



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 803 OF 2013**

(Before Hon. Lady Justice Maureen Onyango)

**THOMAS M. NGUTI AND 196 OTHERS....CLAIMANTS/DECREE HOLDER**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....RESPONDENT/APPLICANT**

**RULING**

1. Judgment in this suit was delivered on 12<sup>th</sup> August 2020 in favour of the Claimants. The judgment was subject to tabulation of benefits which was done by the parties and final judgment delivered on 6<sup>th</sup> November 2020. The Respondent was aggrieved by the said judgment and filed a notice of appeal dated 13<sup>th</sup> November 2020. It further sought certified copy of proceedings by letter dated 11<sup>th</sup> November 2020.

2. In the instant application, the Respondent/Applicant seeks the following orders –

i. Spent.

ii. THAT this Honourable Court be pleased to grant interim ex parte orders of stay of execution of its Judgement delivered on the 6th day of November, 2020 pending the hearing and determination of this Application.

iii. THAT the execution of the Judgment delivered on the 6th day of November, 2020 and any resultant decree therefrom be stayed pending the filing, hearing and determination of the Applicant's intended Appeal.

iv. THAT the costs of and occasioned by this Application be costs provided for.

3. The application is supported by the affidavit of Stanley Gitau, the Applicant's Senior Legal Officer and the grounds on the face of the application. In a nutshell, the Applicant pleads that the decretal sum which is approximately Kshs.400,000,000/- is a colossal sum and that the Applicant's operations will be prejudiced, that the 197 Claimants (decree holders) are scattered all over the country and the Applicant has no knowledge of their financial ability.

4. The Applicant submits that should the orders of stay of execution not be granted, it is likely to suffer substantial loss. It relies on the decision in the case of **Meteine Ole Kilelu & 10 others v Moses K. Nailole [2009] eKLR** where the Court held –

“... where the decree appealed against is a monetary decree, the Applicant has to show that either once the execution is done, after refusal of the application, the Applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence. The appellants needed to show for instance, that the respondent is a man of straw who once the execution takes place and is given the decretal amount, would not be able to refund it when the appeal succeeds.”

5. The Applicant further relies on the decisions in **Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another [2017] eKLR** where the Court cited with approval the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2013] eKLR**, where the Court held:

“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....”

6. The Court in **Sarah N. Sakwa case (supra)** further stated:

“The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory for anything that renders the appeal nugatory impinges on the very right of appeal.”

7. The Respondent/Applicant further submits that its intended appeal is arguable and the same would be rendered nugatory should the stay orders not be implemented.

8. On furnishing of security, the Respondent/Applicant has stated that it has the capacity to pay the decretal sum, being a fully owned state corporation established under Kenya Railways Corporation Act. The Applicant beseeched the Court not to order deposit of the decretal sum as security taking into account the amount involved and the special and unique circumstances of the Applicant. To buttress this position, the Applicant relied on the decision in **Oraro & Rachier Advocates v Cooperative Bank of Kenya Limited [2000] eKLR** where the Court stated:

“This Court in the case of **Clarkson Notcut (Insurance Broker) Limited vs. South Coast Fitness Center, Civil Application No. Nai. 204 of 1995 (unreported)**, stated that: -

“The amount involved is, by any standard a huge one and we think we ought to secure the position of the applicant in this matter.”

In the case of **Trust Bank Limited & another vs. Investech Bank Limited & Three others, Civil Application Nos. Nai.258 and 315 of 1999 (consolidated)**, (unreported), this Court said: -

“On the second limb of the applications, namely, whether unless a stay is granted, the applicants' intended appeals will be rendered nugatory, the decree upon which a stay of execution is sought being a money decree, and since the respondent in our view, is a bank with a sound financial base, we do not think the intended appeals, if successful would be rendered nugatory unless the stay prayed for is granted.”

We must weigh the claims of both sides. If M/s Oraro & Rachier are required to pay up the full decretal amount, as a law firm, they might find themselves in a very tight situation. Whereas if the respondent bank is kept out of the sum of Shs.10,000,000/= it would not be affected. This is in our view, in this case, the position, when we are considering the situation. The balance of convenience overall favours the applicant. For these reasons we would allow this application, stay the execution of the decree which follows the judgment of the superior court dated 23<sup>rd</sup> day of November, 1999...”

9. It further relied on the decision in **Stanley Mugweru Muchira & 2 others v John Muthike Muchira [2020] eKLR** where the Court stated:

“The applicants in their supporting affidavit have stated that the sum of Ksh.2,100,000/= which they have been asked to deposit as security for costs is too high and beyond their means being peasant farmers. They have also stated that they are unable to meet the terms due to the country's economic depression owing to Covid-19 pandemic. As observed by the Superior Court in the cited case of **Butt Vs Rent Restriction Tribunal (supra)**, this Court is bound to consider the unique circumstance which this country and the world at large are going through due to the Covid-19 pandemic while considering whether to grant an application for stay of execution pending appeal and the terms, if any. In the upshot, I find the Notice of Motion dated 14th September 2020 merited and the same is allowed as prayed. Consequently, I hereby grant unconditional order of stay of execution of the orders given by the trial Court on 29<sup>th</sup> May 2020 in Wanguru PMCC No. 101 of 2011 and all other consequential orders pending the hearing and determination of the intended appeal.”

10. The Claimants/Decree Holders did not file either grounds of opposition or replying affidavit. They however filed and submissions opposing the application on grounds that the application was premature as the parties had not tabulated the amount awarded in the judgment and therefore there was no risk of execution.

11. It is further the submission of the Claimants that the Applicant has not met the threshold in Order 42 Rule 6(2) of the Civil Procedure Rules. It relied on the decision in **Charles Ngatia Nguyo v Erika Gathoni Kariithi & Another [2014] eKLR** where the Court opined that;

“Court appealed from has the power to grant a stay in case of appeal on condition that the court should be satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay. In that case, the court cautioned that an application under Order 42 Rule 6 (2) is not concerned with the arguability of appeal as to do so would mean usurping the power of the Court of Appeal as provided for under Rule 5(2)(b) of the Court of Appeal Rules.”

12. The Claimants further relied on **Northwood Service Ltd v Mac & More Solution Ltd (2015) eKLR**, the Court held as follows:

“...stay of execution pending Appeal is governed by Order 42 and specifically Rule 6. The Court will grant the Order with discretion where the Applicant may suffer substantial loss; the application is made without unreasonable delay and on provision of such security as the Court may impose. To grant or to refuse an applicant stay of execution is discretionary, but the discretion must be exercised judicially.”

13. Reference was further made to the decision in the Court of Appeal **Case of Butt v Rent Restriction Tribunal** where it was held that;

1. "the power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such away as not to prevent an appeal"
2. "the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the Judge's discretion"
3. "a Judge should not refuse a stay if there are good grounds for granting it merely because in his/her opinion a better remedy may become available to the applicant at the end of the proceedings"
4. "the court in exercising its discretion on whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements"

14. It is further the submissions of the Claimants that substantial loss does not depend on enormity of the decretal sum, citing the decision of Ogola J. in **Antoine Ndiaye v Africa Virtual University: Nairobi HCCC No, 422 of 2006** where the Court observed –

"Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal."

15. The Respondent's submit that staying the judgment at this stage would without good cause prevent the Claimants from pursuing their just deserts of the judgment that has eluded them for the better part of two decades. For emphasis they relied on the decision in **Kiraita Abuta v**

**Richard Nyandika Nyangoya [2019] eKLR**

"It is trite law that a successful party is entitled to the fruits of their judgment and the court cannot disregard this fact and continue flirting with the unsuccessful. The court in the case of **Machira *ta* Machira & Co Advocates v East African Standard [2002] eKLR** stated as follows:

"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 judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal.

Of course, 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 the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

16. They further relied on the decision in **Ainushamsi Multiple Hauliers Agencies Limited v Francis Ndegwa Karanja & another (Suing as the Administrators of the Estate of John Muya Ndegwa-Deceased) [2020] eKLR** where it was held that –

36. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** 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".

37. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999**.

38. The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then, in those circumstances, where the applicant has reasonable grounds which grounds must be disclosed in the application that the Respondent will not be in a position to refund the decretal sum if the appeal succeeds, have shifted to the Respondent to show that he would be in a position to refund the decretal sum.

See *Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001*; *ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002*.

39. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. Suffice to stay as was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991**, financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

17. On whether there was unreasonable delay, the Claimants rely on the decision in the case of **M'ndaka Mbiuki v James Mbaaba Mugwira [2010] eKLR** where the court held that;

"... there is no exact measure as to what amounts to unreasonable delay ... it must be such delay that goes beyond acceptable limits given the nature of the act to be performed..."

18. They submit that the application is premature.

19. On security, the Respondents submit that Order 42 Rule 6(2)(b) gives the Court unfettered discretion to order that a reasonable sum be deposited in Court or otherwise.

#### **Determination**

20. I have carefully considered the application and the grounds in support thereof as well as the supporting affidavit. I have further considered the submissions for and against the application. The issue for determination is whether the Applicant meets the threshold for grant of the orders sought.

21. Section 13 of the Employment and Labour Relations Court Act provides that –

#### **13. Enforcement of court orders**

**A judgement, award, order or decree of the Court shall be enforceable in accordance with the rules made under the Civil Procedure Act.**

22. Further Rule 32 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows –

#### **32. Execution and warrants**

**1. The Registrar shall issue an order in execution of a decree.**

**2. Rules on execution of an order or decree shall be enforceable in accordance Civil Procedure Rules.**

23. Order 42 Rule (2) provides for stay of execution as follows:

**(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.**

24. It is not in dispute that the parties hereto have not yet agreed on the amount due in respect of the judgment as it involves tabulation of amounts which the parties are yet to agree on.

25. In view of the fact that the parties have not yet agreed on the decretal sum, I agree with the Claimants that the application herein is premature as there is no risk of execution of the judgment at this stage.

26. It is for this reason that I find no basis to grant the orders sought with the result that the application is dismissed.

27. In view of the fact that the Claimants did not file any reply to the application, there shall be no orders for costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JANUARY 2022**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**