



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO.153 OF 2015**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 21<sup>st</sup> May, 2020)**

**DR. JOHN MURIITHI.....1<sup>ST</sup> CLAIMANT**  
**JACKSON AWUOR .....2<sup>ND</sup> CLAIMANT**  
**JOICE ONYANGO.....3<sup>RD</sup> CLAIMANT**  
**JUDY OBURA.....4<sup>TH</sup> CLAIMANT**

**VERSUS**

**THE REGISTERED TRUSTEES**  
**OF THE SISTERS OF MERCY (KENYA)**  
**T/A “THE MATER MISERICORDIA HOSPITAL” .....RESPONDENT**

**CONSOLIDATED WITH CAUSE CAUSE 212 OF 2015**

**JAMES MUTISO KALOKI.....1<sup>ST</sup> CLAIMANT**  
**SUSAN KAGENDO KARANJA .....2<sup>ND</sup> CLAIMANT**  
**JACKSON NGUNJIRI GATHOGO.....3<sup>RD</sup> CLAIMANT**  
**ALICE WAMBUI NJAMBI.....4<sup>TH</sup> CLAIMANT**

**VERSUS**

**THE REGISTERED TRUSTEES**  
**OF THE SISTERS OF MERCY (KENYA)**  
**T/A “THE MATER MISERICORDIA HOSPITAL” .....RESPONDENT**

**CONSOLIDATED WITH CAUSE CAUSE 241 OF 2015**

**LAWRENCE GICAGA MUIGA.....CLAIMANT**

**VERSUS**

**THE REGISTERED TRUSTEES**  
**OF THE SISTERS OF MERCY (KENYA)**

**RULING**

1. The Application before Court is a Notice of Motion filed by the Applicant on 20/11/2019 seeking Orders that:-

**1. Spent**

**2. This Court be pleased to extend the Order for thirty (30) days' stay of execution granted on 25/10/2019 pending the hearing and determination of this application.**

**3. This Court be pleased to stay the Judgment and Decree dated 25/10/2019 pending the hearing and determination of the intended appeal.**

**4. Costs of and incidental to this application abide the Intended Appeal.**

2. The application is premised on grounds that:-

**1. Upon pronouncement of the Judgment and Decree on 25/10/2019, the Advocate for the Applicant informally applied for a certified copy of the Judgment, a copy of the Judgment, a copy of the typed-proceedings and a stay of execution of the Judgment and Decree.**

**2. The Court granted an Order for stay of execution for 30 days for the Applicant's to either appeal against the Judgment and Decree or settle the decretal awards.**

**3. The Applicant has evinced or manifested its intention to appeal by filing a Notice of Appeal dated 28/10/2019 in compliance with rule 75 (1) of the Court of Appeal Rules, 2010.**

**4. The Applicant is reasonably apprehensive that if the order of stay is not granted, the decree holders in this matter will not be able to make full restitution of the sums paid.**

**5. The Applicant applied for a copy of the typed proceedings vide the letter dated 28.10.2019 but it was not possible to obtain a copy of the typed proceedings within the 30 days' stay of execution.**

**6. The Applicant is willing to provide such security as ordered by the Court for due performance of decree.**

3. The application is supported by the Affidavit of Evelyn N. Maina, an Advocate of the High Court, sworn on 20/11/2019, in which she reiterates the grounds set out in the motion.

4. The 2<sup>nd</sup> - 4<sup>th</sup> Claimants in Cause 153 of 2015 filed a Replying Affidavit sworn by Jackson Awuor, the 2<sup>nd</sup> Respondent, on 13/12/2019. He deposes that the 30 days stay of execution was issued on 20/10/2019 lapsed on 24/11/2019 and the same was sufficient for the Applicant to do what they wanted.

5. He deposes that instead of stay of execution, they would prefer that the applicant pays half of the decretal sum and deposits while the other half is deposited in a joint interest earning account. He avers that the instant application should have been filed at the Court of Appeal.

6. He avers that the Applicant's annual returns show that it has gone from a surplus of Kshs. 363,785,616/- in the year 2015 to a loss of Kshs. 145,587,384 in 2018. They are therefore apprehensive that the Applicant will in future be unable to pay the judgment sum.

7. The 1<sup>st</sup> Respondent in Cause 212 of 2015, James Mutiso Kaloki, filed Grounds of Opposition on 10/12/2014. He states that the application has not demonstrated the substantial loss it would suffer if stay of execution is not granted and did not annex any evidence to demonstrate that he is poor. He further states that the applicant has not explained unreasonable delay in filing the Notice of Motion.

8. The 2<sup>nd</sup> & 4<sup>th</sup> Respondents in Cause 212 of 2015 filed a Replying Affidavit sworn by Susan Kagendo, the Respondent on 9/12/2019. She deposes that this is not the right forum to grant such orders as the Court became *functus officio* after delivery of its judgment.

9. She further avers that the Applicant has not annexed the draft Memorandum of Appeal thus it's impossible for the Court to gauge merits of the same. She avers that being professionals, they are in a position to pay back the money if the appeal is successful.

10. The 3<sup>rd</sup> Respondent in Cause 212 of 2015, Jackson Ngunjiri Gathogo, filed a Replying Affidavit sworn on 9/12/2019. He deposes that the Court lacks jurisdiction to issue the orders sought under section 12 (3) (i) and (viii) of the Employment and Labour Relations Court Act. He avers that under Rule 17 (1), (2) & (3) Employment and Labour Relations (Procedure) Rules 2016 an application for stay pending an intended appeal is not interlocutory in nature.

11. He further avers that the Applicant has not demonstrated any loss if stay is not granted. He avers that he is currently running his firm and is in a position to reimburse the applicant if the intended appeal is successful. He avers that should the Court grant conditional stay the applicant should be ordered to pay him half the judgment sum and the other deposited in a joint interest account.

12. The Application proceeded by way of written submissions.

### **Applicant's Submissions**

13. The Applicant submits that the jurisdiction of the Court to grant an order for stay of execution is provided under Order 42 Rule 6 of the Civil Procedure Rules. It avers that an order for stay is fettered upon proof of "*sufficient cause*" by the Applicant.

14. It submits that the Court in **Kenya Shell Ltd v Kibiru & another [1986] KLR 410** identified proof of "substantial loss" as the "cornerstone" for granting an order for stay of execution. It further submits that the Court of Appeal in **Kenya Hotel Properties Ltd v Willesden Investments Ltd & Others [2016] E.A 133** and **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR** determined the principles for proving substantial loss.

15. It avers that it has no knowledge of the financial resources at the disposal of each of the Respondent and is apprehensive that they will not be in a position to reconstitute the sums paid over.

16. It submits that its reasonable apprehension shifted the evidentiary burden to each of the Respondents to prove their resources in substantiation of their ability to reconstitute. It submits none of them has adduced evidence to show the assets they own.

17. It submits that the application was brought before expiry of the 30 days stay of execution granted on 25/10/2019. It further submits that none of the Respondents has expressed any doubt that the applicant would be unable to satisfy any decree or order binding on it.

18. It is its submission that it is willing to comply with the orders of this Court on provision of security. In conclusion, it submits that it has satisfied the conditions under Order 42 Rule 6 of the Civil Procedure Rules.

### **Respondent's submissions**

19. The 2<sup>nd</sup> -4<sup>th</sup> Respondents in Cause 153 of 2015 aver that the Applicant has not demonstrated that it will suffer loss. They submit that the Applicant is willing to provide security which security cannot be equated to a deposit of half the judgment sum in a joint interest earning account. They submit that the Applicant is not doing well financially and this warrants fears that even after the intended appeal they may be in a worse financial state.

20. They urge the Court to rely on the case of **Paul Makatu & another v Quadrant Services [2016] eKLR** and **Kenya Shell v Karuga (1982-1988) 1 KAR 1022**.

21. The 1<sup>st</sup> Claimant in Cause 212 of 2015 and the Claimant in Cause 214 of 2015 rely on Section 107 and 109 of the Evidence Act and submits that the Applicant has failed to annex any evidence to demonstrate substantial loss.

22. They submit that the issue being a money decree, the Applicant was required to prove that they are men of straw and would not in a position to repay the decretal sum should the intended appeal succeed. They rely on **James Wangalwa & another v Agnes Naliaka Chesteo [2012] eKLR** and **Lucy Nyamu Kimani v Lawrence Mburu Muthiga (2006) eKLR**.

23. They submit that having failed to demonstrate that they are men of straw, the evidentiary burden never shifted to them to prove their financial position. They rely on the case of **Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR**.

24. They submit that whereas the Applicant filed a Notice of Appeal within the prescribed 14 days, it failed to file the instant application within 14 days or within the 30 days interim stay period.

25. They further submit that the Applicant has failed to indicate whether it was willing to deposit any security and this failure demonstrates lack of commitment and good will to abide by Order 42 Rule 6 of the Civil Procedure Rules.

26. In conclusion, they submit that the application lacks merit as the applicant has not proved that it would suffer any substantial loss.

27. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in Cause 212 of 2015 submit that the grant of stay or execution pending appeal is discretionary and is to be exercised judiciously in accordance with the principles of law.

28. They submit that the applicant has not demonstrated sufficiently the substantial loss it alleges it will suffer if the decretal sum is paid. In support of this position, they rely on the case of **National Bank of Kenya v Alfred Owino Bala [2015] eKLR** and **James Wangalwa & another v Agnes Maliaka Cheseto, Bungoma HC Misc. Application 42 of 2011**.

29. They submit that should the Court be inclined to grant the prayers sought, it should order the Applicant to deposit the decretal sum in a joint interest earning account in the various advocates in order to secure their interest.

30. I have examined the averments of the parties herein. The Court's jurisdiction to issue stay orders pending appeal are drawn from Order 42 rule 6(2) of the Civil Procedure Rules which state 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”.**

31. The Applicants only demonstrate that they have approached Court within reasonable time, which they have. They also need to demonstrate they are willing to deposit security in Court and also that they stand to lose substantially if the orders sought are not granted.

32. The Applicants indicated that the Respondents may not be in a position to pay back the decretal sum if the appeal succeeds.

33. The Respondents on their part were unable to demonstrate they have resources to pay or they have jobs and earning salaries and so in case the appeal succeeds they would be able to pay back any money paid out to them. Because of this omission, I find the application is merited.

34. I will allow the application on the condition that the Respondents deposit the entire decretal sum in an interest earning account held in joint names of counsels on record and the Respondents within 60 days. In default execution to proceed.

**Dated and delivered in Chambers via zoom this 21<sup>st</sup> day of May, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Atieno for 2<sup>nd</sup> and 4<sup>th</sup> Claimants in Case 212/2015 and holding brief Wesonga for 3<sup>rd</sup> Claimant in 212/2015 – Present

Jude Onyango for 2<sup>nd</sup> and 3<sup>rd</sup> and 4<sup>th</sup> Claimants in Case No. 152/2015 – Present

Mbugua holding brief Chiuri for Respondents – Present