



**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 220 OF 2013**

**IN THE MATTER OF : THE EMPLOYMENT ACT, 2007 & THE  
LABOUR INSTITUTIONS ACT, 2007**

**RACHEAL NUNGARE & 15 OTHERS.....CLAIMANT**

**VERSUS**

**BAKE "N" BITE LIMITED.....RESPONDENT**

**BAKERY, CONFECTIONERY, FOOD**

**MANUFACTURING & ALLIED WORKERS**

**UNION..... INTERESTED PARTY**

**RULING**

**Introduction**

1. This is a Notice of Motion dated 23.6.2014 brought by the Respondent in the suit (hereinafter called the Applicant). It seeks stay pending Appeal lodged against the whole judgment of this court dated 30.5.2014. According to the Applicant, unless stay is ordered she will suffer irreparable loss. The motion is supported by affidavit sworn by Seif Muhammed Seif sworn on 23.6.2014. The gist of the affidavit is that the Applicant's Appeal is not frivolous and has got high chances of success which will be rendered nugatory if stay is not granted. The Applicant committed herself to abide to any condition for stay that the court may order.

2. The Claimants have opposed the motion by the Replying Affidavit sworn by the 1<sup>st</sup> Claimant on 24.6.2014. The gist of the Replying Affidavit is that the Applicant has met the fundamental requirements for granting stay pending appeal by this court. According to the Claimants, the Applicant has no appeal with good chances of success and the motion is only a delaying tactic meant to deny the Claimant the enjoyment of the fruit of their suit. It is also a delaying tactic to allow the Applicant close down her business.

3. The motion was disposed of by way of written submissions which the court has carefully considered.

**Analysis and Determination**

4. It is not in dispute that the Applicant being dissatisfied by the impugned judgment of this

court filed a Notice of Appeal in exercise of her right of appeal. The issue for determination herein is whether the Notice of Motion has met the essential requirements for the grant of stay pending appeal. The criteria precedent before granting stay by the trial court were set out by the Court of Appeal in ***Halai & Another vs. Thorton & Turpin (1963) Ltd [1990] KLR 365*** in the following terms:

***“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.”***

The foregoing criteria are also provided for under Order 42 Rule 6(2) of the Civil Procedure Rules.

5. There is no doubt that the motion for the stay was brought without undue delay after the delivery of the impugned judgment. As to whether there is an appeal with good chances of success is not for this court to decide. What is important to decide is whether the Applicant is likely to suffer substantial loss if stay is declined. In other words the court must assess the possibility of the Applicant's appeal becoming nugatory if it succeeds after execution of the impugned judgment. The court can only do so if there is evidence adduced to prove that the Claimant (Decree Holder) will not be able to refund the judgment debt if the appeal succeeds. In this case no evidence was adduced to prove that the Claimants will not be able to refund the judgment debtor if the Appeal succeeds. The burden of proof cannot be shifted to the Decree Holder to prove his or her ability to repay the judgment debt. It is always upon the Applicant to prove the Decree Holder's inability to repay the decretal sum in the event the appeal succeeds after execution.

6. In view of the foregoing finding the court does not need to deal with the other aforesaid criteria because the impugned judgment is a money decree whereby the Decree Holder can always refund the money if the appeal succeeds. Consequently the stay order is declined because the criteria of inability to repay the judgment debt has not been proved.

#### **Disposition**

7. The Notice of Motion dated 23.6.2014 is dismissed with costs.

**Dated and delivered in Mombasa this 10<sup>th</sup> day of October, 2014.**

**O.N. Makau**

**Judge**