



REPUBLIC OF KENYA



**Matheka v Nyaga & another; Registrar of Trade Unions (Interested Party)  
(Petition E015 of 2022) [2023] KEELRC 816 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 816 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E015 OF 2022  
MN NDUMA, J  
MARCH 23, 2023**

**BETWEEN**

**JOHN BOSCO MATHEKA ..... PETITIONER**

**AND**

**MURITHI NYAGA ..... 1<sup>ST</sup> RESPONDENT**

**KENYA AIRLINE PILOTS ASSOCIATION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**REGISTRAR OF TRADE UNIONS ..... INTERESTED PARTY**

***(IN THE MATTER OF BREACH AND THREATENED CONTINUED BREACH OF THE  
BILL OF RIGHTS UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010)***

**RULING**

1. The applicants in the notice of motion application dated November 10, 2022 seeks an Order in the following terms:-
  1. Spent
  2. Spent
  3. Spent
  4. That this Honourable Court be pleased to issue an Order of stay of execution of the judgment delivered on 27<sup>th</sup> October, 2022 pending the hearing and determination of the intended appeal to the Court of Appeal.
  5. The costs of the application be in the cause.



2. The application is premised on the grounds set out on the face of the notice of motion and in the supporting affidavit of Captain Murithi Nyaga, the nub of which is that the applicant is dissatisfied with the judgment and intend to appeal the decision to the Court of Appeal. That a notice of appeal has been lodged and application made for certified copies of the proceedings and judgment.
3. That appeal has high chances of success.
4. The petitioner has commenced contempt proceedings against the respondents for failure to comply with the judgment of the Court. That the dispute has created a row over the rightful signatories of the 2<sup>nd</sup> respondent's bank accounts and the account will be frozen and its operations paralysed due to unavailability of funds to sustain operations and services to its members.
5. That on November 11, 2022, the petitioner stormed offices of the 2<sup>nd</sup> respondent/applicant and disrupted operations by harassing employees and confiscating cheques which were meant to pay utilities claiming that he had not authorized the said transactions.
6. That the petitioner is demanding payment of unsubstantiated Kshs 605,000 allegedly pursuant to the decree and is threatening execution whereas the same was not granted by the Court and the 2<sup>nd</sup> respondent may never recover same in the event that it is paid.
7. That the operations of the 2<sup>nd</sup> respondent is being stifled and crippled by the Vague Orders of the Court. (Emphasis noted)
8. That the applicants stand to suffer irreparable prejudice if the stay orders are not granted since the petitioner is under investigation for mismanagement of funds in his position as National Treasurer. That the application be granted.
9. The application is opposed vide the replying affidavit of John Bosco Matheka, the petitioner's respondent and deposes that the application is not only preemptive but it is brought in bad faith and riddled with falsehoods.
10. That the respondent is the Treasurer of the 2<sup>nd</sup> respondent and was duly reinstated to the position by the Court. That the applicants are re-litigating matters that are res-judicata before this Court and are interpreting the judgment of the Court to suit their devious purposes. That the respondent is not under any investigation since matter was determined by the Court.
11. That the application is not one for review of the judgment of the Court and the applicants cannot be heard to revisit matters already determined by the judgment of the Court. That the intended appeal is lacking in merit and no draft memorandum of appeal has been attached to demonstrate an arguable appeal.
12. That the Court should take judicial notice of the open defiance of the judgment of the Court by the applicants, having not paid the respondent his monthly dues as Treasurer from December, 2021 through to November, 2022 at a monthly rate of Kshs 35,000 and to facilitate seamless re-occupation of office by the respondent as ordered by the Court.
13. That the applicants seek to benefit from their own contempt and defiance of Court Orders in this application.
14. That the applicants have not satisfied the prerequisite for grant of stay pending appeal in terms of order 42 rule 6(2) of the *Civil Procedure Rules* by demonstrating that the applicants would suffer substantial loss if orders for stay are not granted; that the application has been brought without undue delay and



that the applicants have provided security for the due performance of the judgment and decree of the Court.

15. That the respondent being the National Treasurer is capable of refunding the decretal sum of Kshs 869,980 as of today. That no security has been offered by the applicants for the due satisfaction of the judgment and decree of this Court. That the sum claimed is accumulated monthly salary and sitting allowances not paid by the applicant from the date of judgment of the Court to-date and the amounts accumulate monthly due to the default by the applicants.
16. That the respondent has not instructed the 2<sup>nd</sup> respondent Bank (NCBA) not to facilitate any transactions. That the deposition by the applicants in this respect is false. That the account is operated by two signatories being the Treasurer and any other one signatory being either the General Secretary or the Chairman.
17. That there is no row or crisis as purported by the applicant or at all on the operation of the account of the applicants. That the bill of costs is due for taxation and has been served on the applicants. That the application is brought in bad faith and the Court ought not to exercise its discretion in favour of the applicants.

### **Determination**

18. The Court has considered the deposition by the parties and the submissions made in respect thereof.
19. The prerequisite for grant of stay of execution pending appeal in terms of order 42, rule 6(2) of Civil Procedure Rules and as restated in numerous decisions of the courts are as follows:-
  - (i) The applicant must demonstrate it will suffer substantial loss if the order for stay of execution is not granted and the appeal is eventually successful.
  - (ii) That the application has been brought without undue delay and
  - (iii) That the applicant has provided security for the due performance of the judgment and decree of the Court.
20. This Court is satisfied that the application was brought timeously and is not visited with delay. That a notice of appeal was filed within time and the certified proceedings have been applied for in terms of the rules of the Court.
21. The applicants however have completely failed to demonstrate that they would suffer substantial loss if the orders for stay of execution of the judgment and decree of the Court is not granted. Instead the applicants surreptitiously refer to the orders of the Court as vague and incapable of execution yet, no application for review of the judgment of the Court has been made.
22. The applicants instead of making deposition to satisfy requirements for grant of stay of execution pending appeal, have attempted to re-litigate matters that were determined by the Court and are res judicata before this Court.
23. The applicants have failed to demonstrate any good faith by abiding by the judgment of the Court, by reinstating the petitioner/Respondent to his rightful position of National Treasurer as ordered by the Court. The applicants have also failed to pay the monthly allowance of the respondent as directed by the Court with effect from December, 2021 to the date of filing the application. The application is tainted with malafide and deliberate defiance of the orders of the Court while seeking to be favoured by a discretion of this Court.



24. Accordingly, the Court will not exercise its discretion in favour of the applicants. The applicants must comply with the orders of this Court, pending the hearing and determination of the appeal. Such compliance will not render the intended appeal nugatory since that has not been demonstrated by the applicants

25. The application is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI (*VIRTUALLY*) THIS 23<sup>TH</sup> DAY OF MARCH, 2023.**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Ogola for Petitioner /Respondent

Mr. Achola for Respondents/Applicants

Ekale – Court Assistant

