REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL, COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 30 OF 2018

4MB MINING LIMITED C/O MINISTRY OF MINING, JUBA

REPUBLIC OF SOUTH SUDAN…….....PLAINTIFF

-VERSUS-

MISNAK INTERNATIONAL (UK) LIMITED…….....DEFENDANT

-AND-

TOTAL LINK LOGISTICS.....1ST INTERESTED PARTY

UNION LINK LOGISTICS.....2ND INTERESTED PARTY

FREIGHT FORWARDERS (K) LIMITED.....3RD INTERESTED PARTY

RULING

[1] The Notice of Motion dated **8 June 2021** was brought by the plaintiff pursuant to **Sections 1A, 1B, 3A, 3B, 5 and 63(e)** of the **Civil Procedure Act; Order 42 Rule 1,** and **Order 51 Rule 1** of the **Civil Procedure Rules** for orders that:

[a] Spent

[b] Pending the *inter partes* hearing of the Motion, interim conservatory orders do issue in the following terms:

[i] There be unconditional stay of execution/enforcement of the ruling delivered herein ion **11 February 2021** as well as any/all orders and/or process and/or proceedings consequential thereto;

[ii] There be unconditional stay of taxation proceedings in respect of the 1st defendant's Party and Party Bill of Costs dated **27 December 2019** as well as any/all orders and/or process and/or proceedings related thereto;

[b] The interim conservatory orders subject of Prayer No. 2 above do persist until the hearing and determination of the Motion;

[c] The interim conservatory orders subject of prayer No. 2 above do persist until the hearing and determination of the appeal;

[d] Costs for the application and the entire proceedings borne by the plaintiff in any event.

[2] The brief background to the application is that, vide a Plaint lodged herein on **27 April 2018**, the plaintiff sued the defendant for general damages and for the unconditional release of the consignment the subject of this suit, among other reliefs. The defendant thereafter raised a Notice of Preliminary Objection which was heard and determined by the Court in a Ruling dated **6 July 2018**. The outcome was that the Preliminary Objection was dismissed with costs. Being dissatisfied with that decision, the defendant filed an appeal, being **Mombasa Civil Appeal No. 118 of 2018: Misnak International (UK) Ltd vs. 4MB Mining Ltd**. Upon hearing the appeal on its merits, the Court of Appeal allowed it and upheld the Preliminary Objection. The plaintiff was consequently condemned to pay the costs of both the High Court and the

Court of Appeal.

[3] Armed with the decision of the Court of Appeal, the defendant proceeded to file Party and Party Bill of Costs dated **27 December 2019** for taxation; which Bill was taxed at **Kshs. 300,840/=** in a Ruling delivered by the taxing master on **1 September 2020**. The defendant was however dissatisfied with the amount awarded on taxation and promptly lodged a Reference from the Ruling of the taxing master. The Reference was heard and determined on **12 February 2021**, whereupon the decision of the taxing officer was set aside and the Bill of Costs remitted to the taxing master for re-taxation.

[4] Aggrieved by that decision, the plaintiff has opted to prefer an appeal to the Court of Appeal on the grounds, *inter alia*, that the Judge erred in law by misapprehending the law on taxation under **Schedule 6** of the **Advocates (Remuneration) Order, 2014**. Thus, it is the contention of the plaintiff that it has an arguable appeal with overwhelming chances of success; and that unless the orders sought are granted, the appeal shall certainly be rendered nugatory. The application was supported by the affidavit sworn by **Yoram Moussaieff**, sworn on **7 June 2021** in which a detailed account is given of the chronology of events pertinent to the instant application.

[5] On behalf of the defendant, Grounds of Opposition were filed herein on **8 June 2021** by **M/s Muregi Okere & Company Advocates.** Counsel thereby contended that:

> **[a]** The application refers to an order delivered in this suit on **11 February 2021** whereas no order was delivered in this matter on that date.
>
> **[b]** The ruling and order that was delivered in this matter on **12 February 2021** comprised of an order that is not capable of being enforced. The order meree plaintily referred to the defendant's Party and Party Bill of Costs dated **27 December 2019** back to the taxing officer for re-taxation having declined the manner of taxation comprised in the Ruling and decision of **1 September 2020**. An order of stay cannot be granted against a negative order that is not capable of being enforced.
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> **[c]** The plaintiff's application has been made with unreasonable delay that does not warrant the Court to exercise its discretion to grant stay.
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> **[d]** The plaintiff's application has not provided sufficient grounds for the Court to exercise its discretion and has been filed in response to the defendant's submissions made to the taxing officer for purposes of re-taxation of the Party and Party Bill of Costs dated **27 December 2019**. It is therefore misplaced and seeks to delay the re-taxation of the aforesaid Party and Party Bill of Costs.
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> **[e]** Thff's application is bad in law and has no legal basis.

[6] Pursuant to the directions given herein on **6 July 2021**, the application was canvassed by way of written submissions. Accordingly, **Mr. Ngonze,** learned counsel for the plaintiff relied on his written submissions filed herein on **12 October 2021**. He premised his submissions on **Order 42 Rule 6** of the **Civil Procedure Rules** as well as the cases of **Butt vs. Rent Restriction Tribunal** [1979] eKLR and **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another** [2016] eKLR and urged the Court to find that the plaintiff is entitled to the prayers sought, having met all the prerequisites for stay pending appeal. He pointed out that the plaintiff lodged a Notice of Appeal on **22 February 2021**, just 10 days or so after delivery of the impugned Ruling. In his view, once a Notice of Appeal has been filed, the Court is obliged to protect the substratum of the appeal pending hearing and determination thereof.

[7] On his part, **Mr. Okere** for the defendant relied on his written submissions on **1 July 2021,** and pitched a two-pronged argument, namely:

> **[a]** That the application is bad in law and does not meet the conditions stipulated in the **Civil Procedure Rules, 2010,** for grant of the orders sought; and,
>
> **[b]** That the application seeks to stay an order of the Court that is not amenable to stay; the order in question being a negative order.

[8] It was further the submission of **Mr. Okere** that a Notice of Appeal, *per se*, does not entitle an applicant to an order of stay. He took issue with the fact that he was not served with the Notice of Appeal filed herein by **Mr. Ngonze**. He also contended that, since the substratum of the appeal had not been defined, explained or identified, no justification at all had been made by the plaintiff to entitle it to an order of stay. He consequently urged for the dismissal of the application dated **8 June 2021** with costs, including thrown away costs.

[9] I have given careful consideration to the application, the averments in its Supporting Affidavit as well as the Grounds of Opposition filed. I have also taken into account the written submissions filed herein by learned counsel as well as the oral highlights made on **13 October 2021. Mr. Okere** raised a pertinent technical point which merits consideration upfront. He argued that the Ruling dated **12 February 2021** did not result in a positive order; and therefore the orders ensuing therefrom are not orders capable of being stayed. He went further and submitted that the orders sought are unlawful, in so far as they seek to prevent the Deputy Registrar from obeying a lawful order of the Court.

[10] According to **Mr. Okere**, the best course of action would be for the plaintiff to await the re-taxation of the defendant's Bill of Costs; which taxation would culminate in a positive order capable of enforcement. The plaintiff would then opt to either seek stay of the order or file a reference; or both. He posited that, at this juncture, the application for stay is premature. He referred to **Section 2** of the **Civil Procedure Act**; and the case of **Electro Watts Limited vs. Alios Finance Kenya Limited** [2018] eKLR in which the Court **(Hon. Kamau, J.)** held that:

> **"...the order the lower trial court granted was not a positive order. It was a negative order. The Appellant had been granted an injunction on condition that he paid fifty (50%) per cent of the contested amount. In the event it failed to**

deposit the said sum, the injunction it had been granted would be discharged. That was not an order that was capable of execution."

[11] I have had occasion to peruse that authority and while I agree in principle that a negative order is ordinarily not amenable to stay. It is however noteworthy that in that case, the lower court issued an injunctive order on condition that half of the contested amount be paid by the applicant; failing which the injunction would be discharged to enable sale of the charged property. Thus, the High Court, on appeal, reasoned that there was no order to be executed in the event the Appellant failed to deposit the monies; and that the exercise of statutory power of sale in itself was not a court order as such, but rather was a right that would crystallize upon default in repayment.

[12] A similar position was taken in **Raymond M. Omboga vs. Austine Pyan Maranga**, Kisii HCCA No. 15 of 2010, by **Makhandia, J.** (as he then was) thus:

> **"…The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise... It is trite law that stay of execution pending appeal can only be granted against the order being appealed against. Put differently, an order for stay of execution pending appeal cannot be granted if the intended appeal is not against the order sought to be stayed; yet this is what obtains in this application where the applicant's appeal is against the order of dismissal of his application, yet the stay sought is against the subordinate court's judgement or decree."**

[13] Similarly, in **Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63**, a decision of the Court of Appeal for Eastern Africa that was followed by the Court of Appeal in **George Ole Sangui & 12 Others vs. Kedong Ranch Ltd [2015] eKLR,** it was held thus:

> **"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs…The High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in an application for stay to enforce or to restrain by injunction."**

[14] And in **Co-operative Bank of Kenya Ltd vs. Banking Insurance & Finance Union (Kenya)** [2015] eKLR, the Court of Appeal (per Hon. Kantai, J.) had occasion to restate that:

> **'An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a "positive order" – either an order that has not been complied with or has partly been complied with. See, for this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) where it was stated:**
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> > **'….. an order for stay of execution must be intended to serve a purpose …..' " (emphasis supplied).**

[15] In the instant matter, the Court allowed the Reference and referred the defendant's Bill of Costs back to the taxing officer for re-taxation. To my mind, that is not a negative but a positive order capable of being stayed; with the object that taxation be put on hold until the hearing and determination of the appeal. It is significant that in the impugned Ruling the Court gave specific directions to the taxing master on how to proceed with the re-taxation; and in the proposed appeal, the plaintiff will be arguing that the Court misapprehended the applicable law and therefore erred in law. There is another aspect of the order to consider, and it is the risk of execution to realize the taxed costs upon a Certificate of Costs being issued in that regard. Accordingly, I do not agree with **Mr. Okere** that the orders issued vide the Ruling dated **12 February 2021** are incapable of being stayed; or that to grant stay would amount to an illegality. To the contrary, it is my finding that the orders in question are amenable to stay. The application dated **8 June 2021** is therefore competently before the Court.

[16] It is now trite that a successful litigant is entitled to the fruits of his litigation; and therefore that, barring sufficient cause, no impediments should be placed in the way of a decree holder who is simply seeking to reap the fruits of his/her Judgment. In **Machira T/A Machira & Co. Advocates vs. East African Standard (No. 2)** [2002] KLR 63 this principle was aptly expressed thus**:**

> **"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."**

[17] The foregoing notwithstanding, **Order 42 Rule 6(1)** of the **Civil Procedure Rules,** recognizes that:

> **"… the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is**

preferred may apply to the appellate court to have such order set aside..."

[18] Thus, there is no gainsaying that the Court has the discretion to grant stay of execution, in appropriate cases, should a justification be made to warrant the exercise of such discretion. And, to guide the exercise of discretion in this regard, **Order 42 Rule 6(2)** of the **Civil Procedure Rules**, stipulates that:

> **(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."**

[19] In addition to the prerequisites set out in **Order 42 Rule 2** of the **Civil Procedure Rules**, the Court of Appeal explained, in **Butt vs. Rent Restriction Tribunal** [1982] KLR 417, that:

> **"It is in 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 as not to prevent the appeal, if successful from being nugatory...The court will grant stay where special circumstances of the case so require..."**

[20] With the foregoing in mind, I have given consideration to the question whether the plaintiff stands to suffer substantial loss should the orders sought be declined. At paragraph 9 of the plaintiff's application, the plaintiff complained that, by its Ruling dated **12 February 2021**, the Court summarily condemned it on its response to the defendant's Party and Party Bill of Costs; and that the Court then **"funnelled the Plaintiff towards satisfying an Award of Costs not apportionable to her".** Consequently, it was the contention of the plaintiff that, unless an order of stay is granted, it stands to suffer substantial loss in terms of "**dealing in the property and conduct of its business without any safeguard from the threat of execution by the defendant."**

[21] It is however significant to note that all the Court did in the Ruling dated **12 February 2021** was to allow the reference and to refer the matter to the Deputy Registrar for re-taxation. There is therefore no imminent threat to the proprietary or other interests of the plaintiff by way of execution or otherwise. In the premises, the argument that the plaintiff stands to suffer substantial loss appears extremely strained, in my respectful view. Indeed, in **Kenya Shell Limited vs. Kibiru** [1986] KLR 410 the Court of Appeal made the point that:

> **"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money."**

[22] The Court of Appeal further pointed out (per Gachuhi, Ag.JA (as he then was) at 417 that:

> **"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted..."**

[23] Hence, since no attempt was made by the plaintiff to demonstrate substantial loss in any form, it would follow that even where the appeal is arguable, the possibility of it being rendered nugatory would be dim. Moreover, although the plaintiff satisfied the Court that his Notice of Appeal was filed within the time stipulated for it under **Rule 75(1)** of the **Court of Appeal Rules**, no explanation was given for the delay of about 4 months in filing the instant application. It was still incumbent on the plaintiff to demonstrate alacrity in the filing of the instant application, if indeed it stood to suffer substantial loss as a consequence of the Ruling dated **12 February 2021**. Thus, having failed to demonstrate substantial loss, and having failed to justify the delay in filing the instant application, the question of security for the due performance of the order on costs should the appeal fail, would not arise.

[24] In the result, I find no merit in the plaintiff's application dated **8 June 2021**. The same is hereby dismissed with costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF OCTOBER, 2021

OLGA SEWE

JUDGE