



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

**MISC. APPLICATION NO. 254 OF 2004**

**IN THE MATTER OF ENFORCEMENT OF AN AWARD**

**IN THE INDUSTRIAL COURT AWARD CAUSE NO. 61 OF 1988**

**JOHN KOTINGO.....PLAINTIFF/RESPONDENT**

**BENSON KILUNGU.....PLAINTIFF/RESPONDENT**

**(Filing this application in a representative capacity for and on**

**behalf of 16 former employees of Warren Enterprises Limited)**

**-VERSUS-**

**WARREN ENTERPRISES LIMITED.....DEFENDANT/APPLICANT**

**RULING**

The defendant's application by Chamber Summons dated and filed on 5<sup>th</sup> October, 2005 was brought under Order *XLI*, rules 4 and 32 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap. 21). The defendant's prayers were as follows;

- (a) that, there be a stay of execution of the order entered herein on 26<sup>th</sup> September, 2005;
- (b) that, the costs of this application be in the appeal.

In the grounds upon which the application was premised, it was stated that the applicant had been ordered to deposit in Court three-fourths of the amount of money claimed by the respondents within thirty days; that the applicant had been granted leave to appeal against the order of the Court made on 26<sup>th</sup> September, 2005 upon the oral application of counsel for the applicant; that the deposit of security is incompatible with the proceedings in this case; that the applicant would be in a position to pay any decretal amount adjudged at the end of the appeal proceedings; that if a stay is not granted, the intended appeal by the applicant would be rendered nugatory; that the applicant would suffer irreparable harm unless stay of execution was granted.

**Geoffrey Orao-Obura** the advocate with the conduct of the applicant's case swore on 5<sup>th</sup> October, 2005 a supporting affidavit, in which he averred that the applicant's application dated 7<sup>th</sup> December, 2004 had come up for hearing on 11<sup>th</sup> July, 2005 and ruling was delivered on 26<sup>th</sup> September, 2005. He deponed that the decretal sum in the instant suit has not been identified in the proceedings, and that the amount of Kshs2,108,953 is haphazardly fixed and is not supported by any evidence adduced in the Industrial Court,

or supported by the award of the Court. He deponed that there was high probability of success of the appeal challenging the deposit. The deponent avers that there is no evidence that the applicant is likely to be put under receivership or be wound up.

The plaintiffs responded to the application by filing grounds of opposition, dated 12<sup>th</sup> October, 2005. These grounds are as follows:

- (i) that, the defendant's application is incompetent, bad in law and untenable;
- (ii) that, the defendant has not demonstrated sufficiently or at all that it will suffer substantial loss if the order sought is not granted;
- (iii) that, the defendant's application is vague, and an abuse of Court process.

On the first occasion of hearing the defendant's application, on 18<sup>th</sup> October, 2005 the applicant was represented by learned counsel **Mr. Obura**, while the respondent was represented by learned counsel **Mr. Mungu**.

**Mr. Obura** noted that the instant application arises from a ruling of 26<sup>th</sup> September, 2005 which came against the background of an earlier ruling on 19<sup>th</sup> November, 2004. In the earlier ruling the Court had **adopted the award of the Industrial Court** dated 5<sup>th</sup> August, 1999. The ruling of 26<sup>th</sup> September, 2005 required the applicant herein to deposit three-fourths of the payment due by the defendant on the basis of the Industrial Court award; and it is precisely this requirement of the Court order which constitutes the applicant's gravamen. An **appeal** has been lodged to challenge the order; and now, in the run-up to the appeal the defendant seeks an order of **stay**, so that it does not have to pay the deposit. Learned counsel submitted that if the deposit was paid, this would render the appeal nugatory. But the basis of such reasoning is not entirely clear, in my opinion. How can paying the deposit render the appeal nugatory? The relevant order, in the ruling of 26<sup>th</sup> September, 2005 thus reads:

***“Within 30 days of the date hereof, the applicant shall deposit in Court three-fourths of the amount of money claimed to-date by the respondents, i.e., three-fourths of Kshs.2,108,953/50”***

Since the applicant has repeatedly affirmed that it is not a company on the verge of liquidation, and the payment it makes is only **into Court**, to be held there until the appeal is heard and determined, I am not persuaded there is a valid reason for a strenuous contest to the Court order aforesaid. Indeed I would be inclined to uphold the deposit – payment order because it appears to me that delays of an artificial kind are the only object the applicant could achieve by its application; and it is clear to me that such delay causes injustice to the respondents.

Learned counsel argued that if the applicant has to pay the deposit aforesaid, then this will deprive the applicant of its working capital, pending the hearing and determination of the appeal. Such a contention runs counter to the impression created in the supporting affidavit, that the applicant is an enterprise that enjoys financial stability. I would rather go by the evidentiary material in the affidavit, than by the bare contention of counsel in Court.

Learned counsel **Mr. Obura** urged: “If the applicant deposits the money, this brings jeopardy – doing what it is trying to avoid by appealing”. It cannot, I think, be a proper task of this Court to aid the applicant to avoid paying a deposit as ordered, in the hope that the appeal might vindicate such avoidance. The more responsible position, in my opinion, is that the applicant, even as it awaits a hearing and determination of its misgivings on appeal, must **fulfil the terms of orders** already judiciously made in the High Court.

Although learned Counsel has maintained that the deposit - payment obligation be suspended, because the applicant has “good grounds of appeal” and a “high probability of success”, there is no tell-tale evidence in favour of such a construction of the law, in the current position; I am not convinced of the merits of

such an argument.

**Mr. Obura** maintained that the *balance of convenience* lay in favour of the applicant rather than the respondents: because the applicant is a trading body which at any given time, needed to be in control of all its money. Yet, in my view, for precisely that reason it can only be concluded that the applicant's funding base is buoyant enough to enable it to comply with the deposit – payment order made by the Court. Learned counsel had remarked: “[There is no] evidence that this money would not be available should there be failure of the appeal”.

Learned counsel sought reliance on a Court of Appeal decision, **Oraro & Rachier Advocates v. Co-operative Bank of Kenya Limited**, Civil Application No. Nai. 358 of 1999 in which it was remarked:

**“Mr. Gatonye for the respondent bank argued that if Mr. Oraro were to succeed in the appeal the respondent bank was sound enough to be able to refund the sum in question. Ordinarily that is the principle on which this Court acts but recent rulings of this Court suggest that in dealing with this limb of the application the Court ought to weigh the claims of both parties.”**

Learned counsel also relied on a later decision of the Court of Appeal, **Reliance Bank Limited v. Norlake Investments Limited** [2002] 1 E.A. 227, in which the following summary appears (p. 228):

**“For an application under rule 5(2)(b) to succeed, the applicant had to satisfy the Court that the appeal was arguable, that is, it was not frivolous, and that if the order were not granted, the appeal, were it eventually to succeed, would be rendered nugatory. In determining the second limb of the test, the Court in Oraro and Rachier Advocates v. Co-operative Bank of Kenya Limited [1999] LLR 1118 (CAK) had not been enunciating a third principle but merely stating that, in making its decision, it was bound to consider the conflicting claims of both sides. Where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory. The factor that could render the success of an appeal nugatory thus had to be considered within the circumstances of each particular case ...”**

It was **Mr. Obura's** position that the principle set out in the foregoing two cases favoured his client, rather than the defendants, in terms of both *law* and *fact*, but the factual position, which it is clear the Court must in this case take into account, stands out thus: (i) the contest is between a greatly successful business enterprise, on the one hand, and several poor persons who used to work for the applicant but lost their jobs, on the other hand; (ii) the national entity empowered to resolve labour disputes, namely the **Industrial Court**, had in its wisdom resolved the matter in favour of the former workers; (iii) after some six years since the Industrial Court's determination of the matter, the applicant has taken **no action**. How are such facts to be applied to the law so as to favour the application for stay of execution of Court orders herein?

The law, so far as I can read from the interstices of the several decisions cited, is that this Court is **not required to put in abeyance the enforcement of its order of decree, in favour of a dissatisfied party who is appealing, and it is a discretionary matter** for this Court how the question is to be resolved. The Court's discretion is to be exercised after taking into account the prevailing **facts**.

Learned counsel **Mr. Obura** urged: “The applicant has every reason to hold that money pending the determination of the appeal”; “Should we fail in our appeal, would Kshs.2,000,000/= be available to be deposited?” The answer to that question as apparently intended, was in the affirmative. Counsel remarked: “The applicant is a trading body and needs every bit of its capital.”

Learned counsel **Mr. Mungu**, for the respondents, took a contrasting stand. He submitted that the entire ruling which is being challenged by the applicant in its appeal, is concerned with **discretion**. Counsel submitted that the Court has an unfettered discretion to prescribe conditions of effectuation of its judgment – so long as these conditions were reasonable and not so onerous as to amount to a denial of the very essence of the intended appeal; and it was the responsibility of the applicant herein to convince the

Judge that the orders ought to be set aside.

**Mr. Mungu** submitted that the authorities cited by the applicant related to stay of execution of orders and decrees at the **Court of Appeal level** – and that the governing rules in that case, found in Rule 5(2)(b) of the Court of Appeal Rules, were not identical to the rules set out in Order **XLI** of the Civil Procedure Rules which ought to guide the applicant's case in this instance.

After giving anxious attention to the terms of the application, its prayers, grounds and evidence, the responses of the opposing side, and after considering the submissions of counsel, it has become clear to me that there would be no compelling cause to hold in abeyance the motion of the Court's orders, pending the applicant's appeal. From the facts placed before me, it is not possible to conclude that the payment of a money deposit into Court would work such an injustice against the applicant, that the Court's orders ought to be stayed. To the contrary, the ends of justice will be advanced, given the pertinent background and the surrounding facts, if the moneys which have lain at the centre of the contest, are placed in the safe custody of the Court while the applicant proceeds to the Court of Appeal.

I therefore refuse the defendant's application by Chamber Summons of 5<sup>th</sup> October, 2005. The applicant herein shall bear the respondents' costs in the instant application.

**Orders accordingly.**

DATED and DELIVERED at Nairobi this 24<sup>th</sup> day of February 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiff/Respondent: Mr. Mungu,

Instructed by M/s. Mungu & Co. Advocates

For the Defendant/Applicant: Mr. Obura,

Instructed by M/s. Obura Mbeche & Co. Advocates