



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. E055 OF 2021**

**BHACHU INDUSTRIES LIMITED.....APPLICANT**

**VERSUS**

**PETERSON OMBUNA MAKUMBA.....RESPONDENT**

**RULING**

1. In the notice of motion of motion dated 10<sup>th</sup> February 2021 the appellant/applicant seeks the following orders:

*1. Spent*

*2. Spent*

*3. That this honourable court do grant stay of execution of the Judgment delivered on 5<sup>th</sup> of February 2021 in the Chief Magistrate's Court at Nairobi Milimani Commercial Court, Civil Suit No. 4118 of 2016 pending the hearing and determination of the applicant's appeal.*

*4. That the costs of this application be provided for.*

2. Its premised on the grounds on its face plus the sworn affidavit of **Winnie Paul** the head of department Kennindia assurance company the appellant/applicant's insurer. An appeal HCCA No. E055 of 2021 has already been filed. It is feared that if execution is not stayed the appeal will be rendered nugatory.

3. Further the deponent has averred that the respondent's source of income and assets are unknown hence the fear of a non-refund in case of a successful appeal.

4. The appellant/applicant is raising an issue of lack of jurisdiction by the trial magistrate in the matter which falls under WIBA – Workmen's Injuries Benefits Act. It has shown its willingness to comply with all the conditions for stay that will be given by the court.

5. A sworn replying affidavit dated 1<sup>st</sup> March 2021 was filed by Mr. Maurice Muli Nzavi the respondent's counsel. Counsel annexed a letter from the then Chief Justice ("A") and not dated. He averred that the letter indicated that work injury claims that were pending before the court had to proceed to conclusion before the said courts. He further deponed that these directives were binding on everyone and took precedence over the two WIBA cases cited.

6. Counsel went on to depon that the applicant has not shown any prejudice it suffered, since it fully participated in the hearing.

7. The application was canvassed by way of written submissions.

8. M/s Mucheru advocates for the applicant have relied on the case of **Cooperative bank of Kenya Ltd vs Banking Insurance and Finance Union (Kenya) [2015] eKLR** where it was held:

***“It is now trite that two principles must be satisfied by an applicant who applies for stay of execution under the said rule – firstly that there is an arguable appeal which is to say that it is not frivolous and secondly, that if the appeal, if filed, or intended appeal, would be rendered nugatory if stay of execution applied for was not granted.”***

He also relied on Order 42 Rule 6(2) Civil Procedure Rules to argue the application.

9. Counsel has submitted that the applicant has an arguable appeal as can be assessed from the grounds filed. That if stay of execution is not granted the applicant will suffer substantial loss, which will cripple its business operations and render the appeal nugatory.

10. Its main ground of appeal relates to the trial court's jurisdiction to hear this matter. He has referred to the Supreme court case **Petition 4 of 2019 – Law Society of Kenya vs Attorney General & anor [2019] eKLR**. He argues that the matter in issue having been instituted in 2016 falls within the matters filed after 2<sup>nd</sup> June 2008 and ought to have been dismissed. He adds that the contents of the Chief Justice's letter annexed to the replying affidavit in respect to how WIBA matters should be handled supports his position.

11. Stressing on the importance of jurisdiction he referred to the cases of:

(i) **Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & anor [2020] eKLR**.

(ii) In the matter of **Interim Independent Electoral Commission [2011] eKLR** where the court stated:

*“Jurisdiction is everything. Without it, a court has no power to make one more step.”*

12. On whether the applicants appeal will be rendered nugatory he submits in the affirmative, saying the respondent is not a person of means and he would not be able to refund the decretal sum if paid in the event of a successful appeal. He relied on the case of **Bonface Kariuki Wahome v Peter Nziki Nyamai & anor [2019] eKLR**. He urged the court to allow the application.

13. Mr. Nzavi for the respondent in his submissions 22<sup>nd</sup> March 2021, argues that the appellant/applicant has not satisfied the three (3) conditions for issuance of an order staying execution as set out in Order 42 Rule 6(2) Civil Procedure Rules. He identified these as:

(i) That the applicant stands to suffer irreparable loss if the application is not allowed.

(ii) Applicants willingness and readiness to provide security to secure the interests of both parties.

14. Counsel has referred to the case of **Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others [2013] eKLR** where the court of appeal Judges stated the principles to be applied in considering an application for stay of execution to be as follows:

*“The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”*

15. Counsel submits that the applicant has failed to demonstrate that it has an arguable appeal. He has relied on two cases to support this, namely:

(i) **Stanely Kang'ethe Kinyanjui v Tony Ketter & others [2013] eKLR**.

(ii) **Bob Morgan Systems Ltd & anor v James [2004] 1KLR 194**.

He submits that according to the two (2) cases for one to succeed in an application for one to succeed in an application for stay of execution he/she must demonstrate firstly that the appeal or intended appeal is arguable or in other words, that it is not capricious or frivolous. Secondly, that unless it is granted a stay of execution the appeal or intended appeal, if successful, will be rendered nugatory.

16. It is his contention that the applicant has failed to demonstrate any of the above, since the respondent is a person of means and his whereabouts are well known. He urges the court to dismiss the application for being an abuse of the court process, as both the application and intended appeal lack merit.

### **Analysis and determination**

17. The judgment being appealed against was delivered on 5<sup>th</sup> February 2021. This memorandum of appeal herein is dated 10<sup>th</sup> February 2021 and was filed on the same day. The notice of motion dated 10<sup>th</sup> February 2021 was filed on 12<sup>th</sup> February 2021. The main prayer is for stay of execution of the judgment, which is anchored on Order 42 Rule 6(2) of the Civil Procedure Rules which provides:

*“(2) No order for stay of execution shall be made under subrule (1) unless—*

*(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”*

18. There are several decisions which clearly spell out the principles to be established for one to qualify for an order of stay of execution

pending appeal. Both counsel have referred to some of the said decisions, and identified what an applicant needs to demonstrate.

19. From the law and the decided cases it is the duty of one seeking an order of stay of execution to demonstrate firstly that he/she has an arguable appeal. Secondly that he/she will suffer irreparable harm if stay of execution is not granted.

In the present case the main ground of appeal is the jurisdiction of the trial court to hear the case. It is the applicant's argument that owing to the enactment of the WIBA, the case ought not to have been heard before the magistrate's court, which lacked jurisdiction.

20. In his response Mr. Nzavi has averred that the finding of the Court of Appeal in Civil Appeal No. 133 of 2011 and that of the Supreme court in Petition No. 4 of 2019 were made prior to the directions issued by the then Chief Justice in the memo marked "A" by the applicant.

21. The issue of jurisdiction though not raised at the trial court is an arguable one and has to be resolved. From the memorandum of appeal, the decretal sum is slightly over Kshs 103,000/= if interest and costs are considered. The applicant is fearful that if the appeal is not successful the respondent may not refund the decretal sum paid, since his source of income and assets are unknown. This is neither here nor there.

22. Its however prudent that the court protects the interests of both parties as the appeal proceeds to hearing. In this case an appeal was filed within a week of the delivery of the judgment.

23. I therefore find merit in the application and grant stay of execution pending the hearing and determination of the appeal on condition that the entire decretal sum is deposited in court within ten (10) days. Failure to comply will lead to automatic lapse of the order of stay of execution.

Orders accordingly.

**DELIVERED ONLINE, SIGNED AND DATED THIS 24<sup>TH</sup> DAY OF JUNE, 2021 AT NAIROBI**

**H. I. ONG'UDI**

**JUDGE**