



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2204 OF 2015**

(Before Hon. Lady Justice Hellen S. Wasilwa on 27<sup>th</sup> October, 2020)

**KENYA AVIATION WORKERS UNION.....CLAIMANT**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....RESPONDENT**

**RULING**

1. Pending before this Honourable Court for determination are three Applications.

2. The first Application is the Notice of Motion Application dated 11<sup>th</sup> August, 2020, filed by the Claimant/Applicant. The same is filed under certificate of urgency and is brought under Rule 32 (2) of the Employment & Labour Relations Court (Procedure) Rules, 2016 and Order 23 Rules (1), (8) and (9) of the Civil Procedure Rules and Legal Notice No. 151 of 2010. Seeking orders that:-

***1. This Application be certified as urgent to be heard ex-parte in the first instance.***

***2. An Order of Garnishee be and is hereby issued to Absa Bank and Citi Bank to transfer and/or deposit Kshs. 38,669,171.20 into Account No. 010000515668 Account name: J.A Guserwa & Co. Advocates, International Life House, Harambee Avenue Branch; Nairobi being the SATISFACTION OF THE COURT ORDER of 28<sup>th</sup> July, 2020 in the above suit.***

***3. The costs of this Application be provided for.***

3. The Application which is premised on the grounds that:-

***a) The Respondent has refused and/or ignored to satisfy the Court Order of 28<sup>th</sup> July, 2020.***

***b) The Respondent has a tendency of frustrating the Claimant/Applicant and/or enforcement of Court Order.***

***c) The Honourable Court needs to enforce compliance of its order.***

4. The Application is further supported by the Affidavit of **MOSS NDIEMA**, the Secretary General of the Claimant/Applicant herein sworn on 11<sup>th</sup> August, 2020, in which he reiterates the averments made in the Notice of Motion Application.

5. The Application has been opposed vide the Replying Affidavit of **ANTHONY NJAGI** on 18<sup>th</sup> August, 2020.

6. The 1<sup>st</sup> Garnishee, Barclays Bank of Kenya (ABSA Bank Kenya PLC) filed a Replying Affidavit to the Application deponed by **MICHAEL MASSAWA**, a Legal Counsel at the Bank on 26<sup>th</sup> August, 2020, in which he maintains that the Respondent's account being account number 2022988088 held at the Bank has a Credit Balance of Kshs. 10, 870,662 and therefore has no sufficient funds to clear the entire amount of Kshs. 38 Million demanded by the Claimant.

7. The Claimant argued that the funds held by the 1<sup>st</sup> garnishee ought to be released to the union with the balance being paid by the 2<sup>nd</sup> Garnishee.

8. The second Application is the one dated 13<sup>th</sup> August, 2020 filed by the Respondent herein. The Application is similarly filed under certificate of urgency under the provisions of Sections 3, 12 and 13 of the Employment and Labour Relations Act, Order 22 Rule 22 and Order 42 of the Civil Procedure Rules, 2010. Seeking the following orders that:-

*1. The Honourable Court be and is hereby pleased to hear this Application ex-parte at the first instance.*

*2. The Honourable Court be and is hereby pleased to schedule an expedient Hearing for the Application herein in light of the restrictions imposed by COVID 19 pandemic and issue appropriate orders for directions on inter parte hearing and disposal of the instant motion.*

*3. The Honourable Court be and is hereby pleased to issue an interim order of injunction and/or stay against execution and/or further proceedings in respect of the whole or any of the Orders as reposed in the impugned Ruling and Order dated and delivered on 28<sup>th</sup> July, 2020 pending hearing and determination of Application herewith.*

*4. The Honourable Court be and is hereby pleased to issue an Order of injunction and/or stay against execution and/or further proceedings in respect of the whole and/or part of any of the orders as reposed in the impugned Ruling and Order dated and delivered on 28<sup>th</sup> July, 2020 pending Hearing and Determination of the Application for stay pending CA E223 of 2020 before the Court of Appeal or further orders of this Honourable Court.*

*5. The Honourable Court be and is hereby pleased to issue any further directions or orders as may be appropriate to give effect to the Orders sought herein; and*

*6. The costs of this Application be provided for.*

9. The Application is premised on the ground as set out on the face of the Notice of Motion Application and the Supporting Affidavit of **ANTHONY NJAGI**, the General Manager, Human Resources Development of the Respondent Authority sworn on 13<sup>th</sup> August, 2020 in which he maintains that the Claimant's Application seeking Orders of garnishee against the Respondent despite the pendency and knowledge of Orders of stay in CA E223 of 2020 which matter remains pending before the Court of Appeal for directions.

10. He further avers that the Respondent/Applicant stands to be exposed to grave irreparable harm that would result in its Appeal being rendered nugatory should the injunctive orders sought in the instant Application not be granted.

11. The Affiant further maintains that it has an arguable Appeal, which it seeks to prosecute. It is on this basis that he urged this Honourable Court to allow its Application with costs.

12. In response to the Application the Claimant Union filed a Replying Affidavit deponed to by **MOSS NDIEMA** the union's National Secretary General in which he maintains that there are no stay orders in place as contended by the Respondent in its Application dated 13<sup>th</sup> August, 2020. The Affiant further averred that no such orders have been annexed to the Application to prove the existence of such orders.

13. He further maintained that at the time of filing the current Application the Applicant was aware of the existence of the garnishee orders issued against the Respondent's Bankers on 12<sup>th</sup> August, 2020 and therefore there is nothing to stay.

14. The Claimant union further confirmed that there is a pending Application for stay at the Court of Appeal and argued that the instant Application is only made in a bid to forum shop and is therefore an abuse to the Court process.

15. The Claimant union therefore urged this Honourable Court to find the Application dated 13<sup>th</sup> August, 2020 devoid of merit and proceed to dismiss the same with costs to the Claimant.

16. The third Application is the Notice of Motion Application dated 18<sup>th</sup> August, 2020 seeking vacation of the Order Nisi issued by this Honourable Court on 11<sup>th</sup> August, 2020 and to further have the Claimant's Application dated 11<sup>th</sup> August, 2020 struck out. The Applicant further sought to have the Union's Secretary General cited for contempt of this Honourable Court's Orders.

17. The Application is supported by the Affidavit of **ANTHONY NJAGI** dated 18<sup>th</sup> August, 2020. In further support of its Application the Respondent/Applicant filed a Supplementary Affidavit deponed by **MUCHIRI ELIAS GITHINJI**, Manager Human Resource Development, on 17 September, 2020, in which he reiterates on the averments made in the Notice of Motion Application dated 13<sup>th</sup> August, 2020 and the Supporting Affidavit thereto.

18. In response to the Application the Claimant union filed a Replying Affidavit deponed by **MOSS NDIEMA** sworn on 10<sup>th</sup> September, 2020, in which he maintains that the union was not aware of any stay orders as contended by the Applicant. He further avers that if there were any stay Orders then the same lapsed on 11<sup>th</sup> August, 2020, 14 days after their issuance and failure by the Applicants to extend the same.

19. The Affiant further avers that the Claimant Union did not mislead the Court as contended by the Applicant in the Application dated 11<sup>th</sup> August, 2020 for garnishee orders as the union was indeed not served with any stay orders by the Applicant.

20. He further contended that the Notice of Appeal filed in this matter by the Applicant does not operate as a stay of execution and that it

was up to the Applicant to apply to stay of execution.

21. It is further contended that there is no basis for this Honourable Court to vacate its Orders of 11<sup>th</sup> August, 2020 as demanded by the Respondent and that the Respondent does not stand to suffer any harm if the funds are released as requested as the same are deductions from the union member's salaries.

22. He further urged this Honourable Court to dismiss the Application with costs to the Claimant.

23. Parties thereafter agreed to dispose of the Applications by way of written submissions.

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

24. In its submissions, the Claimant union maintains that the Respondent has failed to comply with the Court Orders of 28<sup>th</sup> July, 2020 and therefore there is need to allow the Application dated 11<sup>th</sup> August, 2020 in terms of the reliefs sought therein.

25. The Claimant further submitted that the Respondent had no basis of continued withholding of the sums demanded and therefore urged this Honourable to find its Application to be merited and proceed to allow it as prayed.

26. The Claimant further submitted that the Respondent's Application for stay dated 13<sup>th</sup> August, 2020 has failed to meet the threshold for the grant of the Orders sought and therefore urged this Honourable Court to accordingly dismiss the Application in its entirety with costs to the Claimant.

#### **Respondents' Submissions**

27. The Respondents on the other hand submitted that the Claimant's Application dated 11<sup>th</sup> August, 2020 was lodged in violation and/or contravention of this Honourable Court's Orders issued on 28<sup>th</sup> August, 2020 and were to remain in force until 13<sup>th</sup> August, 2020.

28. The Respondent maintains that this act by the Claimant contravenes ex-parte orders issued by this Honourable Court. To buttress this argument the Respondent cited and relied on the provisions of Section 57 of the Interpretation General Provisions Act and the case of **Longinus Oroni Muranga Vs David Masika Mafumbo (2017) eKLR.**

29. The Respondent further submitted that it did call for a meeting with the union representatives on 5<sup>th</sup> August, 2020 where the union was informed of the stay orders in force despite there being no order to serve at that particular moment. It therefore maintained that on this basis the Claimant Union was aware of the Order despite the fact that the same were not served upon them.

30. The Respondent maintains that mere knowledge of the Order by the Claimant Union is enough and that emphasis should not be laid on personal service. For emphasis, the Respondent cited and relied on the Court of Appeal decision in the case of **Shimmers Plaza Limited Vs National Bank of Kenya Limited (2015) eKLR** on service of summons.

31. The Respondent further submitted that it indeed enjoyed protection from this Honourable Court against any enforcement by virtue of the stay orders and that any purported enforcement during this period is infact a nullity. For emphasis, the Respondent cited and relied on the cases of **Macfoy Vs United Africa Co. Limited 2 ALL ER 1169, R Vs Chairman Political Parties Tribunal & 2 Others ex-parte Susan Kihika (2017) eKLR** and **Kituo Cha Sheria and Others Vs The Attorney General (2013) eKLR.**

32. The Respondent further maintained that the Claimant's Application dated 11<sup>th</sup> August, 2020 is tainted with misrepresentation and should therefore be dismissed with costs to the Respondent.

33. The Respondent contends that its Application for injunctive Orders is merited as it is likely to suffer potential substantive loss if the orders are not granted. It is further submitted that the Respondent has indeed met the threshold as set out in Order 42 Rule 6 for grant of the orders.

34. The Respondent further contended that its Appeal would be rendered nugatory in the event the orders sought in its Applications are not granted by this Honourable Court.

35. In conclusion, the Respondent urged this Honourable Court to dismiss the Claimant's Application dated 11<sup>th</sup> August, 2020 and that it has proved its case to warrant the granting of the orders sought in its Applications dated 13<sup>th</sup> and 18<sup>th</sup> August, 2020.

36. I have considered the averments of the Parties herein. As per my orders of 8/9/2020, there are basically 2 applications before me:-

1) ***The garnishee application***

2) ***The stay order***

37. In respect of the garnishee application, there is indeed a debt owing by the Respondent for which the Claimant is entitled to payment. The 1<sup>st</sup> Garnishee Absa Bank has confirmed holding money for the Respondent in their bank account to the tune of Kshs.10,870,662/=. This cash is therefore liable to order of attachment and there is a decree nisi in force.

38. The second application relates to setting aside the decree nisi and staying any other proceedings in this case.
39. The Respondents have argued in favour of this application that they have stay orders in Court of Appeal No.E223 of 2020 and therefore this Court should proceed to grant the orders setting aside the decree nisi.
40. The Respondents have however failed to exhibit before this Court the existence of such stay orders. The orders of stay are not attached to the application and therefore if there is indeed such stay orders from the Court of Appeal, the same have not been brought to this Court's attention.
41. The Applicants also denied knowledge of such orders nor service of the same.
42. In the absence of any stay orders from the Court of Appeal as stated, there is no any other reason that would entitle this Court to set aside the decree nisi.
43. In the circumstances, I find the decree nisi orders valid and I confirm them as absolute to the tune of Kshs.10,870,662/= as against the 1<sup>st</sup> Garnishee.
44. The Applicant is free to pursue the 2<sup>nd</sup> Garnishee for the remainder of the Decretal sum.
45. As concerns stay orders, they are therefore rejected and Respondents are free to pursue the same in any other Court
46. Costs in the cause.

Dated and delivered in Chambers via zoom this **27<sup>th</sup> day of October, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Guserwa for Claimant Union – Present

Olando holding brief Luci for Respondents