REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 70 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

PAUL KIPSANG KOSGEI.....PETITIONER

VERSUS

NATIONAL INDUSTRIAL TRAINING AUTHORITY.....1ST RESPONDENT

KAMAU GACHIGI.....2ND RESPONDENT

AND

CABINET SECRETARY,

MINISTRY OF LABOUR AND SOCIAL SERVICES.....INTERESTED PARTY

RULING

Before me for determination is the Respondent/Applicant's Notice of Motion Application dated 3rd September, 2020. It seeks the following orders THAT:

1. Spent

2. Due to urgency, an order be made ex parte at the first instance to stay execution of the Judgment and Decree issued by this Court on 7th August 2019 awarding the Petitioner general damages in the sum of Kshs.27,600,000/= and ordering the 2nd Respondent to bear the costs of the suit pending the hearing and determination of this application and/or further orders.

3. An order be issued to stay execution of the Judgment and Decree issued by this Court on 7th August 2019 awarding the Petitioner general damages in the sum of Kshs.27,600,000/= and ordering the 2nd Respondent to bear the costs of the suit, pending the hearing and determination of **Civil Appeal No. E286 of 2020, National Industrial Training Authority & Kamau Gachigi v Paul Kipsang Kosgei & Cabinet Secretary, Ministry Of Labour And Social Services.**

4. The costs of this Motion be provided for.

This Application is premised on the grounds THAT:

a. THAT by Judgment delivered on 7th August 2020, this Court found that the Respondents had violated the Petitioner's rights under Articles 41, 47, 50 and 236 of the Constitution, the values and principles of public service under Article 232 of the Constitution and breached the Petitioner's legitimate expectation that his Contract of employment dated 14th April 2014 would be renewed for a further period of five (5) years.

b. THAT in lieu of reinstatement, this Court awarded to the Petitioner and against the 1st Respondent general damages in the sum of Kshs.27,600,000/=, which sum is substantial.

c. THAT this Court further ordered the 2nd Respondent to personally bear the costs of the suit.

d. THAT the 1st and 2nd Respondents are aggrieved by the aforesaid Judgment and Decree issued on 7th August 2020 and have exercised their right of appeal by lodgment of an Appeal at the Court of Appeal being **Civil Appeal No. E286 of 2020, National Industrial Training Authority & Kamau Gachigi v Paul Kipsang Kosgei & Cabinet Secretary, Ministry of Labour and Social Services** seeking to set aside the Judgment and Decree made by this Court on 7th August 2020 in entirety.

e. THAT the 1st and 2nd Respondents have an arguable appeal with good prospects of success.

f. THAT the Petitioner shall presently take steps towards the execution of the Judgment and Decree made on 7th August 2020 against the 1st and 2nd Respondents.

g. THAT the 1st Respondent is a State Corporation established under Section 3 of the Industrial Training Act Cap. 237 Laws of Kenya with the mandate to offer inter alia, industrial training; assessment and collection of industrial training levy and fees; development of industrial training curricula; accreditation of institutions engaged in skills training for industry and the integration of labour market information into skills development. As a consequence, the 1st Respondent is fully funded from the Exchequer.

h. THAT it is necessary to stay execution of the Judgment and Decree made by this Court on 7th August 2020 in order to preserve the substratum of the Appeal filed by the 1st & 2nd Respondents.

i. THAT justification for the orders sought is that if payment of the substantial decretal sum is made to the Petitioner who is a man of unknown means and the appeal succeeds, the said sum shall not be readily recovered from the Petitioner, if at all. To the contrary, the 1st Respondent who is a State Corporation shall readily abide the orders by the Court of Appeal.

j. THAT it will not be prudent and in accord with Article 232(1)(b) of the Constitution to commit substantial public funds by effecting payment while it is most probable that the Award may be set aside and/or varied.

k. THAT the Respondents shall endeavor to have the Appeal heard within a short relatively short period of time. Hence, a final adjudication of this matter will be known within the next few months.

The application is further supported by the affidavit of **KAMAU GACHIGI,** the 2nd Respondent and the Chairman of the Board of the 1st Respondent, sworn on 3rd September, 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion Application.

The Application is filed under Section 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules, 2010.

In response to the Application, the Claimant filed a Replying Affidavit dated 19th November, 2020 objecting the application which he contends is mala fides, is misconceived, incompetent, vexatious, frivolous and an abuse of the process of the Court, brought in bad faith and bad in law.

The affiant avers that the ex parte order was issued contrary to the provisions of Rule 17(4) of the Employment and Labour Relations Court (Procedure) Rules, 2016 therefore the said ex-parte order issued on 4th September, 2020 be vacated and or set aside. That the Applicant has not attached a draft Memorandum of Appeal to the Application to enable the Court to determine whether or not the grounds in the intended Appeal are arguable.

The affiant states that execution has not commenced in these proceedings therefore there is no basis for fear and apprehension on the part of the Applicant. He argues that it is an ordinary principle and trite law that a successful party is entitled to the fruits of his judgment or any decision of the court given his/her success at any stage.

The affiant states that he ought to enjoy a valid judgment of the court and which judgment should be satisfied by the Applicant and that the Applicant's averment that he will be unable to repay any monies advanced to him is not persuasive as he enjoys a right to his judgment even if he were a man of straw.

The affiant avers that the Applicants have not complied with the rule concerning security for costs and therefore the order for stay sought by the Applicants cannot be granted. He states that if the court is minded to grant the Applicants stay orders, then the court is invited to do a balancing act between the interests of the Respondent and the Applicants. He therefore urges this court to have the Applicants pay 50% of the decretal sum to the Respondent and 50% to be deposited in the interest earning joint bank account of the Applicants' and the Respondent's Advocates.

He concludes that the 1st Respondent in the Petition is not undergoing any financial distress and is one of the richest public institutions in Kenya and should be able to pay the decretal sum. The question that it gets the money from the exchequer does not arise and cannot be a valid argument for grant of stay orders.

Applicant's rejoinder

In response to the Petitioner/Respondent's replying affidavit, the Applicant filed a supplementary affidavit sworn on 23rd October 2020 in rejoinder.

The Applicant responds to the Petitioner/Respondent's complaint that copies of the decree and/or judgment of this Court were not attached to

the Motion, that the documents are well within the knowledge and/or possession of both the Petitioner and this Court which is a court of record. He adds that the Record of Appeal in **Civil Appeal No. E286 of 2020, National Industrial Training Authority & Another v Paul Kipsang Kosgei & Another** was served upon the Petitioner's counsel on 7th September 2020.

He states that the Petitioner's purported Wealth Declaration Form does not establish the Petitioner's current financial position as the aforesaid declaration is in respect of the Petitioner's income and assets for the period from 14th April 2014 to 13th April 2019.

The form was executed on 12th October 2020 and is under the letter head of the 1st Respondent. As at that 12th October 2020, the Petitioner had ceased being an employee of the 1st Respondent. The genuineness of the form is thus doubtful.

Additionally, he avers that the decretal sum is indeed a colossal sum and given that Respondents are unaware of the Petitioner's current financial position, restitution is impossible in the event that the decretal sum is paid to the Petitioner. That in the event that the decretal sum or any part thereof is paid to the Claimant, recovery will be impossible and additionally this would not be in accord with the constitutional requirement of prudent use of public resources.

He avers that the 1st Respondent is a State Corporation fully owned by the Government of Kenya and in the unlikely event that the Respondents' appeal is dismissed, the 1st Respondent shall apply for funds from Treasury to pay the decretal sum. Hence the Petitioner is assured that any payment to him shall be timeously effected.

Applicant's submissions

The Applicant submits that it is not required to deposit security for costs relying on the case of **Teachers Service Commission v Benson Kuria Mwangi [2020] eKLR** where the court held that being a public institution, there is public interest in granting the orders of stay as the decretal sum is payable from public funds. Being a public institution, the Applicant is not required to deposit security by virtue of Order 42 Rule 8 of the Civil Procedure Rules.

Additionally, the Applicant relied on the Supreme Court decision in **Lemanken Aramat v Harun Meitamei Lempanka & 2 Others [2014] eKLR** where the court held:

> *"The court in weighing the competing claims in Munya's case was attentive to public interest considerations and the constitutional imperative of good governance, and held as follows:*
>
> *"Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources."*

The court also placed reliance on Article 201 which requires the proper and prudent utilization of public funds. This position was also upheld in the case of **Ethics & Anti-Corruption v Peter Mangiti & 17 Others [2016] eKLR.**

On the issue of whether the Respondent would be able to reimburse the monies, the Applicant relied on the high court case of **Cooperative Bank of Kenya v Taramusi Francis Ongoki [2019] eKLR.** The court, in this case relied on the case of **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR** where the court held:

> *"Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."*

The Applicant further relied on the case of **Kenya Airways Limited v Alex Wainaina Mbugua [2019] eKLR** where the Court of Appeal held that;

> *"Regarding the compensation for unfair termination, the learned Judge granted 12 months' gross salary. Under the Act, 12 months is the maximum that can be granted by a court as compensation for unfair termination but in every case it grants it the court ought to explain and justify the maximum. The 12 months must never be the instinctive default amount of compensation and this Court has so stated in many other cases including* ***United States International University v Erick Rading Outa (Supra)*** *and* ***Cmc Aviation Limited v Mohammed Noor (supra)."***

Respondent/Petitioner's Submissions

The Respondent/Petitioner submitted on the purpose of a stay order and relied on the case of **Selestica Limited v Gold Rock Development Ltd (2015) eKLR** where Aburili J. held that while the purpose of stay execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Regarding the issue whether the Applicant would suffer substantial loss if stay is not granted, the Respondent submitted that the application is premised on Order 42 Rule 6 of the Civil Procedure Rules which provides that:

No order for stay of execution shall be made under sub rule (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.

He relied on the case of **Selestica Limited v Gold Rock Development Ltd supra** wherein Aburili J. quoted the case of **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR,** where Gikonyo J. defined substantial loss thus:

"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, a question that was aptly discussed in the case of ***Silverstein v Chesoni [2002] IKLR 867****, and also in the case of* ***Mukuma v Abuoga*** *quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rides, respectively, emphasized the centrality of substantial loss thus:*

...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

The Respondent submitted that it is not enough for Applicants to merely state in the Affidavit that the 1st Respondent in the Petition is a public body and therefore public money be used in a prudent manner. They are obliged by law to demonstrate the damages they are to suffer or incur if stay order is declined by the court.

The Respondent argued on the matter of his wealth that the Applicants have not adduced any evidence to controvert his evidence that he is a man of means by annexing his wealth declaration form which is a government document that was processed by the 1st Respondent who have a copy of the same under its custody. He submits that to doubt its authenticity is to question the intention of the Applicants in this application.

On whether the application had been made without unreasonable delay the Respondent submitted that the period between the judgment delivery date and the filing of the application was 56 days and therefore there was an inordinate delay that should not be tolerated by the Court. He submitted that the Respondents' application is only intended to delay the process of taxation of the Petitioner's Bill of Costs and the Petitioner's right to the fruits of his judgment which was a lawful process under the law.

On the assertion of the Applicants that the Intended Appeal has reasonable chances of success, the Respondent submitted that the Applicants have failed to attach a draft Memorandum of Appeal and hence there is no basis upon which the Court can make a determination on whether or not the Applicants intended appeal is arguable. He relied on the case of **Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & Another [2015] eKLR.**

Based on the above, the Respondent argued that the Court should be convinced that there are no grounds or arguable points that have been raised to enable the court to determine this point and therefore the Application on this point should fail.

The Respondent submitted that it is incorrect for the Applicants to allege that since the 1st Respondent is a public entity it is excused from the purview of Order 42 Rule 8 of the Civil Procedure Rules. He urged the court not to make such an outrageous finding and stated that in case of a public entity like the 1st Respondent herein, the Court of Appeal in the case of **Board of Trustees National Social Security Fund v Caroline Wanjiru Karori [2020] eKLR** stated that:

"Balancing the interests of both parties, we are inclined to allow the application on condition that the Applicant pays directly to the Respondent Kshs.3 million within 30 days from the date hereof; the balance of the decretal amount be deposited in an interest earning joint account in the names of counsel for both parties within 45 days from the date hereof pending the hearing and determination of the intended appeal. In default, the Notice of Motion dated 27th February, 2020 will stand dismissed".

He added that the Applicants have failed to offer any security and the court cannot exercise its discretion to impose security upon them. The offer of security ought to have come from the Applicants themselves in their Supporting Affidavit. He urged the court to make similar findings as that made by the court of Appeal in the above cited case.

Applicant's Further Submissions

The Applicants filed a reply to the Respondent's submissions responding to the objections raised. It submitted on substantial loss through reliance on the case of **Winfred Nyawira Maina v Peterson Onyiego Gichana [2015].** They submitted that failure by the Petitioner to refund the decretal sum paid by the Respondents would render the appeal nugatory thereby subjecting the Respondents to undue hardship and loss of public funds.

The Applicant submitted that the duty to prove the Respondent's ability to repay the decretal sum is vested upon him and not the Applicants. This is manifest from a reading of Section 112 of the Evidence Act. He added that the document filed by the Respondent to prove his financial means falls far short of the legal threshold of an Affidavit of Means as per the holding in the case of **Cooperative Bank of Kenya v Taramusi Francis Ongoki (2019) eKLR.**

On the submission of delay in filing the appeal, the Applicant stated that the assertion by the Respondent that the Motion herein was filed on 3rd October 2020 is factually incorrect as it had actually been filed on 3rd September 2020 barely a month after judgment was delivered. The motion was filed barely a day after filing the appeal.

Regarding the provision of security, the Applicant submitted that the 2nd Respondent in the main suit was sued in his capacity as a public officer within the meaning of Article 260 of the Constitution faulting the manner in which he exercised his powers in his official capacity as *"Chairman"* of the 1st Respondent's Board; and on which basis an award of general damages for unfair termination was made in favour of the Petitioner. The 2nd Respondent was condemned to personally bear the Petitioner's costs of the suit as a consequence.

He submitted that Order 42 Rule 8 of the Civil Procedure Rules 2010 provides that;

> **No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.**

The Applicants urged this Court to reject the Petitioner's submissions dated 28th October 2020 and allow the Appellant's motion dated 3rd September 2020 as prayed.

Analysis and Determination

Upon consideration of the application, the affidavits and submissions by the parties, I find that the issues for determination are whether the application has met the threshold for grant of the orders sought in the instant application.

What is the threshold of Stay Pending Appeal Applications?

Order 42 Rule 6(2) of the Civil Procedure Rules upon which the application is premised bars this Court from ordering stay of execution pending appeal unless –

a) The Application is brought without inordinate delay.

b) The Applicant demonstrates that he will suffer substantial loss unless stay is ordered, and

c) The Applicant is willing to give security as the Court may deem fit to order.

The principles for grant of stay of execution pending Appeal were set out in **Butt v Rent Restriction Tribunal [1982] KLR 417,** where the Court of Appeal held that: -

> *1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way 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 opinion, a better remedy may become available to the Applicant at the end of the proceedings.*
>
> *4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.*
>
> *5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.*

The Respondent argued that the application was filed 54 days after the judgment and that the Applicant is guilty of inordinate delay in filing the application. It is however clear from the application that it is dated 3rd September 2020 and was filed on 4th September 2020. The Court record shows that the application for stay was considered by myself ex aprte on 4th September 2020.

Judgment having been delivered on 7th August 2020, I find that the application for stay was filed timeously and that the Applicants are not guilty of delay in filing the same.

The second threshold is that the Applicant must demonstrate substantial loss that it would suffer if orders of stay of execution are not granted. Substantial loss was defined in the case of **Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR** in which Gikonyo J. stated that:

> *"The substantial loss under order 42 rule 6 of the Civil Procedure Rules especially where money decree is involved lie in the*

inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift. But it is not enough for the Applicant to merely state that the Applicant cannot refund the sum paid. There must cogent evidence which show the inability or financial limitation on the part of the Respondent to refund the decretal sum. And, it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent. Evidential burden does not arise on mere averment that the Respondent cannot refund the money as the Applicant intends the court to believe."

The Respondent submits that the Petitioner is a man of unknown means and the decretal sum is a substantial amount such that it may not be readily recoverable from the Petitioner. That the authenticity of the wealth declaration form filed by the Petitioner is doubtful as it is on the 1st Respondent's letterhead yet it is dated 12th October 2020 when the Petitioner was no longer in its employment.

Further that the wealth declaration is in respect of the period 2014 to 2019 which is irrelevant for purposes of this application.

The Applicant further submitted that it is wholly owned by the Government of Kenya and the 2nd Respondent is its Chairman and that whatever is paid out to the Petitioner would be public funds which cannot be attached.

I would disagree with the Applicant on both arguments. I do not think the Petitioner is a man of straw. Land is one of the most valuable properties in this County, if not in the world. A person who owns as much land as is reflected in the title deed produced by the Respondent cannot therefore be a man of straw. This is irrespective of whether or not the attached valuation of the property is admissible or not.

I therefore do not agree with the Respondent that it would suffer financial loss should it succeed in the appeal as it will not be in a position to recover the decretal sum from the Petitioner. For the same reason, the appeal, if successful, would not be rendered nugatory.

On the issue of deposit of security, the 1st Respondent has argued that under Order 42 Rule 8, it is not required to deposit security. Order 42 Rule 8 provides that

[Order 42, rule 8.] No security to be Government.

8. No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.

The provision is clear that it is applicable only where the Government has undertaken the defence or whether security is required from Government. The 1st Respondent herein is established under the Industrial Training Act. Section 3(2) thereof provides that it is a corporate body capable of suing and being sued in its corporate name. The Section provides as follows –

(2) The Authority shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name be capable of—

(a) suing and being sued;

(b) taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;

(c) borrowing or lending money;

(d) entering into contracts; and,

(e) doing or performing all other things or acts for the proper performance of its functions under this Act, which may be lawfully done or performed by a body corporate.

Further Section 4G(1) provides for sources of funding for the 1st Respondent as follows –

4G. Funds of the Authority

(1) The funds of the Authority shall consist of—

(a) moneys provided by Parliament;

(b) training levy funds;

(c) trade testing fees;

(d) course and hostel fees;

(e) grants from the Government;

(f) such moneys as may accrue to or vest in the Authority in the course of the exercise of its powers or the performance of its functions under this Act or under any other written law;

(g) such grants, gifts, donations or endowments received by the Board on behalf of the Authority; and

(h) any other funds that may be received by the Authority from any other source.

Section 4H(5) further provides that –

(5) Not more than thirty-five percent of the total annual levy collected under this Act may be used for administration of the Authority within that year.

In the case of **Midrocwater Drilling Co. Ltd v National Water Conservation & Pipeline Corporation [2021] eKLR**, the Court considered a similar submission by the Respondent which is a state owned corporation and stated that –

56. On the other hand, Government proceedings are governed by the Government Proceedings Act, Cap 40, Laws of Kenya. Section 21(1) refers to institution of civil proceedings against a government or a government officer while sub section (4) bars the execution of or attachment or process in the nature for enforcement by the government, or government department or government officer.

57. The entire Section 21 of the Act does not at all refer to a Corporation and specifically sub section (4) does not exempt execution against a Corporation. It follows that the Applicant is not subject to Government Proceedings Act and being established under a Common Seal can sue and be sued on its own. It must shoulder its responsibilities and liabilities individually. It cannot hide under the guise of being a Government Corporation to cushion it against execution.

*58. I also find solace in the case of **Anniversary Press (K) Limited v National Water Conservation & Pipeline Corporation (supra)** where the court cited the case of **Greenstar Systems Limited v Kenyatta International Convention Centre (KICC) & 2 Others [2018] eKLR** where the Court held thus:*

*"Finally on this point I will refer to the decision of Hon. Justice J. Onguto (now deceased) in the case **of IKON PRINTS MEDIA COMPANY LIMITED – VS – KENYA NATIONAL HIGHWAYS AUTHORITY & 2 OTHERS [2015] eKLR** in which he held: - 'Foremost though, it is important to point out that it may not be tenable to invoke the Government Proceedings Act (Cap 40) as a bar to any execution herein. The 1st Respondent is a body corporate with perpetual succession and a common seal. It is a corporate entity capable of subsisting independently. It is dependent on government funding but it is not government or servant of agent of Government. Any judgments decreed against the 1st Respondent are not judgments against the government but against an independent juridical body." The above authority which is of persuasive value upholds the view that a state corporation or parastatal is not automatically subject to the Government Proceedings Act…. It is too late in the day for the Applicant to seek to don a different coat. Its invocation of the Government Proceedings Act is but a last ditch attempt to scuttle the execution proceedings against it..."*

59. This is case that involves a monetary decree and a security in equal measure is the most appropriate to order. The court will accordingly order the deposit of a security it deems fit and just to grant."

Again in the case of **Kimoi Ruto & Another v Samuel Kipkosgei Keitany & Another (2014) eKLR,** Munyao J. held as follows with respect to the application of Section 21 of the Government Proceedings Act to state owned corporations –

"..It will be seen from the above that State Corporations may be established by the President (Under S.3) or through an Act of Parliament. They are ordinarily body corporate with capacity to sue and to be sued and with capacity to hold property. I find it difficult to hold that they should be considered as "government" because if they were, then litigation would be governed by the Government Proceedings Act (CAP 40) and I am more prepared to hold that they are not strictly "Government", unless the context otherwise prescribes, but rather, that they are independent agents of Government, formed by government in order to undertake and perform certain functions on behalf of government, which functions cannot adequately or efficiently be performed within the structure of Government Ministries."

In the case of **Ng'ok v Attorney General & Another [2005] eKLR,** Justice J.B Ojwang (as he then was) cited with approval the holding by Justice Aaron Ringera (as he then was) in **Attorney General v Kenya Commercial Bank HCCC NO. 329 of 2001**, in which the Hon. Attorney General had filed a suit for and on behalf of the National Irrigation Board a body corporate with power to sue and be sued in its own name. Ringera J held as follows:-

"All in all, I think the Attorney General's institution of a suit for and on behalf of the National Irrigation Board which is a body Corporate with power to sue and be sued in its own name is a legal misadventure. It is an action without juridical basis…"

From the foregoing, it is clear that the 1st Respondent, and by extension the 2nd Respondent, would not be exempt from the requirement to provide security for the appeal, as it is a body corporate with capacity to sue and be sued, and to own and dispose of property in its corporate name.

I have however taken judicial notice of the fact that the 1st Respondent is a public institution with sufficient funds to meet any liability from the decision herein and any liability that may arise from the decision of the Appellate Court should its appeal fail. I will therefore on this ground alone, not require it to deposit security for the appeal.

I however also take cognizance of the fact that the Petitioner is the holder of a valid decree and is entitled to benefit from the fruits of the judgment made in his favour. As was stated by the Court in **Board of Trustees National Social Security Fund v Caroline Wanjiru Karori** (supra), the courts must balance the interests of both parties. Again as was held in **Machira T/A Machira & Co Advocates v East African Standard (No 2) [2002] KLR 63**:

> *"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."*

Taking into account the totality of the foregoing, I make orders as follows –

> **1. An order be and is hereby issued staying execution of the judgment and decree issued by this court on 7th August 2020 (and not 7th August 2019 as stated in prayers 2 and 3 of the Applicant's application herein) pending hearing and determination of Civil Appeal No. E286 of 2020, National Industrial Training Authority & Another v Paul Kipsang Kosgei & Others on condition that Kshs.5,000,000.00 is paid to the Petitioner within 30 days from the date of this ruling.**

The costs of the application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF JULY 2021

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 15th March 2020 and subsequent directions of 21st 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, the 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 the 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