



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 389 OF 2014

MARY MUMBI KARIUKI.....CLAIMANT

v

THE DIRECTOR PAMOJA WOMEN DEVELOPMENT PROGRAMME....RESPONDENT

RULING

1. In a judgment delivered on 23 October 2015, the Court found and held that the services of the Claimant was unfairly terminated by the Respondent and the Claimant was awarded a total of Kshs 100,925/.
2. The Respondent was aggrieved and on 2 February 2016, it lodged a motion seeking
 1. (spent)
 2. (spent)
3. THAT this Court be pleased to order stay of execution of the Decree issued herein pending the hearing and determination of the intended Appeal.
4. THAT the costs of this application be provided for in any event.
3. Order 2 of the motion was granted on 8 February 2016, and the order was extended on 15 February 2016 on condition that the Respondent deposited into Court the decretal sum.
4. The motion was urged on 22 February 2016, and is the subject of this ruling.
5. The Respondent has advanced several reasons to support the application for stay pending appeal and these are, that if stay is not granted, the intended appeal if successful would be rendered nugatory; that a Notice of Appeal has been lodged; that the Claimant has commenced the process of execution; that the intended appeal has high chances of success; that the Claimant is not in position to refund the decretal sum if she is paid and that security has been deposited.
6. The Claimant opposed the motion and contended that the application was filed in bad faith and after inordinate delay; that no appeal had been preferred; that the appeal is not arguable and that the

Respondent had not demonstrated that it would suffer loss incapable of financial redress.

7. The legal principles to be satisfied by a party seeking an order of stay of execution pending appeal have been settled for so long now that they need no rehashing. The principles are derivatives from Order 42 of the Civil Procedure Rules.

8. Order 42 rule (6)(2) of the Civil Procedure Rules has outlined the conditions upon which stay of execution pending appeal may be granted. Briefly, these are that the applicant should satisfy the Court that substantial loss may be occasioned; that the application should be made without unreasonable delay and lastly, provision of such sufficient security by the applicant.

9. Courts, have on various occasions discussed and distilled the principles arising out of Order 42 rule 6 of the Civil Procedure Rules. Such cases are *Mukuma v Abuoga* (1988) KLR 645, *Jotham Simiyu Wasike & another v Jackson Ongeru & 4 others* (2013) eKLR, *Tabro Transporters Ltd v Absalom Dova Lumba* (2012) eKLR and *Anthony Kiberenge Kamau v Kibuchi Wamunyi & 3 others* (2010) eKLR.

10. The Court will therefore only examine whether the Respondent has brought itself within the legal principles.

Substantial loss

11. In *Cosmas Kipkoech Sigei v Madrugada Ltd & Ar* (2010) eKLR Emukule J held that a stay will not be made on the ground that the decree holder is a pauper, and will therefore be unable to refund the decretal sum if paid to him....

12. In the present proceedings, apart from the bare assertions that the Claimant would not be able to repay the decretal sum, no tangible evidence was offered.

13. In *Republic v The Commissioner for Investigations and Enforcement ex parte Wananchi Group Kenya Ltd* (2014) eKLR, Odunga J observed that, and I endorse the holding, the issue of substantial loss is a crucial issue in such applications that it ought to come out clearly in the supporting affidavit....it is therefore not sufficient to merely state that the decretal sum is a lot of money and the applicant would suffer loss if the money is paid. In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted.....

14. The Respondent, with all due respect has failed to demonstrate that it would suffer any substantial loss were it to pay to the Claimant the decretal sum which by the stretch of the imagination is not such a huge sum of money.

Delay in bringing application

15. The judgment was delivered on 23 October 2015 while the application for stay was filed on 2 February 2016, an interlude of nearly 3 months.

16. The explanation tendered for not bringing the application any sooner as stated from the bar, was that the Respondent only obtained a copy of the judgment on 9 November 2015 as it was not present when the judgment was delivered.

17. This explanation is more of an excuse.

18. The record of the Court indicates that the date for delivery of judgment was set in the presence of the Respondent's counsel, Mr. Kimani Charagu.

19. The said counsel had a professional obligation to attend Court to take judgment or make arrangements for representation. The failure to attend or send a representative has not been explained.

20. The Claimant, in her replying affidavit deposed that 2 reminders were sent to the Respondent but there was no response.

21. In the considered view of the Court, the 3 month delay has not been sufficiently explained and the Court finds it inordinate.

Security for due performance of decree

22. The Respondent complied with the Court order as to deposit of security and nothing turns on this limb save to note the Respondent has not satisfied the other 2 limbs.

23. Before concluding, the Court wishes to make reference to observations by Kuloba J (as he was then) in the case of *East African Breweries Limited v. Castle Brewing Kenya Limited*, HCCC No. 848 of 1998 that with regard to the viability, prospects and chances or otherwise, of the appeal succeeding, it is really not for a trial Court, or the court appealed from to reconsider its own decision to find out whether it was probably wrong, and to assess the chances of the appeal against the decision succeeding. It is invidious, if not odious, for a judge of the Court from which an appeal emanates, whether he is the one who rendered the decision to be challenged on appeal, or some other judge of the same jurisdictional hierarchy, after a decision in his Court, to embark upon a reconsideration of the merits and demerits of the same case or application so as to change his mind and reach a different position and hold that he realizes that with hindsight, the decision rendered by his Court was wrong or doubtful and that there are reasonable or high prospects of the appeal succeeding

24. The Court has made reference to the observations by the Judge because the Respondent put a lot of emphasis on the contention that its appeal had high chances of success, which is not one of the considerations in applications of this nature at this level.

Conclusion and Orders

25. The Court reaches the conclusion that the Respondent has failed to meet the threshold for grant of an order of stay of execution pending appeal at this hierarchy of the judicial chain.

26. The motion dated 2 February 2016 is thus dismissed with costs to the Claimant.

Delivered, dated and signed in Nakuru on this 11th day of March 2016.

Radido Stephen

Judge

Appearances

For Claimant Ms. Kerubo instructed by Korongo & Co. Advocates

For Respondent Mr. Kimani Charagu instructed by Kimani Charagu & Co. Advocates

Court Assistant Nixon



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