



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 536 OF 2016

IN THE MATTER OF AN APPLICATION BY THE HERITAGE A.I.I. INSURANCE COMPANY LIMITED RETIREMENT BENEFITS SCHEME FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND DECLARATION

AND

IN THE MATTER OF THE RETIREMENT BENEFITS ACT, CAP 197 LAWS OF KENYA

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010 ORDER 53

BETWEEN

REPUBLIC..... APPLICANT

-VERSUS-

RETIREMENT BENEFITS APPEALS TRIBUNAL.....RESPONDENT

BENIAH WEKESA WANYONYI.....INTERESTED PARTY

AND

THE HERITAGE A.I.I. INSURANCE COMPANY LIMITED RETIREMENT BENEFITS SCHEME.....EX-PARTE APPLICANT

RULING

Introduction

1. On 24th May, 2017, this Court dismissed the Notice of Motion dated 10th November, 2016, by which the *ex parte* applicant herein, **The Heritage A.I.I. Insurance Company Limited Retirement Benefits Scheme**, was seeking the following orders:

1. **CERTIORARI** removing to this Honourable Court for the purposes of quashing the judgement against the Applicant dated 9th September 2016 and the consequential decree.

2. **DECLARATION** that the judgement dated 9th September 2016 is a violation of the Applicant's right to fair administrative action and contrary to Article 47 of the Constitution of Kenya, 2010 as read with Section 4 of the Fair Administrative Action Act, 2015 as the same is an abuse of process, arbitrary, capricious and brought mala fides by the Respondent in abuse of due process of the court, and has occasioned the subject great prejudice.

3. **DECLARATION** that the judgement dated 9th September 2016 amounts to deprivation of the Applicant's right to property guaranteed under Article 40 of the Constitution as payments were lawfully expended to offset the Interested Party's mortgage liabilities.

4. **DECLARATION** that the judgement dated 9th September 2016 was null and void as it affects the contractual rights of the parties *to wit*, the Interested Party and the Sponsor regarding the mortgage and further condemned the Sponsor un-heard.

5. **DECLARATION** that the claim by the Interested Party before the Chief Executive Officer of the Retirement Benefits Authority was time-barred.

6. **Costs be provided for.**

Ex Parte Applicant's Case

2. Aggrieved by the said decision the said applicant has now moved this Court vide a Notice of Motion dated 30th June, 2017 seeking the following orders:

1. **This application be certified urgent and service thereof be dispensed with at the first instance for purposes of prayer 2 and 3 hereof.**

2. **The application herein be set down for hearing *inter-partes* as a matter of urgency.**

3. **There be a temporary stay of execution of the Judgment of this Honourable Court entered on the 24th May 2017 and the resultant decree pending the hearing and determination of this application *inter-partes*.**

4. **There be a stay of execution of the Judgment of this Honourable Court entered on the 24th May 2017 and the resultant decree pending the hearing and determination of the *Ex-Parte* Applicant's appeal against the said Judgment and Decree.**

5. **The Interested Party be restrained from communicating the proceedings of this Honourable to third parties and/or use third party to exert undue pressure upon the *Ex-Parte* Applicant pending the hearing and determination of the *Ex-Parte* Applicant's appeal.**

6. **The costs of this application be provided for.**

3. According to the ex parte applicant, following the dismissal of its application, I filed a Notice of Appeal and requested for proceedings to enable it lodge an appeal to the Court of Appeal. It was however yet to be furnished with the said proceedings.

4. It was averred by the applicant that after it filed the Notice of Appeal, the Interested Party wrote to the Insurance Regulatory Authority on 31st May 2016 requesting for the intervention of the Authority to have the monies deposited as security release to him. As a result, the Insurance Regulatory Authority wrote to the Sponsor *vide* a letter dated 20th June 2017 seeking for an update.

5. In the ex parte applicant's view, the intention of the letter from the Interested Party to the Insurance Regulatory Authority is meant to exert undue pressure to the Sponsor to have the scheme release the monies that have already been deposited in a joint account as security. It was disclosed that the decretal

sum of Kshs.6,062,610.61 was deposited in a Joint Interest earning account pursuant to the order of this court on 4th November 2016 and the *Ex-Parte* Applicant is willing to abide by any other conditions that may be imposed by this Honourable Court pending the hearing and determination of the appeal.

6. It was the applicant's case that it will suffer substantial loss and irreparable damage if execution of judgement and decree is not stayed and the Interested Party proceeds to have the monies released to him. In that event, the intended Appeal which in its view is meritorious and raises triable issues for determination, would also be rendered nugatory if stay is not granted.

7. It was therefore the ex parte applicant's case that it is in the interests of justice that the Orders sought be granted.

8. In its submissions the ex parte applicant reiterated the legal position that for the Court to grant the stay orders, the Applicant has to meet the two limbs for stay *to wit* that the Applicant has to have an arguable appeal and that if stay is not granted, the intended appeal would be rendered nugatory. In this respect the applicant relied on **Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (Kenya) [2015] eKLR** where the Court of Appeal stated as follows:

“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 – Ishmael Kagunyi Thande v Housing Finance Company Limited (Civil Application No. 156 of 2006 where these principles were restated thus:

“The jurisdiction of the court under rule 5(2)(b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

9. It was submitted that in respect of the first limb of the conditions for granting stay pending hearing and determination of an appeal being an arguable appeal, the Applicant has an arguable appeal as per the Draft Memorandum of Appeal that was attached to the Notice of Motion.

10. As to whether the intended appeal is arguable and not frivolous, the ex parte applicant relied on **Transjuba International Limited vs. ZEP-RE (PTA Reinsurance Company) & 2 Others [2015] eKLR, Kenya Tea Growers Association & Another vs. Kenya Planters & Agricultural Workers Union Civil Application Nai. No. 72 of 2001** and **Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji & another [2015] eKLR.**

11. In respect of the second limb, that stay will be granted where the pending appeal would be rendered nugatory it was submit that the Applicant is a retirement benefits scheme with limited means as it depends on contributions from the members and will be unable to recover the sums if the stay is not granted and the Appeal succeeds. In this respect the applicant relied on **Reliance Bank Ltd vs. Norlake Investments Ltd (2002) 1 E.A 227** where it was held that :

“The Court in the *Oraro and Rachier Advocates vs. Co-Operative Bank of Kenya Limited (1999) LLR 118 (CAK)* specifically says that in considering the second limb, namely whether the appeal would be rendered nugatory if a stay is not granted, the court is to consider the conflicting claims of both sides. The issue of “the balance of convenience” or “the claims of both sides” is one of the elements to be considered when dealing with the question of whether the success of an appeal would be rendered nugatory if a stay of execution or an injunction is not granted...In the *Oraro and Rachier Case*, the Court took into account the fact that if the law firm was ordered to forthwith deposit the decretal sum, the firm itself might well be

forced to go out of business and such an eventuality may itself be sufficient to render the success of their appeal nugatory...The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. In *Butt vs. The Rent Restriction Tribunal (1979) LLR 1247 (CAK)* the court took into account the amount of money involved. In *Kenya Breweries Limited Case*, the Court again took into consideration the amount of money the Applicant was required to pay under the decree and the court come to the conclusion that the damages that would be entailed in the immediate payment of the money might be so severe that the Applicant might never recover from it even if the money were to be refunded to it in the event of its appeal succeeding.”

12. It was the applicant's case that the Respondents have not placed before this court any evidence that they are persons of means with substantial assets capable of paying back the suit amount were the appeal to succeed. In its view, the sum involved is a colossal sum and there is reasonable apprehension as to the ability of the Interested Party to repay the same in the event that the appeal is successful as no material is availed in proof thereof. In support of its submission the applicant relied on *Housing Finance Company of Kenya vs. Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR*, where the Court quoted the Court of Appeal in the case of *Kenya Hotel Properties Limited vs. Willesden Properties Limited Civil Application Nai. No. 322 of 2006 (UR 178/06)* in relation to a money decree where it held thus:

“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.

13. It was recalled by the applicant that the decretal sum of Kshs.6,062,610.61 was deposited in a Joint Interest earning account pursuant to the order of this court on 4th November 2016 and the Ex-Parte Applicant is willing to abide by any other conditions that may be imposed by this Honourable Court pending the hearing and determination of the appeal. However, the Interested Party was now using the Insurance Regulatory Authority to exert pressure on the Ex-Parte Applicant to release the amounts deposited in a joint account when the Ex-Parte Applicant intends to file an appeal against the judgement.

14. The Court was therefore urged to allow the application as prayed.

Respondent's Case

15. In opposition to the application the Respondent filed the following grounds of opposition:

1) THAT the Application is devoid of merit for lack of positive or negative order sought to be appealed against. It is frivolous, whimsical and a waste of precious judicial time.

2) THAT the application offends the provisions of Order 42 Rule 6(2) (a) of the Civil Procedure Rules 2010 in that the same has been brought over a month after the delivery of the Judgment.

3.)THAT the applicant ought to move the Court of Appeal under Rule 5(2)b of the Court of Appeal Rules, Laws of Kenya.

16. It was submitted on behalf of the Respondent that this application is devoid of merits and ought to be dismissed with costs. In so urging the Respondent relied on *Republic vs. The Commissioner For Investigations & Enforcement 'Ex-Parte' Wananchi Group Kenya Limited [2014] eKLR*.

17. The Respondent therefore prayed the court adopts the same reasoning and dismisses the ex-parte applicant's motion in its entirety with costs to the Respondent.

Interested Party's Case

18. On his part, the interested party's case was that it is a matter of judicial notoriety and legal principle that a dismissal Ruling is incapable of being stayed since dismissal of an Application is not a positive Order capable of being stayed. It was disclosed that upon dismissal of the Application, the Learned Judge issued a fourteen days status quo on the date of the Ruling being 24th May, 2017 which essentially meant that the interested party would not execute the Retirement Benefits Authority decision dated 9th November, 2015 wherein he was awarded Kshs. 6,035,901.41. To him, the order maintaining the *status quo* ended on 7th June, 2017, and he had the liberty to execute the same by seeking for the decretal sum to be released from the joint interest earning account to him. Accordingly, he wrote a letter to the Insurance Regulatory Authority seeking for it to oversee the release of the decretal sum. Despite drafting the letter on 31st May, 2017, he obeyed the Court Order that maintained the status quo and delivered the said letter on 12th June, 2017 when the status quo had expired.

19. It was the interested party's case that the Applicant seeks to limit his constitutional right to freedom of speech and restrain him from any form of communication to any third party with regard to a case that pertains to him which in any case, once a matter is filed in the Court, is easily accessible to the public.

20. It was the interested party's case that the intended appeal may in any case not succeed.

21. The Court was therefore urged to dismiss the application with costs as the same is misadvised and a waste of judicial time.

22. In his submission the interested party relied on the decision of **Kantai, JA in Cooperative Bank Limited –vs- Banking Insurance & Finance Union Kenya - Nairobi Application no. 133 of 2017** that “an order for stay of execution 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...the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order. That was the position in **Executive Estates Limited vs. Kenya Posts & Anor. [2005] 1 E.A. 53** where it was stated that “..... *The order which dismissed the suit was a negative order which is not capable of execution.*”

23. In this case, the Applicants Application was dismissed for lack of merit, making it a negative order incapable of being stayed. Further, the Applicant has in any event not met the requirements envisaged under order 42 Rule 6(2) of the **Civil Procedure Rules 2010** and relied on **Ndaiye –vs- African Virtual University HCC Suit no. 422 of 2006** and **Bungoma Hc Misc Application No 42 of 2011 James Wangalwa & Another vs. Agnes Naliaka Cheseto** where it was held that:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”

24. It was the interested party's case that the Applicant has not met the requirement to show that any substantial loss will be felt, in any case, if the matter is stayed, the Interested Party is the party which will suffer substantially bearing in mind that the Applicant acted illegally and unlawfully. In the interested party's view, the Applicant is in a mere fishing expedition and is intent on delaying the payment of the award issued by the Retirement Benefits Authority and sustained by the Retirement Benefits Appeals Tribunal. He therefore urged the Court to disallow the application with costs as the same lacks merit, is an abuse of precious judicial time.

Determinations

25. I have considered the cases of the various parties as presented in this application.

26. The first issue for determination is whether taking into consideration the orders issued by this Court an order of stay is feasible.

27. In my view, where the orders granted by the High Court which are the subject of an appeal to the Court of Appeal be it in judicial review proceedings or civil proceedings are capable of being executed, the same are amenable to stay of execution. I gather support for this position from the decision of the Court of Appeal in **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 (CAK) [2002] 2 EA 572**, where the Court of Appeal granted a stay in respect of a matter that arose from a judicial review application. In that case the High Court ordered the University to “*convene the necessary Disciplinary Committees where the students concerned shall be tried, paying attention to the matters raised in this ruling.*” The Court of Appeal noted that there was no prayer before the Court for an order of mandamus to warrant the grant of the said order. The Court recognised that whereas the High Court could properly quash the decision of the University whether it could direct the University in the manner of proceedings thereafter was an arguable point and unless the stay was granted the students risked being expelled or suspended at the hands of the University acting in obedience to the said order. It is therefore my view that where the order being appealed from is capable of being executed over and above the order for costs, stay of execution may be granted.

28. However it is clear that all that this Court did in the judgement against which the Applicant intend to appeal was to dismiss the Applicant’s application for judicial review. There is a long line of authorities where the Court of Appeal has held that where the High Court has dismissed an application for judicial review, the Superior Court does not grant any positive order in favour of the Respondents which is capable of execution. See **Yagnesh Devani & Others vs. Joseph Ngindari & 3 Others Civil Application No. Nai. 136 of 2004**, **Mombasa Seaport Duty Free Limited vs. Kenya Ports Authority Civil Application No. Nai. 242 of 2006** and **William Wambugu Wahome vs. The Registrar of Trade Unions & Others Civil Application No. Nai. 308 of 2005**.

29. In this case the applicant is seeking two substantive orders which are as follows:

1) There be a stay of execution of the Judgment of this Honourable Court entered on the 24th May 2017 and the resultant decree pending the hearing and determination of the *Ex-Parte* Applicant’s appeal against the said Judgement and Decree.

2) The Interested Party be restrained from communicating the proceedings of this Honourable to third parties and/or use third party to exert undue pressure upon the *Ex-Parte* Applicant pending the hearing and determination of the *Ex-Parte* Applicant’s appeal.

30. In my view the second prayer is very easy to dispose of. In my view as long as a party is enforcing his rights accruing from a judgement, as long as he uses lawful methods the Court cannot restrain him from doing so. In this case, it is clear that money was deposited in a joint account as a condition for leave operating as a stay. By the dismissal of the applicant’s case, it followed that unless there was a further order of stay, the interested party was entitled to seek that the said sum be released. The interested party contends which contention is not disputed that he only sought for release of the said sum after the lapse of the order maintaining the *status quo*. If the ex parte applicant feels that the interested party’s conduct violated the said order, its recourse lies in an application for contempt and not in seeking a gagging order as it seeks herein.

31. It follows that the second prayer is misconceived and cannot be granted.

32. As regards the first prayer, the intended appeal as far as this Court is concerned is directed at the decision disallowing the applicant’s judicial review application. The issue whether a Court would competently grant an order of stay as opposed to an injunction pending an appeal where an application for injunction has been dismissed was dealt with by the Court of Appeal in **Umoja Service Station Ltd & 5 Others vs. Hezy John Ltd Civil Application No. Nai. 39 of 2006**, where it stated that a prayer seeking for the stay of an order dismissing an injunction application is futile as the grant of the same would not in any way advance the applicants’ cause. In this case to grant stay of the decision being challenged would

mean that this Court would have stayed the order dismissing the application in which event the application would still be live. In other words the manner in which the application is crafted does not lend itself to grant thereof.

33. However, even if this Court was of the view that the Court could in the circumstances of this case grant the order of stay sought the Court would be obliged to consider the grounds upon which such an order ought to be granted. In an application for stay pending appeal to the Court of Appeal there is no requirement that the Court considers the chances of success of the intended appeal. That is a requirement where the Court of Appeal is considering an application under Rule 5(2)(b) of the ***Court of Appeal Rules*** since the intended appeal would be heard by the Court of Appeal. One of the considerations to be taken into account is whether substantial loss is likely to result to the applicant if the stay is not granted. In this case what the applicant seeks to stay, if I understand it correctly is the release of the sum deposited to the interested party. This Court simply dismissed the applicant's application. The release of the said deposit is only a consequential step and is not even the subject of the intended appeal.

34. In **The Hon. Peter Anyang' Nyong'o & 2 Others vs. The Minister for Finance & Another Civil Application No. Nai. 273 of 2007**, the Court of Appeal expressed itself as follows:

“It is trite law that the Court of Appeal is a creature of statute and can only exercise the jurisdiction conferred on it by statute. The jurisdiction of the Court of Appeal to grant interim reliefs in civil proceedings pending appeal is circumscribed by rule 5(2)(b). It is apparent that under that rule the Court can only grant three different kinds of temporary reliefs pending appeal, namely, a stay of execution, an injunction and a stay of further proceedings. That rule has been construed to the effect that each of the three types of reliefs must relate to the decision of the superior court appealed from. Where the High Court has merely dismissed the suit with costs, any execution can only be in respect of costs since the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum and therefore there is nothing arising out of the High Court judgement for the Court of Appeal in an application for stay, to enforce or to restrain by injunction. A temporary injunction asked for is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and the Court of Appeal has no jurisdiction to entertain it..Where the superior court merely upheld the preliminary objection and as a consequence struck out the application for judicial review with costs, the order striking out the application is not capable of execution against the applicant save for costs. Moreover since the order of stay is neither an order of stay of execution or stay of proceedings nor an order of injunction of the species envisaged by Rule 5(2)(b), the Court has no jurisdiction to grant such an order since the orders sought do not relate to what the superior court decided.”

35. Similarly, in **Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010, Makhandia, J** (as he then was) held:

“The court cannot see how it can order stay of the decree that is not the subject of an appeal. Had the aforesaid order been the subject of this appeal then different considerations would have applied. The court would have looked at it alongside the settled principles aforesaid for granting stay of decree. 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."

36. Where therefore the application for stay is directed to a decision against which the intended appeal is not directed a stay of execution pending that appeal, it has been held, is not available and the application is rendered incompetent on that score. See **Muhamed Yakub & Another vs. Mrs Badur Nasa Civil Application No. Nai. 285 of 1999.**

37. In addition, there are no concrete grounds upon which the applicant believes that the interested party will not be able to refund the sum in question if the appeal succeeds. The law as I understand it is that a successful litigant can only be deprived of the fruits of success in exceptional circumstances. Therefore the legal burden is on the applicant to adduce evidence on the basis of which he forms his belief that he stands to suffer loss. Thereafter the evidential burden shifts to the successful party to show that that is not the case.

38. In this case I have no evidence upon which I can find that the applicant has discharged the legal burden in order to call upon the interested party to discharge the evidential burden.

39. Whereas the applicant's fears may well be real the applicant has not in the supporting affidavit expounded on how it will suffer substantial loss. While I agree with the decision in **Oraro and Rachier Advocates vs. Co-Operative Bank of Kenya Limited (1999) LLR 118 (CAK)**, I do not understand the Court of Appeal to be saying that in applications for stay of execution pending appeal the burden is on the successful party to show that the applicant will not suffer irreparable loss. That kind of interpretation with due respect would be clearly against the legal provisions dealing with stay pending appeal.

40. In my view the issue of substantial loss is such a crucial issue in such applications that it ought to come out clearly in the supporting affidavit rather than to be dealt with in the submissions.

41. The importance of complying with the conditions precedent to the grant of stay pending appeal was emphasised in **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** where it was held that:

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of 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".

42. 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 since by granting stay would mean that the *status quo* should remain as it were before the judgement and that would be denying a successful litigant the fruits of his judgement which should not be done if the applicant has not given to the Court sufficient cause to enable it to exercise its discretion in granting the order of stay. See **Kenya Shell Limited vs. Kibiru & Another [1986] KLR 410.**

43. In the premises, I find no merit in the Notice of Motion dated 30th June, 2017 and the same is dismissed with costs to the Respondent and the interested party.

44. It is so ordered.

Dated at Nairobi this 29th day of November, 2017

G V ODUNGA

JUDGE

In the presence of:

Mr Ndungu for Mr Kigata for the applicant

CA Ooko