



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 825 of 2003**

**LAWRENCE ADIYO .....PLAINTIFF**

**VERSUS**

**KENYA REVENUE AUTHORITY.....DEFENDANT**

**RULING**

The background information to this application is that the applicant /defendant had put in an application dated 10/8/2005 seeking to strike out the plaint. The same was opposed by the plaintiff and argued on merit. It gave rise to this courts' ruling dated 16<sup>th</sup> day of March 2007 dismissing the said application for the reasons given and sustaining the plaint.

When the matter came up for main hearing before Khamoni J. On 21/11/2007, it was discovered that there was pending on record an application for discovery which the learned judge ruled that this should be disposed off first.

On 21/2/2008 when that application came up for hearing before this court, the defence raised a preliminary objection to the matter contending that it was a constitutional issue and should be referred to the honourable the chief justice of this court, for direction.

Both parties were heard orally and that gave rise to this courts' ruling of 26<sup>th</sup> day of February 2008 dismissing the said oral preliminary objection.

On 11/3/2008 the matter went before Khamoni J. who once again referred the application for discovery to this court. The said application was dated 5/11/2004 and filed on 12/11/2004. It was argued on merit on 23/4/2008 and it gave rise to a ruling delivered by this court on the 6<sup>th</sup> day of June 2008. The result of the assessment run from page 18-20 thus:-

*“The net result of the fore going assessment is that the court finds that the applicant application dated 5/11/2004 has merit. The same is allowed for the following reasons:-*

*(i). Pay rolls are not private documents. They fall into the category of public documents belonging to public institutions, forming the basis of acts or transactions by public officers for the benefit of public officers.*

*(ii). Its production will save on costs and the length of litigation, in that it will save the plaintiff and the defence from lining up beneficiaries of the two tier salary scheme to give oral evidence of the content of the pay rolls.*

*(iii). The defence admits that they have it in their possession and so it is within reach.*

*(iv). No hardship will be suffered by the defendant in producing the same as the plaintiff narrowed down the size of the payroll required which is limited to the 34 officers who were in the two tier salary structure.*

*(v). Being documentary evidence the law in terms of section 64, 65, and 67 of the evidence Act requires such evidence to be proved by either primary evidence meaning the document itself or secondary evidence meaning copies of the same. These two modes of proof do not satisfy the defence admission that the document exist and that indeed there was a two tier salary structure at the time, whose inquiry is subject of these proceedings.*

**(vi).** *The authorities relied upon by the defence on instances when such reliefs are to be with held by the court, from the applicant were found to be distinguishable as explained above.*

*2. For the reasons given in number 1 above the defendant has a period of 30 days from the date of the reading of this ruling to comply with the said notice.*

*3. In default of number 2 above the defence shall stand struck out.*

*4. The plaintiff/applicant will have costs of the application.*

The defendant/applicant has once again moved to this court, vide an application dated 4<sup>th</sup> July 2008 and filed on the same date. It seeks a total of 6 prayers namely.

**(1)** Spent

**(2)** That this Honourable court be pleased to stay the orders made on 6<sup>th</sup> June 2008 pending the hearing and determination of this application inter partes.

**(3)** That this honourable court, be pleased to stay the orders of this honourable court made on 6<sup>th</sup> June 2008 pending the hearing and determination of the intended appeal.

**(4)** That in the alternative the time limited for the production and delivery of the documents as ordered on 6<sup>th</sup> June in 2008 be elarged until the determination of the intended appeal.

**(5)** That this honourable court be pleased to make such orders and grant such relief as it may deem fit.

**(6)** That costs of this application be in the cause.

The grounds are set out in the body of the application, supporting affidavit and oral submission in court. The major ones are as follows:-

**(1)** That the applicant was aggrieved by this courts', orders made on the 6<sup>th</sup> day of June 2008. the content of the said ruling was brought to the attention of the defendant who after due consideration of the same gave instructions to appeal hence the issuance of the applicant letter dated 27<sup>th</sup> June 2008 asking for a copy of the ruling and certified proceedings, ruling and order for appeal purposes as per annexure ACM3.

**(2)** The notice of appeal is duly lodged dated 18<sup>th</sup> day of June 2008 and lodged on 19<sup>th</sup> June 2008 annexure ACM2. the grieving orders have already been extracted and annexed in accordance with the rules as ACM1.

**(3)** The grounds they intend to raise are contained in ground (b) of the grounds in support in the body of the application and are replicated in paragraph 8 of the supporting affidavit. These are;-

**(a)** *The court Suo Moto amended the application for discovery in the ruling by making an order in respect of 34 unknown officers without the applicant being given the opportunity to address the issues raised in the amended application.*

**(b)** *The court shifted the well established principle of the burden of proof being of a party alleging by observing that the applicant should have approved issues alleged by the respondent.*

**(c)** *The orders made on 6<sup>th</sup> June 2008 are contrary to section 139 of the evidence Act Cap 80 of the laws of Kenya and order X rule 22A of the CPR.*

**(d)** *The said orders are not capable of compliance as the court record does not have the names of 34 officers whom the applicant expected to produce their documents.*

**(e)** *The applicant does not have the dates from which the documents in respect of which the orders is directed can be made from.*

**(f)** *The pay roll of the applicant are public documents."*

4. The applicant will suffer substantial loss if stay orders are not granted.
5. The prejudice will be suffered by the respondent which can not be compensated for by way of cost.
6. The application has been made timeously

In their oral submission in court counsel stated their inability to avail the said records due to the fact that the software in which the information for the 1996-97, pay rolls was saved is not known where it is archived.

(2) That there is information on who the 34 officers are and as such the orders is ambiguous.

(3) Notice of appeal has been filed and served and as such the applicant's right of appeal has arisen and the applicant is entitled to exercise the same, which right will be prejudiced if the court orders will not be stayed

The appeal would have been rendered nugatory as the matter would have proceeded after the applicants' defence is struck out.

(4) They maintain that the application was presented promptly without undue delay.

(5) No prejudice will be occasioned to the respondent if the matter is stayed where as the defence will be prejudiced if the order of stay is not granted since it cannot comply with the court, order.

(6) They also contend that the order extracted by the plaintiff and annexed is not in line with the orders of the court, issued herein.

The plaintiff/respondent opposed the application on the basis of the content of the replying affidavit sworn by the said plaintiff on 11<sup>th</sup> day of July 2008 and filed the same date. The points stressed by him are:-

1. If the applicant is unable to produce the pay roll for 1996 to September 1997, then they can produce those for October 1997 to the year 2000 to confirm what he intends to prove.
2. The court, has already ruled that these are public documents.
3. He contends that the 34 officers are known because they exchanged letters which he can give to the court, given time.
4. It is his stand that the stay order is unnecessary as the applicant can proceed with the trial, as his plaintiff, has nothing to lose or win by the said appeal succeeding or not succeeding.
5. He maintains the orders sought to be appealed against were going to assist the defendant case.

In reply counsel for the applicant stated that the issue of whether the pay rolls are public documents or not will be decided by the court, of appeal.

(2) Maintain that as at the time the court, made the orders, the 34 officers were not known.

(3) They maintain there was nothing secretive about the two tier system.

(4) counsel was unable to understand what the respondent meant by saying that he was willing to proceed with the hearing whether the pay rolls are produced or not. On the courts, assessment of the facts herein, there is no dispute that the applicant herein is entitled to exercise his doubted right of appeal if he feels aggrieved by this court's orders of 6<sup>th</sup> June 2008. Indeed the applicant has demonstrated as, shown above that he is indeed aggrieved and that he is desirous of appealing against that decision.

The applicant has gone further to demonstrate that desire by lodging a notice of appeal which is annexed. The notice of appeal has been lodged with the court, of appeal and in terms of order 41 rule 4(1) (4) CPR the court of appeal has become seized of the matter. The provision reads; "*order,41 rule (4) for the purpose of the rule an appealed to the court, of appeal shall be deemed to have been filed when under the rules of that court, a notice of appeal has been given.*"

What the applicant seeks from this court, is a stay of execution pending hearing of the intended appeal. The reason why he has moved to the court, appealed from, to seek stay, is because he is required to comply with the requirement in

the said order 41 rule 4(i) that the plea for stay pending appeal should be presented first to the court, whose orders are sought to be appealed against.

The reading of the said order 41 rule 4(i) reads that:- “ the grant of stay of execution by either the court appealed from, or the court appealed to is not automatic. There are certain ingredients which have to be satisfied before the said order granted. These are found in sub rule 2 of the said order 41. These are:-

- (1) Satisfaction that the application for stay has been presented without undue delay. The orders complained of were made on 6/6/2008. Where as the application for stay was dated and presented on 4<sup>th</sup> July 2008. This court agrees with the submissions of the applicants’ counsel, that there has been no unreasonable delay in presenting the application.
- (2) The second ingredient to be proved is the satisfaction that if stay is not granted the applicant will suffer substantial loss. In this courts, opinion the grounds fronted by the applicant in satisfaction of this ingredients are intertwined with the grounds, that the applicant intends to take up on appeal against the said ruling. This is so because the applicant has contended that if stay is not granted ,the defence will be struck out, and the trial will proceed and yet they have a strong appeal against the said orders which would have paved the way for the plaintiff to proceed to hearing in the absence of their defence. And if the trial proceeds in such a manner, then their appeal will be rendered nugatory. The mention of their appeal being rendered nugatory bring to the fore the calling in to the effect the necessity for the consideration of the merits of the appeal, which this court, is not in position to consider, as in doing so it will be sitting on an appeal of its own ruling. Therefore the best forum to consider that is the court, of appeal as the court, appealed to. The said court, will be in a position to consider the argueability of the appeal presented, the loss and or prejudice that the defendant as an institution is likely to suffer if the said information divulged or withheld, the impact, and or likely impact of the absence of the said documents on the overall result of the case, what is to be made of the now alleged inability of the applicant to avail the said documents ,the likely prejudice or miscarriage likely to be suffered by either party should the trial proceed exparte, and then the applicant ultimately succeeds on his appeal, likelihood of the plaintiff suffering prejudice and or injustice if stay is granted and then the applicant appeal falls ultimately, whether on the face of the record the applicant has not only a genuine but a serious complaint to take appeal. For this reasons, the court makes a finding that the applicant application herein is a proper candidate for consideration by the court of appeal.
- (3) The last ingredient is a requirement that there has been an offer of security for the ultimate performance of the decree. The security may be offered by the applicant. But that notwithstanding, where the offer has been made the court, seized of the matter has the jurisdiction to order the grant of stay of execution pending appeal on such terms as the court, in its discretion, impose as it deems fit in the circumstances of each case.

It is therefore the finding of this court, that had this court found it fit to make an order for stay pending appeal, it would have gone ahead to impose terms as regards offer of security for the due performances of the decree, as the court deem necessary in the constitution of this case since there is no monetary element involved as the ultimate decree and since the appeal is against an order for discovery, the order for security would perhaps have taken into account the issue of costs.

The court takes note that the court, was referred to the case of Mark Omollo Agencies and 2 others versus Daniel Kioko Kaindi and another Nairobi HCCC number 1061 of 1990 decided by Nyamu J. on the 25<sup>th</sup> day of March 2004. The court, has perused the same and finds that as per observation of the learned judge at page 4 of the said ruling, where the stay sought is an order for stay of proceedings, the monetary considerations sought to be satisfied by ingredient 2 do not apply. What is to be considered should be the legal points the applicant intends to take upon appeal. If the appeal on the said legal points is likely to render the appeal nugatory then the court should lean towards staying the proceedings. this court, took that into consideration when it gave reason for its finding that the scenario demonstrated herein is a proper candidate for direction to the court of appeal, to seek an order for stay pending appeal..

For the reasons given in the body of the ruling, the applicant’s application dated 4/7/2008 and filed on the same date is refused and dismissed, save that,

the applicant will only be granted 30 days stay from the date of the reading of the ruling, to enable it seek stay from the court, appealed to.

- (3) The respondent/plaintiff will have cost of the application paid to him by the applicant /defendant. The same to be paid in the usual manner.

**Dated, Read and Delivered at Nairobi this 3<sup>rd</sup> day of October 2008.**

**NAMBUYE**

**JUDGE**