by 11<sup>th</sup> September, 2013. Had the Applicant perused the court file or made an inquiry at the registry, they would have found this out. The information about the typed proceedings is endorsed on the Applicant's letter dated 9<sup>th</sup> July, 2013 and filed in court on 10<sup>th</sup> July, 2014. This means that by 12<sup>th</sup> March 2014 when the present application was filed the typed proceedings had been lying in the court file for exactly 6 months. It means the applicant did not make any follow up for the proceedings. They also did not bother to move the court for eight months from the date of judgment to secure a stay of execution and therefore preserve the subject matter of appeal.

This in my opinion is inordinate delay and is inexcusable.

As was stated in the case of *Ishamel Kagunyi Thande vs Housing Finance Company of Kenya Ltd*, the jurisdiction of the court to stay execution pending appeal is discretionary. The courts will not exercise its discretionary powers in favour of a litigant who is guilty of laches.

The next issue I have to consider is whether the Applicant will suffer irreparable harm should this application not be granted. The applicant's reason is that the Respondent may not recover any amount paid to the claimant. No evidence is adduced to support this assertion. The Claimant has stated that he has means and has invested in immovable property whose value is far in excess of the decretal sum and will be capable and willing to refund the decretal sum should the appeal succeed.

I therefore find that the Applicant has not proved that the appeal will be rendered nugatory as it will be unable to recover the decretal sum from the Claimant should the appeal succeed.

The final issue I have to consider is whether the Applicant has an arguable appeal. **Section 17 of the Industrial Court Act and Rule 27(4) of the Industrial Court (Procedure) Rules** provide for appeals from decisions of this court only on matters of law. I have perused the draft memorandum of appeal and find that most of the issues raised therein are issues of fact and not law. Others are framed as issues of both fact and law.

Authorities on whether this ground should be considered by the court which passed the decree is not

unanimous. Some authorities are to the effect that this is a matter that should be left to the appellate court to determine while others have ruled that the court to which an application for stay is made ought to consider the arguability of an appeal as a condition for granting or refusing to grant orders for stay.

Fortunately for me the first two conditions herein are sufficient to make a determination of this matter and I do not have to decide whether the appeal is arguable or not.

I find that there was inordinate delay of eight months in filing the application for stay of execution. I also find that the Applicant has not

proved that should the orders sought in it's application dated 11<sup>th</sup> March 2014 not be granted it will suffer irreparable harm.

For these reasons I find the application without merit and dismiss the same with costs.

Orders accordingly.

Dated at Nairobi this 6<sup>th</sup> day of June 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

Eng. F.N. Gachuri Claimant - present in person

No appearance for Respondent/Applicant