



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 694 OF 2013**

**CLARICE ODHIAMBO.....CLAIMANT**

**VERSUS**

**THE COCA-COLA COMPANY.....1<sup>ST</sup> RESPONDENT**

**COCA-COLA EURASIA & AFRICA GROUP.....2<sup>ND</sup> RESPONDENT**

**(Successor in Title to Coca-Cola Africa Group) COCA-COLA CENTRAL,**

**EAST & WEST AFRICA LIMITED.....3<sup>rd</sup> RESPONDENT/APPLICANT**

**(Successor in title to Coca-Cola East and Central Africa Division Limited)**

**RULING**

1. On 11.12.2019, the 3<sup>rd</sup> respondent herein filed the Notice of Motion dated 10.12.2019 seeking stay of execution of this Court's judgment entered on 15.3.2019 pending an intended appeal. The application was opposed by the claimant vide Grounds of Opposition filed on 24.1.2020. The application was canvassed by written submissions which were highlighted by both counsel on 16.7.2020 and the matter was scheduled for ruling on 17.9.2020.

2. However, on 17.9.2020, the Claimant asked the court to defer the ruling until the affidavit she filed after the hearing of the application is considered. However, the 3<sup>rd</sup> Respondent objected to the affidavit being admitted as it had the potential of reopening the stay application for fresh hearing. She contended that a formal application should be made so that she can respond. Consequently, the court deferred its ruling and directed the claimant to file a formal application for leave to have the said affidavit admitted and considered in the stay application.

3. On 9.10.2020, the claimant filed the Notice of Motion dated 25.9.2020 seeking the following orders: -

- (a) **That** this Honourable Court be pleased to admit the Further Affidavit of Clarice Odhiambo, the Claimant, sworn on 15.9.2020.
- (b) **That** upon admission, the Further Affidavit of Clarice Odhiambo, the Claimant sworn on 15.9.2020, be deemed as part of her evidence in opposition to the Notice of Motion dated 10.12.2019.
- (c) **That** costs of this application be awarded to the claimant.

4. The Application is based on the grounds set out on the body of the motion and the Supporting Affidavits sworn by the claimant on 25.9.2020. In brief, the claimant contended that the evidence contained in her Further Affidavit sworn on 15.9.2020 was not within her knowledge at the time of filing and hearing the Application for stay dated 10.12.2019; that the evidence is material to the determination of the said application; and that the 3<sup>rd</sup> respondent will not suffer any prejudice which cannot be cured by costs if the new and material evidence is placed on record.

5. The 3<sup>rd</sup> respondent opposed the application vide the Replying Affidavit sworn by her Legal Counsel Angela Temesi Ambetsa on 8.10.2020. In brief the affiant contended that the Further Affidavit sworn on 15.9.2020 should not be admitted because this court lacks jurisdiction to deal with matters pertaining to provident fund dues; that the issues raised by the Further Affidavit are not new and are irrelevant to the question of whether a stay of execution should be granted especially considering that parties have already submitted on the efficacy of provident fund being sufficient security in respect of the judgment sum or in illustrating that the claimant is a person of means; that the claimant has not met the legal threshold for arresting of a the ruling in respect of the application for stay and reopening the arguments

on the matter; that even if the affidavit was to be admitted, the same relates to matters that occurred in 2007, 13 years ago whose records cannot be traced; and that, under Rule 14.3 of the Provident Fund Scheme rules, no payment can be made by the fund to the employer (Sponsor) without prior written consent from the Retirement Benefits Authority and Commissioner of Income Tax. Finally, the 3<sup>rd</sup> respondent contended that she does not, in any way, deal with or handle provident funds and as such any cause of action arising from the Provident Fund should be directed at the Trustees of the Provident Fund or the Administrator.

6. The Application was argued orally by the counsel for the two parties on 12.10.2020.

#### **Claimant's submissions**

7. The claimant submitted that her application is for leave to adduce evidence to prove her financial capacity to repay the decreed sum if the respondent's appeal succeeds. She contended that she has discovered that there are funds which were withdrawn from her contributions to the Provident Fund in 2007 without her knowledge and it is held by the employer which in addition to the unclaimed pension, is evidence that she is a person of means. Consequently, she argued that she has established that she is a person of means by proving that she has a huge pension held by the provident fund plus over Kshs.5 million in the custody of the 3<sup>rd</sup> respondent. She contended that pension is property like land and as such evidence of existence of pension is sufficient proof of property ownership and therefore capacity to repay the decreed sum.

8. In addition, the claimant contended that the employer is a big company which cannot be affected by releasing the decreed sum to her. She urged the court to consider that the employer had offered to pay her higher sum upon separation than what the court finally decreed.

#### **Respondent's submissions**

9. The respondent submitted that the Further Affidavit should not be admitted and the hearing of the application reopened because according to the decision of the Supreme Court in **Albert Chaurembo Mumba & 7 others v Kenya Ports Authority [2019] eKLR**, only the Retirement Benefits Authority (RBA) has Jurisdiction to determine disputes related to pensions.

10. She further submitted that the alleged withdrawal of pension occurred in 2007, 13 years ago and there are no records traceable on the same. She argued that under the CBK Regulations, records are only kept for 7 years and as such it will be prejudicial for the court to deal with issue raised by the Further Affidavit.

11. She further contended that the claimant has not met the threshold for arresting the ruling on the application for stay, and reopening of the application for hearing. She relied on **Gateway Insurance Company Limited v Jimmy Kiamba, Treasurer Nairobi County Government & 2 others [2016] eKLR** and **Samuel Kiti Lewa v Housing Finance Company of Kenya LTD [2015] eKLR**, for emphasis.

#### **Claimant's rejoinder**

12. The claimant maintained that by the intended Affidavit, she is only demonstrating that she is a person of means because she has unclaimed pension of kshs. 22 Million plus over kshs. 5 Million withdrawn by the 3<sup>rd</sup> respondent from her pension in 2007.

#### **Issues for determination and analysis**

13. I have carefully considered the Application, affidavits and submissions by counsel. I agree with the submission by the respondent that the instant application is tantamount to requesting the court to reopen the hearing of application for stay dated 10.12.2019, and admit new evidence. Consequently, the main issue for determination herein is whether the Applicant has met the legal threshold for reopening the hearing of the stay application, and for admitting new evidence before a ruling can be rendered.

14. The legal threshold for reopening a case for hearing is set out under Rule 26(2) of the ELRC Procedure Rules 2016 which provides that:

***“The court shall not re-open a hearing unless, for sufficient reason, it considers it fit to do so.”***

15. In **Samuel Kiti Lewa v Housing Finance Company of Kenya LTD [2015] eKLR**, Kasango J held that:

***“The court retains discretion to allow reopening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening will be defeated by inordinate and unexplained delay.”***

16. In the Australian case of **Smith v New South Wales [1992] HCA 36; (1992)176 CLR 256** cited in the foregoing precedent, the court held that:

***“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to inquire why the evidence was not called at the hearing.”***

17. In **Gateway Insurance Company Limited v Jimmy Kiamba, Treasurer Nairobi County Government & 2 others [2016] eKLR** Odunga J held that:

***“Therefore whereas the power to arrest the decision may be invoked, it is a power which ought to be invoked very sparingly and in exceptional circumstances and not to assist a person who is intent upon abusing the process of the court. Being a discretionary power, as held in Shah v Mbogo [1979] EA 116 at 123 B, the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”***

18. In this the claimant contended that the evidence intended to be added is new and was received after the hearing of the application for stay. She has annexed copies of correspondences between her, her lawyer, the Provident Fund, the respondent, and the respondent’s bankers all of which were done after the close of the hearing of the said application. I am therefore satisfied that the failure to adduce the said evidence during the hearing was not deliberate on the part of the claimant because it was not within her knowledge and possession at the time of the hearing.

19. I am also satisfied the application by the claimant was not made after unreasonable delay since she received the evidence on 24.8.2020 and brought to the attention of the court vide the Affidavit sworn on 15.9.2020. Finally, I am satisfied that admission of the intended affidavit on record will not occasion prejudice on the 3<sup>rd</sup> respondent which cannot be remedied by costs. Consequently, it is my holding that the claimant has met the legal threshold for the court to arrest the ruling on the application for stay of execution pending appeal.

20. In view of the foregoing, I admit the claimant’s Further Affidavit sworn on 15.9.2020 for consideration in determining the respondent’s application for stay of execution dated 10.12.2019. In order to avoid any prejudice, I grant leave to the respondent to file any further affidavit if necessary, to respond to any issues of concern raised by the claimant’s Further Affidavit. Finally, the claimant will pay the 3<sup>rd</sup> respondent costs of the instant application.

**Dated, signed and delivered at Nairobi this 29<sup>th</sup> October, 2020.**

**ONESMUS N MAKAU**

**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> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**