



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1488 OF 2010.

RAHAB WOTHAYA ESIROMO & 7 OTHERS.....CLAIMANTS

VERSUS

BLUE SHIELD INSURANCE CO. LTD & 3 OTHERS.....RESPONDENTS

RULING

1. The Claimants/Applicants filed a Notice of Motion Application dated 27<sup>th</sup> June 2021 seeking to be heard for orders that all the funds deposited and currently being held at Standard Chartered Bank Joint Account No. xxxxxxxx under the names of Kaplan & Stratton Advocates and Kinyanjui Kirimi & Company Advocates, together with interest thereon, be released to the Applicants herein through their Advocates Kinyanjui Kirimi & Co. Advocates. They also seek for costs of the applications to be borne by the Respondent. The Application is premised on the grounds that part of the decretal sum amounting Kshs. 1,985,487.62 was deposited in the said joint account via a consent order, pending the hearing of the appeal filed by the Respondent herein. The Applicants assert that on 4<sup>th</sup> June 2021, the Court of Appeal declined the application filed by the Respondent seeking extension of time to file the record of appeal out of time and there is therefore no pending appeal. The Applicants assert that since the conditional stay of execution as granted has since lapsed and there being no order for extension of stay of execution, the money held in the joint account became payable to the Claimants/Applicants. The Applicants assert that they continue to be inconvenienced and suffer loss and damage unless this Honourable Court intervenes and grants the orders sought in the interest of justice and fairness. The Application is supported by an affidavit sworn by Rahab Wothaya Esiromo, one of the Claimants/Applicants. She reiterates the grounds of their application and annexes copies of the consent and bank statement and the ruling by the Court of Appeal. She further avers that their advocates also wrote to the Respondent's advocates vide a letter dated 7<sup>th</sup> June 2021 but the said advocates have failed and neglected to have the funds moved to the Applicants' advocates' account. She contends that they have suffered sufficiently and that this litigation must come to an end.

2. In response to the application, the 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on 19<sup>th</sup> August 2021 by its CEO Gwen Kinisu. The said deponent avers that on 29<sup>th</sup> April 2013, the Honourable Lady Justice Maureen Onyango delivered a judgment in this matter which directed *inter alia* that any amount due to the Claimants from the 1<sup>st</sup> to 2<sup>nd</sup> Respondents shall be settled by the 3<sup>rd</sup> Respondent. That following the Claimants' successful application for warrants of attachment and sale of the 2<sup>nd</sup> Respondent's property and the proclamation of its goods, the 2<sup>nd</sup> Respondent sought stay of execution and setting aside of the warrants but the same was dismissed by Honourable Justice Nduma Nderi on 9<sup>th</sup> December 2016. That the 2<sup>nd</sup> Respondent then filed its Notice of Appeal against the said ruling and after parties negotiated on the stay, a Consent Order was recorded before the Court of Appeal on 16<sup>th</sup> January 2018 in **Civil Application No. 204 of 2017**, and a stay of execution of the Judgment delivered by Lady Justice Maureen Onyango was granted. That the 2<sup>nd</sup> Respondent duly complied with the terms of the Consent and deposited half of the decretal sum in a joint interest earning account in the names of Advocates for both parties.

3. He further avers that the proceedings were delivered to the 2<sup>nd</sup> Respondent's advocates on 26<sup>th</sup> February 2020 and the Certificate of Delay was subsequently issued on 4<sup>th</sup> March 2020 and that the 2<sup>nd</sup> Respondent had 60 days to file the Record of Appeal. That the 2<sup>nd</sup> Respondent was however unable to file the Record of Appeal owing to the outbreak of the COVID-19 pandemic and with the Court of Appeal Registry not accepting hand delivered documents. That moreover, when the Judiciary introduced the online filing platform on 1<sup>st</sup> July 2020, the period for filing the Record of Appeal had lapsed. He depones that the 2<sup>nd</sup> Respondent is dissatisfied with the ruling delivered on 4<sup>th</sup> June 2021 by the Court of Appeal (Lady Justice A.K. Murgor JA) sitting as a single Judge dismissing its application for extension of time and has pursuant to Rule 55(1)(b) of the Court of Appeal Rules, 2010 referred the application for hearing before a full bench of the Court of Appeal. He contends that the reference letter was served upon the Applicants' legal representatives and they failed to disclose this material fact to the Court. He further avers that the 2<sup>nd</sup> Respondent responded to the Claimants' request for the release of funds held in the joint interest earning account, indicating it had filed its Record of Appeal and its Reference from the Court of Appeal Ruling of 4<sup>th</sup> June 2021. He asserts that as the reference before the Full Judge Bench is yet to be heard and determined, the application herein is premature and in bad faith. Further, the stay orders remain in force as the issue on extension of time remains pending until the 2<sup>nd</sup> Respondent's reference application is heard and determined and that the sums should not be released as sought by the Claimants. He asserts that the Claimants/Applicants stand to suffer no prejudice if the sums are not released to them at this point in time as the same are already secured and are at no risk of dissipation.

4. What I am required to determine is whether by operation of law the stay granted herein has lapsed. The matter was referred to the Court of Appeal vide a Notice of Appeal and subsequently an order was sought before the Appellate Court where Murgor JA dismissed the motion for stay. The matter is now stated to have been referred to a full Judge Bench of that Court for the determination on the stay the Respondent/Applicant seeks. Under Rule 55 of the Court of Appeal Rules 2010 the rules provide as follows:-

55. (1) Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge—

(a) in any criminal matter, wishes to have his application determined by the Court; or

(b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, he may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.

(2) At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced.

5. The Rules therefore do not show the decision of the single Judge of Appeal is stayed automatically pending the reference. All it indicates is that a reference can be sought. That said, would the Applicant suffer any loss that would not be compensated by an award of damages should the stay not be granted herein? An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules 2010 namely; 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 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. The applicant has two things running in their favour – firstly, the motion seeking stay was made without delay and in the Court’s mind the absence of stay would render the intended reference to the Court of Appeal moot and of no effect if the substratum of the matter in the Court of Appeal is taken away. To the parties’ credit, the sum is secured in a joint interest earning account and as such there is security for the performance of the decree. As the funds are secured and there is reason to grant the stay so as not to render the matter before the Court of Appeal academic, I hereby grant stay pending the outcome of the reference before the Court of Appeal. The orders in the Court of Appeal are what this stay order will give way to. The issue of costs shall abide the outcome in the Court of Appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**