



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1957 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**KEPHA MORENO BOSIRE.....CLAIMANT**

**VERSUS**

**TITUS NAIKUNI.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**KENYA AIRWAYS LIMITED.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

The Applicants filed a Notice of Motion on 28<sup>th</sup> August, 2019 seeking the orders that:

1. Spent
2. The Court be pleased to grant an order for stay of execution of the Judgment and Decree of the Court by Abuodha J. and delivered by Wasilwa J. on 28<sup>th</sup> June 2019 pending the hearing and determination of this application inter partes;
3. The Court be pleased to grant an Order for stay of execution of the Judgment and Decree of the Court Abuodha J. and delivered by Wasilwa J. on 28<sup>th</sup> June 2019 pending the hearing and determination of the intended Appeal from the said Judgment and Decree; and
4. The costs of this application do abide the outcome of the appeal.

The application is based on grounds that:

1. The Court entered Judgment against the Applicants on 28<sup>th</sup> June, 2019 (“the Judgment”) and awarded the Respondent a composite sum of Kshs.10 Million (“the award”) particularized as follows:
  - a) Three (3) months’ salary in lieu of notice in the sum of Kshs.1,800,000 plus interest;
  - b) Twelve (12) months compensation in the sum of Kshs.7,200,000.00 plus interest; and
  - c) Kshs.1,000,000.00 for undignified treatment; and
  - d) Costs of the suit
2. The Applicants informal application for stay was declined by the Court and they intend to appeal against the entire judgment of Court and have filed and served a valid Notice of Appeal against the Respondent.
3. The Respondent’s Party and Party Bill of Costs (“the Bill”) dated 11<sup>th</sup> July 2019 was fixed for taxation on 25<sup>th</sup> July 2019 and parties have taken directions to file respective submissions on the bill;

4. The Respondent vide a letter dated 5<sup>th</sup> August 2019 threatened to execute against the Applicant within seven (7) days from the date of the letter. They are apprehensive that the Respondent will actualize the threat to execute the Judgment and Decree of the Court;

5. The decretal amount is colossal, and the Applicant stands to suffer substantial loss and irreparable damage of the order for stay of execution of the Judgment and Decree of the Court is not granted. Further, the Respondent is a person of unknown financial means and is unable to refund the decretal amount if the Appeal is successful;

6. The Applicants have prepared a draft Memorandum of Appeal and aver that the intended Appeal has merit and will be rendered nugatory of the order for stay of execution is not granted;

7. The Applicants are ready and willing to deposit the entire decretal amount as security in a joint interest earning account and abide by such conditions as the court may impose; and

8. The parties obtained the decree on 31<sup>st</sup> July 2019 and the application for stay of execution has been made within a reasonable time.

The Application is supported by the affidavit of Mellisa Makokha the 2<sup>nd</sup> Respondent's Head of Legal sworn on 13<sup>th</sup> August 2019, on behalf of the Applicants, in which she reiterates the grounds set out in the application.

### **Respondent's case**

In response to the application, the Respondent filed a Replying Affidavit sworn on 1<sup>st</sup> October, 2019. He depones that the application is premature as the Party and Party Bill of Costs filed by the Respondent is yet to be taxed. Without the taxation of the party and party bill of costs and without a certificate of taxation, there is no imminent threat of execution as alleged by the Applicants.

He depones that the Applicants have not annexed a draft Memorandum of Appeal to the supporting affidavit to enable the Court gauge the chances of success of the intended appeal.

He avers that there were no orders issued against the 2<sup>nd</sup> Respondent to warrant the 2<sup>nd</sup> Respondent's representative to swear the affidavit in support of the Notice of Motion. He further depones that the 1<sup>st</sup> Respondent ceased to be an employee of the 2<sup>nd</sup> Respondent and there is no authority attached to the Supporting Affidavit to prove that she had authority to swear the affidavit on behalf of the 1<sup>st</sup> Respondent.

He avers that the Applicants do not stand to suffer any substantial loss and undue prejudice if he is paid the decretal sum as it is the 1<sup>st</sup> Applicant who is a person of unknown means having ceased working for the 2<sup>nd</sup> Applicant. He avers that there are many ways of executing a judgment of the Court which the Applicants can employ to recover the sum from him in the event they are successful in the appeal.

He avers that in the unlikely event that the Court is inclined to pay him the entire decretal sum, he is agreeable to being paid half of the decretal sum while the other half of the decretal sum be deposited in a joint interest earning account to be upended by the Parties advocates.

He avers that the application has not been made in good faith and that there is a valid judgment of a court of competent jurisdiction which has not been overturned on appeal.

### **Submissions by the Parties**

Counsel Ms Opakas holding brief for Mr. Ohaga for the Applicants submitted that there is imminent danger of execution as the respondent's advocates in their letter dated 5<sup>th</sup> August, 2019 threatened execution. He submitted that there are arguable grounds of appeal as the Court granted maximum compensation without justifying it and that the 1<sup>st</sup> Applicant was ordered to be personally liable.

He submitted that the Applicants have fully complied with Order 42 Rule 6 of the Civil Procedure Rules. He argued that if the order of stay is not granted the appeal if successful would be rendered nugatory and the applicants may not recover the sum of Kshs.10 million.

He submitted that the application was filed within reasonable time and there was no unreasonable delay. He submitted that the final tests in an application for stay of execution is security and that the applicants have demonstrated they are willing to deposit security in a joint interest account. He argued that contrary to the Respondent's allegation that the applicants are not in a position to deposit the security is untrue for reason that the applicant is a state corporation.

He argued that the applicants have satisfied the threshold for grant of stay of execution and urged the Court to grant the orders sought.

Counsel Mr. Mokuu for the Respondent submitted that the Judgment against the 1<sup>st</sup> Applicant is a judgment in persona thus he was supposed to file his affidavit. He argued that the Supporting Affidavit was sworn by an individual against whom no ward was made and on this basis the application is incompetent.

He argued that the averments in the Respondent's Replying Affidavit were not controverted by either a Further Affidavit or Supplementary Affidavit thus the application should fail. He submitted that there is no threat of imminent execution as the bill of costs has not been taxed. He therefore submitted that the instant application is premature and ought to have been filed after taxation.

He submitted that it is good practice that a draft memorandum of appeal is annexed to application for the court to gauge the grounds of appeal but no draft was annexed to the instant application. He argued that a Notice of Appeal is merely an intention.

He submitted that there are 2 tests under Order 42 the first being substantial loss and that court should be alive to fact that there is a valid judgment of a Court of competent jurisdiction and Respondent is entitled to the fruits of the judgment.

He submitted that the second ground is the deposit of security for costs. He argued that these two conditions under Order 42 Rule 6 (2) of the Civil Procedure Rules the use of the word and means that there must conjunctively be both substantial loss and security of costs. He submitted that they are agreeable to the amount be deposited in a joint interest earning account but the Applicant be granted half of the decretal amount. In conclusion, he urged the court to dismiss the application with costs.

In rejoinder, Counsel Opakas submitted that the suit herein is due to an employment relationship and in that regard Ms. Melissa Makokha is a justified deponent as the 2<sup>nd</sup> Applicant is the Respondent's employer.

He argued that while it is good practice to annex grounds of appeal it is not mandatory to do so. He submitted that it is uncontroverted that taxation proceedings have begun and it is not in doubt what follows next.

He opposed the release of half of security for reason that it would not be useful to put the Respondent under any form of execution. He submitted that the Respondent will not suffer ant prejudice if the application is allowed and urged the court to allow the application.

### **Determination**

The main issue for determination is whether the Applicants ought to be granted the orders for stay as sought in their application.

The Respondent however raises issue with the Supporting Affidavit having been sworn by the 2<sup>nd</sup> Applicant's Head of Legal, Melissa Makhoha, on behalf of the Applicants. He argues that the 1<sup>st</sup> Applicant ought to have sworn an affidavit as the Judgement against him was in persona.

I disagree that Melissa Makhoha is a stranger with respect to the 2<sup>nd</sup> Applicant as she states in paragraph 1 of her supporting affidavit that she has the authority to make the affidavit from the 2<sup>nd</sup> Applicant's Board of Directors and from the 1<sup>st</sup> Applicant. In respect of the 1<sup>st</sup> Applicant, I find that Melissa Makokha rightfully swore the affidavit on his behalf as the actions disputed by the Respondent in his claim occurred when the 1<sup>st</sup> Applicant was the 2<sup>nd</sup> Applicant's chief executive officer.

In **Spire Bank Limited v Land Registrar & 2 others [2019] eKLR** the Court of Appeal held:

*“Clarifying the position on the question of authorization in the case of **Makupa Transit Shade Limited & Another vs Kenya Ports Authority & Another [2015] eKLR** this Court stated thus;*

*“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized.”*

*So that it was sufficient for the authorized person to depone that he or she was duly authorized, but in the event of a complaint that such person was unauthorized, it was up to the disputing party to demonstrate with evidence that the deponent did not have the requisite authority, the onus being on the party making the allegation to prove it. A bare statement that the plaintiff or applicant was not authorized would not be sufficient.”*

On the main issue for determine, Order 42 Rule 6 (2) of the Civil Procedure Rules provides:

**(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.**

### **Substantial Loss**

The Applicants aver that they are bound to suffer substantial loss should the order for stay not be granted. They aver that the Respondent is a person of unknown financial means and is unable to refund the decretal amount should th appeal be successful. The Respondent on his part avers that the 2<sup>nd</sup> Applicant has over the past been registering losses and that the 1<sup>st</sup> Applicant is a person of unknown means who ceased working while working for the 2<sup>nd</sup> Applicant.

The Respondent avers that there are many ways of executing a judgment of the court which the Respondents can employ in order to recover the sum from him should the appeal be successful.

In **National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another [2006] eKLR**, the court stated that:

*“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses 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 Respondent who lost his employment with the 2<sup>nd</sup> Applicant has not demonstrated how he shall refund the decretal sum of Kshs.10 million to both applicants should the appeal be successful. Most importantly, should the respondent not be in a position to refund the decretal amount it is evident that the 2<sup>nd</sup> Respondent which is a public company would adversely be affected by such loss.

#### **Unreasonable delay**

The Judgment in this suit was delivered on 28<sup>th</sup> June 2019 while the decree was issued on 31<sup>st</sup> July 2019. The Applicant filed its Notice of Appeal on 1<sup>st</sup> July 2019. The Respondent’s counsel in his letter dated 5<sup>th</sup> August, 2019 instructed the Applicants’ counsel to deposit the decretal sum of Kshs.10 Million within 7 days’ failure to which they would commence execution proceedings.

The Applicants filed the instant application on 2<sup>nd</sup> October 2019. They do not give reasons for the delay and only state that the application had been made within a reasonable time and in good faith. The Respondent avers that its informal application for stay of execution was declined by Court. The Applicants filed the instant application one and a half months after Judgment was delivered, I do not find this period to amount to inordinate delay.

#### **Security**

Both parties are agreeable to the amount being deposited in a fixed deposited account held by Counsel save that the Respondent only wishes to have half the decretal sum Kshs.5 Million, deposited in the account. Having stated that the Respondent has not demonstrated his capability to refund the sum of Kshs.5 million should the appeal be successful, I am inclined to find that parties should the entire amount should be deposited in the fixed.

#### **Draft Memorandum of Appeal**

The Respondent submitted that the application is defective because the Applicants did not annex a draft Memorandum of Claim to the Supporting Affidavit. The Applicants argued that whereas it is good practice to annex a draft Memorandum of Appeal it is not mandatory to annex it. I find that it is sufficient that the Applicants have filed a Notice of Appeal as provided under Order 42 Rule 6 (4) and most importantly they has demonstrated their grounds of appeal against the Judgment of this Court.

The Court of Appeal in **Somak Travels Ltd v Gladys Aganyo [2016] eKLR** held:

*“It is trite law that the applicant need not show a multiplicity of arguable points. One arguable point is sufficient to satisfy the first principle. In addition, an arguable point is not necessarily one that must succeed on appeal, but one that merits a consideration and determination by this Court. While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application.”*

From the foregoing, it is my finding that the Application has merit. I thus grant stay of execution pending appeal conditional upon the applicants/respondents depositing the entire decretal sum in court with 14 days from date of this ruling.

Costs to the claimant in any event.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF FEBRUARY 2020**

**MAUREEN ONYANGO**

**JUDGE**