



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

*(Before Hon. Lady Justice Maureen Onyango)*

**CAUSE NO. 682 'B' OF 2014**

**JIMMY MATHEW LABI.....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

**CONSOLIDATED WITH CAUSE NO. 1330 OF 2014**

**SYLVESTER AKOLO MUTULI.....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

**CONSOLIDATED WITH CAUSE NO. 1331 OF 2014**

**JOSEPH NAFTALY MACHARIA KARUMBA.....CLAIMANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

**RULING**

Before me, for determination is the Respondent/Applicant's Notice of Motion Application dated 6<sup>th</sup> March, 2020. It seeks orders that:

1. Spent.
2. A temporary injunction be and is hereby issued restraining both the Claimants and Chaka Auctioneers either by themselves, their servants, employees and/or assigns from attaching selling by way of public auction or any other way the moveable property listed in the proclamations issued to the Applicant on 4<sup>th</sup> March 2020 by the said Auctioneer pursuant to warrants of attachment of moveable property in execution of a decree for money dated 3<sup>rd</sup> March 2020 pending hearing and determination of the Applicant's Notice of Motion application dated 4<sup>th</sup> November, 2019.
3. An injunction be and is hereby issued restraining both the Claimants and Chaka Auctioneers either by themselves, their servants, employees and/or assigns from attaching selling by way of public auction or any other way the moveable property listed in the proclamations issued to the Applicant on 4<sup>th</sup> March 2020 by the said Auctioneer pursuant to warrants of attachment of moveable property in execution of a decree for money dated 3<sup>rd</sup> March 2020.
4. Pending the hearing and determination of the Applicant's Notice of Motion application dated 4<sup>th</sup> November, 2019 inter partes, the Court be pleased to grant an order staying execution of the Judgment and resultant decree of Onyango J. delivered on 14<sup>th</sup> June 2019.
5. Any other relief that the court deems fit in the interest of justice.

6. The costs of this Application be provided for.

This Application is premised on the grounds that:

1. Judgment in this case was delivered on 14<sup>th</sup> June, 2019 in favour of the Claimants as against by the Respondent.
2. The Respondent/Applicant being dissatisfied with the Judgment lodged Notices of Appeal evidencing its intention to Appeal the decision of this Court and further proceeded to request the Court through its Deputy Registrar seeking to be furnished with the typed proceedings and the Certified copy of the Decree to enable it file an Appeal.
3. Further, the Respondent/Applicant did file a Notice of Motion Application dated 4<sup>th</sup> November, 2019 seeking for stay of execution of the Judgment and decree of this Court dated 14<sup>th</sup> June, 2019. The Application was certified urgent and set down for interpartes hearing on 13<sup>th</sup> November, 2019.
4. On 13<sup>th</sup> November, 2019 the hearing did not proceed as the Claimants sought 14 days to file their responses to the Application and directions issued that the Application be heard on 29<sup>th</sup> January, 2020.
5. On 29<sup>th</sup> January, 2020 the matters were not listed before the trial Court as the Judge was not sitting. Another hearing date was therefore issued and the hearing rescheduled for 19<sup>th</sup> March, 2020.
6. Only one Claimant in **626 "B" Jimmy Labi v National Bank of Kenya** filed his Replying Affidavit to the Application on 10<sup>th</sup> February, 2020.
7. The Other Claimants in Cause No. 1330 and 1331 both of 2014 Sylvester Mutuli and Joseph Macharia Karumba proceeded with taxation of their respective bills of costs and execution of the decrees.
8. The 2 Claimants further proceeded with proclamation through Chaka Auctioneers and the goods proclaimed attached on 11<sup>th</sup> March, 2020 for sale by way of public auction in execution of the decrees.
9. The Applicant now seeks an injunction and stay of execution pending hearing and determination of the Application for stay of execution scheduled for 19<sup>th</sup> March, 2020 as the same will be rendered nugatory should the attachment and sale proceed on 11<sup>th</sup> March, 2020.
10. The Applicant is apprehensive that its Appeal would be rendered nugatory as it would not be able to recover any sums from the Claimants in the event the Appeal is successful as they are currently unemployed with no steady income and with therefore not be able to repay the decretal sum if the same is paid out to them.

The Application is further supported by the Affidavit of **STEPHINE O. OBONYO**, the Head of Employee Relations at the Respondent Bank sworn on 6<sup>th</sup> March, 2020 in which she reiterates the grounds as set out on the face of the Notice of Motion Application.

The Application is filed under Rule 32 (2) of the Employment and Labour Relations Court Act (2014), 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 in Cause No. 626 "B" of 2014 filed a Replying Affidavit dated 10<sup>th</sup> February, 2020 in which he contends that the Applicant has not met the threshold for the grant of the Orders sought in the Application.

The Affiant further maintains that the Application has been filed in bad faith and that it is only meant to delay him from enjoying the fruits of the Judgment entered in his favour as against the Respondent.

He urged this Court to consider his matter separately from Cause No. 1330 and 1331 of 2014 despite the fact that the matters were consolidated for the sole reason that he was yet to initiate the process of execution as against the Respondent herein unlike the Claimants in Cause 1330 and 1331 of 2014 long before the Applicant obtained orders and deposited the decretal sum as directed by Radido J. He therefore urged the Court to dismiss the Application with costs.

The Claimants in Cause No. 1330 and 1331 of 2014 sought leave on 13<sup>th</sup> November 2019 to respond to the Respondent's Application dated 4<sup>th</sup> November 2019. They proceeded to file their bill of costs for taxation and the same was delivered on 13<sup>th</sup> February 2020. The two Claimants thereafter initiated the process of execution.

The process was however halted by Radido J. when he heard the instant Application exparte on 9<sup>th</sup> March 2020 and directed the Respondent to deposit the decretal sum in Court.

Parties agreed to dispose of the Application by way of written submissions.

#### **Submissions by the Parties**

The Respondent/Applicant submits that it has met the threshold for the grant of the Orders sought in its Application as provided under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 and therefore urged the Court to allow the same as prayed.

The Applicant contends that it will be unable to recover any sums

from the Claimants should its appeal be successful thus rendering it nugatory as the Claimants herein have no known source of income. The Applicant relied on the cases of **Meteine Ole Kilelu & 10 Others v Moses K. Nailole (2009) eKLR** and **Sarah N. Sakwa v Elizabeth Wamwanyi T/A Namukhosi Limited & Another (2017) eKLR** where the Courts held that an Application for stay of execution ought to be allowed where an Applicant has shown that it would suffer substantial loss by not being able to get a refund of the decretal sum should execution proceed.

The Applicant further urged this Court to protect the substratum of its intended Appeal by allowing its Application in terms of the prayers sought therein.

It is further the Applicant's contention that it has an arguable Appeal and that there is a need to preserve the subject matter in dispute in order to safeguard its interest. For emphasis the Applicant relied on the case of **John Mwangi Ndiritu v Joseph Ndiritu Wamathai (2016) eKLR**.

The respondent/Applicant further submitted that it filed its Application without unnecessary delay, the Judgment having been delivered on 14<sup>th</sup> June, 2019. It further maintained that the Notices of Appeal dated 20<sup>th</sup> June, 2019 were lodged evidencing its intention to appeal. That it further sought to be supplied with typed proceedings.

It further argued that the delay in obtaining the said proceedings

was not occasioned by it but rather the Office of the Deputy Registrar who failed to assess the requisite fees for payment of the same. The Applicant urged this Court to be guided by the case of **Jaber Mohsen Ali & Another v Priscillah Boit & Another (2014) eKLR** where the Court in dealing with the question of unreasonable delay held that the same is dependant on the surrounding circumstances of each case. It therefore urged this Court to find that its Application was made within reasonable time.

On the issue of security, the Applicant submitted that it is ready to offer security on the terms as imposed by this Court for the due performance of the Orders sought to ensure protection of the interests of the parties hereto. For emphasis the Respondent/Applicant relied on the case of **Richard Muthusi v Patrick Gituma Ngomo & Another (2017) eKLR**.

In conclusion the Applicants urged the Court to allow the instant Application as prayed.

#### **Claimant's Submissions**

The Claimant/Respondent submitted that the Applicant has not met the threshold for the grant of the Orders sought in its Application and therefore sought to have the Application dismissed with costs. For emphasis the Claimant relied on the case of **Kwekwe Mwakela v Krystalline Salt Limited (2014) eKLR** where the Court dismissed a similar application having failed to meet the 3 mandatory conditions as provided under Order 42 Rule 6 for its grant.

He argued that this Court exercise its discretion and allow the instant Application but maintained that the same ought to be allowed only on condition that the Applicant pays 50% of the decretal sum directly to the Claimant within 30 days and the balance in a joint interest earning account in the joint names of the counsels on record. He further argued this Court to further direct that in case of failure to comply with the conditions the stay so granted should automatically lapse.

#### **Analysis and Determination**

Upon considering the parties' arguments and the evidence on record, I find that there is only one issue for determination which is whether or not the instant Application is merited.

#### **What is the threshold of Stay Pending Appeal Applications?**

**Order 42 Rule 6(2)** of the Civil Procedure Rules 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 deems fit to order.

The requirements 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."*

### **Inordinate Delay**

Judgment in this cause was delivered on 14<sup>th</sup> June, 2019. The Applicants being dissatisfied with the Judgment filed Notices of Appeal dated 20<sup>th</sup> June, 2019 and filed in the same Court on 21<sup>st</sup> June, 2019. They proceeded to write to the Deputy Registrar on 19<sup>th</sup> June, 2019 seeking to be furnished with certified copies of the Judgment and typed proceedings for purposes of lodging appeal.

It is also noted that prior to the instant Application the Applicant filed an Application for stay dated 4<sup>th</sup> November 2019 seeking stay of execution of the Court's Judgment delivered on 14<sup>th</sup> June, 2019. Before the said Application could proceed for inter partes hearing the Claimant in Cause No. 626 'B' of 2014 proceeded with taxation of his matter and filed his bill dated 21<sup>st</sup> August, 2019. The Deputy Registrar delivered her Ruling on the bill on 13<sup>th</sup> February, 2020 and the Claimant proceeded with the process of execution.

This prompted the Applicant to file the instant Application which was heard under Certificate of Urgency on 9<sup>th</sup> March, 2020.

This Court granted the Applicant conditional stay and directed that the decretal sums be deposited in Court before 19<sup>th</sup> March 2020. From the foregoing circumstances I find that the Application herewith was filed expeditiously.

### **Substantial Loss**

The right to Appeal is enshrined in the right to a fair hearing. A party has the right to seek justice to the highest court of the land.

In the instant Application the Claimants have not demonstrated that they will be able to refund the decretal sum should the appeal succeed and this would mean the Applicant risks losing substantial sums of money with respect to the individual Claimants together with costs and interest and its appeal shall be reduced to an academic exercise.

It is therefore in the interest of justice that the application be allowed so that the Applicant can pursue its appeal. I therefore grant the applicant orders staying execution of the decree herein pending appeal but on conditions **THAT:**

1. The Applicant deposits the entire decretal sums together with costs in a joint interest earning account in a bank to be agreed upon in the joint names of Counsel for the Claimant and Counsel for the Respondent within 30 days.
2. The intended Appeal **be filed within 60 days from the date hereof** failure to which Claimants/Respondents be at liberty to proceed with execution.

Costs of the application shall be in the appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2020**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, this 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 this 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**