



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 673 OF 2016**

**CONSOLIDATED WITH**

**CAUSE NO 674 OF 2016**

**AND**

**CAUSE NO 675 OF 2016**

**AND**

**CAUSE NO 676 OF 2016**

**SALIM NASSORO MWARIWA.....1<sup>ST</sup> CLAIMANT**

**EDWIN MWADZUNGU LWAMBI.....2<sup>ND</sup> CLAIMANT**

**MICHAEL M. MUNGA.....3<sup>RD</sup> CLAIMANT**

**FRANCIS OTWANE.....4<sup>TH</sup> CLAIMANT**

**VS**

**HAKIKA TRANSPORT SERVICES LIMITED.....RESPONDENT**

**RULING**

1. In his summative judgment dated 11<sup>th</sup> May 2018, my brother, **O.N Makau J** awarded the Claimants various sums ranging from Kshs. 231,000 to Kshs. 275,000 in compensation and notice pay.
2. Being dissatisfied with the judgment, the Respondent lodged a Notice of Appeal on 8<sup>th</sup> June 2018.
3. Subsequently on 23<sup>rd</sup> September 2018, the Respondent lodged a Memorandum of Appeal together with the Record of Appeal at the Court of Appeal.
4. What is before me is an application for stay of execution of the judgment by my brother Judge, pending the hearing and determination of the intended appeal.
5. The application is by way of Notice of Motion dated 17<sup>th</sup> October 2019 and is based on the following grounds:
  - a. The Respondent is dissatisfied with the judgment dated 11<sup>th</sup> May 2019 and delivered on 23<sup>rd</sup> May 2019;
  - b. The Respondent has an arguable appeal with high chances of success;
  - c. If stay is not granted, the Claimants will execute the judgment and that will occasion the Respondent substantial and irreparable loss and damage;

d. The Claimants have obtained judgment against the Respondent and taxation of party and party costs has been completed with a ruling delivered on 25<sup>th</sup> September 2016 where the Claimants' costs were taxed at Kshs. 144,710 for Salim Nassoro, Kshs. 118,110 for Edwin Madzungu Mwambi, Kshs. 118,110 for Michael M. Munga and Kshs. 118,110 for Francis Wabwire Otwane, all totalling Kshs. 499,040 and hence there is a real likelihood of execution;

e. Execution against the Respondent is imminent and the right of appeal is likely to be severely compromised.

6. The application is supported by an affidavit sworn by the Respondent's Human Resource Manager, Rajab Yeri Kombe. He depones that the Respondent is prepared to post appropriate security for the amount due under the decree, if so required.

7. Kombe further depones that the Claimants will not suffer prejudice if stay orders are granted as it was proved at the trial that they had secured other employment soon after leaving the Respondent's employment and the sums awarded do not relate to any unpaid salaries/wages or dues.

8. Kombe adds that the award amounts continue to attract interest which is meant to cushion the Claimants from the effects of inflation in case the judgment is eventually upheld by the Court of Appeal.

9. The Claimant filed Grounds of Opposition on 2<sup>nd</sup> December 2019, stating that the application is belated, ill-conceived, misinformed and tainted with *mala fides* for the reasons that:

a. It seeks orders that are untenable in the circumstances of this case;

b. It is vexatious and does not meet the threshold requirements for grant of the orders sought;

c. It is bad in law and an abuse of the court process in light of the rules of practice and procedure;

d. It is fatally defective.

10. The Respondent's application is grounded on Order 42 Rule 6 (2) of the Civil Procedure Rules which gives the following conditions upon which an order for stay of execution pending appeal may be granted:

**a. the court is satisfied 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.**

11. It was submitted on behalf of the Respondent that this being a money claim and the Claimants having failed to demonstrate how they would refund the decretal sum once paid out, the Respondent would suffer substantial loss if the orders sought are denied.

12. In this regard, the Court was referred to the decision in *Equity Bank Ltd v Taiga Adams Ltd [2006] eKLR* where it was held that inability by the Claimants to reimburse any moneys paid out is an aspect of substantial loss to the Respondent.

13. Reference was also made to the holding in *Gatobu M'Ibutu Karotho v Christopher Muriithi [2008] eKLR* that where doubt on the Claimant's ability to repay the decretal sum has been raised, the evidential burden shifts to the Claimant to dispel that doubt.

14. In *David Mbugua v Keroche Breweries Ltd [2015] eKLR* my brother, **Radido J** held that an assertion by a judgment debtor that a decree holder will not be able to refund a decretal sum is not by itself an adequate reason to move the Court to grant an order of stay of execution pending appeal.

15. Earlier on my sister, **Mbaru J** in *Michael Kiboi Gatumia v Mastermind Tobacco (K) Limited [2013] eKLR*, restated that stay of execution serves to preserve the subject matter of an appeal but is not meant to deny a claimant the fruits of litigation.

16. In all these cases, the Court must balance the right of appeal against the right of a successful party to actualise a judgment.

17. For some reason that was not clear to the Court, the Claimants opted not to file replying affidavits in response to the Respondent's application for stay of execution. Instead, the Claimants' Advocates filed general grounds of opposition. There was therefore no commitment by any of the Claimants that they would refund the decretal sum if they were to lose in the Court of Appeal. The Claimants' silence on this issue casts doubt as to their willingness and ability to be bound by the rules of litigation.

18. It seems to me therefore that in this case, the Respondent has satisfied the Court that it would suffer substantial loss if the orders sought are not granted.

19. On the question whether the application has been brought without unreasonable delay, the Court noted that a Notice of Appeal was lodged on 8<sup>th</sup> June 2018 and served on the Claimants' Advocates on 13<sup>th</sup> June 2018. Ruling on taxation was delivered on 23<sup>rd</sup> September 2019.

20. It is evident that the present application filed on 17<sup>th</sup> October 2019, was made once threat of execution became imminent, which was upon taxation of the Party and Party Bill of Costs. I cannot therefore fault the Respondent for delay in bringing the application.

21. With regard to security, the Respondent undertakes to deposit the entire decretal sum in a joint interest earning account in the names of the Parties' Advocates. This is a reasonable undertaking and security.

22. Overall, I am persuaded to allow the Respondent's application and therefore make the following orders:

a. Execution of the judgment and decree of **O.N Makau J** dated 11<sup>th</sup> May 2018 and delivered on 23<sup>rd</sup> May 2018 is hereby stayed pending the hearing and determination of the Respondent's appeal in the Court of Appeal;

b. The entire decretal sum shall be deposited in a joint interest earning account in the names of the Advocates for the Claimants and the Advocates for the Respondent within the next thirty (30) days from the date of this ruling;

c. Failure to comply with order (b) above will lead to automatic lapse of the stay hereby granted.

d. The costs of this application will be costs in the appeal.

23. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> DAY MARCH 2020**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Ngonze for the Claimants

Mr. Onyango for the Respondent