



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1446'B' OF 2012**

**(Before Hon. Justice Hellen S. Wasilwa 11<sup>th</sup> November, 2020)**

**PATRICK OMUTIA OTULIA.....1<sup>st</sup> CLAIMANT**

**PETER GACHIE KAROGI as legal representative**

**of GRACE NZOMO (Deceased).....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**NAIROBI CITY WATER & SEWERAGE**

**COMPANY LIMITED.....RESPONDEDNT/APPLICANT**

**RULING**

1. Before this Court is the Respondent's Application dated 16/9/2020 seeking the following orders:-

- a. *This Application be certified as urgent and the service thereof be dispensed with in the first instance for purposes of prayer 2 and 3.*
- b. *The Honourable Court be pleased to order stay of execution of the judgment and decree of the Honourable Court given on 22/5/2018 pending the hearing and determination of this Application.*
- c. *The Honourable Court be pleased to order the warrants of attachment and sale of property issued to Viewline Auctioneers on 14/9/2020 be recalled and/or cancelled pending the hearing and determination of this Application.*
- d. *The Honourable Court be pleased to order stay of execution of the judgment and decree of the Honourable Court given on 22/5/2018 pending the hearing and determination of the appeal.*
- e. *The cost of the application be provided for.*

2. The Application is supported by the grounds set out therein and the Supporting Affidavit of Patrick M. Maina sworn on 17/9/2020 and his Supplementary Affidavit sworn on 26/10/2020. The Claimants have opposed the Application vide the Replying Affidavit of Alfred Nyabena sworn on 16/10/2020.

**The Applicant's Case**

3. The Applicant avers that this Honourable Court delivered its judgment on 22/5/2018 where the 1<sup>st</sup> and 2<sup>nd</sup> Claimants were awarded KShs. 1,579,689.44 and KShs. 4,823,598.50 respectively. Aggrieved by the decision, the Applicant filed an application for review of the judgment on 26/3/2019. However, the application was dismissed vide the Ruling of 30/1/2020.

4. On 5/2/2020 the Applicant filed its Notice of Appeal and a letter requesting for typed proceedings in order to lodge an appeal at the Court of Appeal. The same were served upon the Claimants.

5. However, the Claimant's auctioneers obtained warrants of attachment and sale on 14/9/2020 to sell the Applicant's movable property in order to satisfy the contested and unpaid portion of the decretal sum of KShs. 2,989,744.94. The Applicant further avers that I. G Ringera T/A Viewline Auctioneers proclaimed the Applicant's movable properties vide the Proclamation of Attached Movable Property dated 14/9/2020.

6. It is the Applicant's case that it will suffer great prejudice if the proclaimed goods are sold in satisfaction of the disputed portion of the decretal sum, as they are its tools of trade essential for its daily operations as a public utility provider.

7. Further, the 2<sup>nd</sup> Claimant is a person of unknown and undisclosed means hence unlikely to refund the contested portion of the decretal sum, in the event the appeal succeeds. As such, the Applicant will bear an unreasonable burden of recovering the decretal sum.

8. It is the Applicant's case that despite the extreme financial constraints occasioned by COVID-19, it is willing to issue a bank guarantee or insurance bond for the due performance of the unsettled portion of the decree. The Applicant therefore urged that it was in the interest of justice that the orders sought be granted.

9. The Claimants contend that the Application is devoid of merit and does not meet the threshold for the grant of an order for stay of execution hence should be dismissed with costs. Further, the Applicant is guilty of inordinate delay in filing the application which has not been explained to this Court.

10. It is the Claimants' case that the intended appeal is frivolous, lacks merit and is intended to waste the court's time. Further, a substantial amount of time has passed since this Court delivered its judgment hence it is in the interest of justice that the application be dismissed with costs.

11. It is the Claimants' position that the right of appeal ought to be balanced against the Claimants' right to enjoy the fruits of the judgment. As such, this Court should allow execution to proceed. They contend that the Respondent cannot choose the orders to comply with hence should not be aided at the 2<sup>nd</sup> Claimant's expense.

12. It is the Claimants' contention that the Respondent has misled this Court that it is experiencing financial constraints due to COVID-19 yet the judgment was entered around two years ago. They further contend that the application is fatally defective as the time within which to file the appeal has lapsed without the Applicant seeking an extension of the same.

13. The Claimants aver that the 2<sup>nd</sup> Claimant will suffer prejudice if the application is allowed hence urged this Court to exercise its jurisdiction and disallow the application.

#### **The Applicant's Rejoinder**

14. The Applicant has sought to clarify that its application seeks to stay execution of the judgment and decree pending the hearing and determination of its appeal on the ruling dismissing its application for review. The Applicant contends that the ruling regarding its application for review was delivered on 30/1/2020 hence there has been no inordinate delay.

15. The Applicant avers that it settled the Claimants' Party and Party Bill of Costs as a demonstration of good faith, leaving the issue of the contested sums. The Applicant reiterates that it will suffer great prejudice if the proclaimed goods are sold hence the application should be allowed.

16. The Application was disposed of by way of written submissions with both parties filing their respective submissions.

#### **The Applicant's Submissions**

17. The Applicant submits that it has demonstrated the substantial loss it will suffer if the orders sought are declined. In particular, the 2<sup>nd</sup> Claimant is a person of unknown means, hence highly unlikely to refund the decretal sum if the appeal succeeds.

18. Further, the Claimants' auctioneers have proclaimed the Applicant's movable properties and if the orders sought are not granted, the proclaimed goods will be sold. It is contended that the 2<sup>nd</sup> Claimant has not filed an Affidavit of Means to prove his capability to refund the decretal sum and relies on the case of **Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR** for support.

19. It is submitted that the appeal is not a means of denying the 2<sup>nd</sup> Claimant the fruits of his judgment. The Applicant contends that it has demonstrated good faith by paying the undisputed sum and settling the Claimants' Party and Party Bill of Costs.

20. The Applicant submits that the application was made within a reasonable time in light of the circumstances this case and relies on the case of **Mohsen Ali & Another vs. Priscillah Boit & Another [Supra]** where the Court observed that what amounted to unreasonable delay depended on the surrounding circumstances of each case.

21. Finally, the Applicant submits that it has made an offer to issue a bank guarantee or an insurance bond as security for the due performance of the decree should the appeal be dismissed. The Applicant therefore urges that it has met the threshold set to warrant the issuance of stay of execution thus the orders sought should be granted as prayed.

#### **The Claimants' Submissions**

22. The Claimants submit that the Applicant's failure to file a Memorandum of Appeal is an indication that the Applicant does not have an arguable appeal which is intended to waste this Court's time. As such, the application should be disallowed to save this Court's time.

23. The Claimants contend that the Applicant has not demonstrated the substantial loss it stands to suffer if the orders sought are not granted

hence the same should be granted as was held in the case of **Samvir Trustee Limited vs. Guardian Bank Limited; Milimani HCCC 795 of 1997.**

24. It is the Claimants' submissions that there has been an inordinate delay of more than 2 years in making the application hence the application is an afterthought. To fortify this position, the Claimants have relied on the case of **Mohsen Ali & Another vs. Priscillah Boit & Another [2014] eKLR.**

25. The Claimants submit that the Applicant has not furnished any security or demonstrated any willingness to furnish securities hence it is in the interest of justice the application be disallowed and the Applicant condemned to bear the costs of the application together with the auctioneers' costs.

26. I have examined the averments of the Parties herein. The Applicants seeks stay of this Court's judgement issued on 22/5/2018.

27. The Applicants further filed an application for review of this Court's judgement and this was dismissed on 20/1/2020. The Applicants now seek stay of the Court's judgement.

28. Order 42 rule (6)(2) of the Civil Procedure Act provides 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”.*

29. Key is this order in issue of the Applicant being timeous. The Applicant seek stay in this case over a judgement delivered in May 2018, over 2 years ago. The delay in seeking stay is not explained.

30. The Applicants aver they have filed an appeal over this Court's judgement and they stand to suffer harm if the orders sought are not granted.

31. On issue of security, the Applicants aver that they are willing to provide such security in form of a bank guarantee.

32. In view of the fact that the Applicants have filed an appeal and are willing to offer security, I will exercise my discretion and allow the application for stay on condition that the Applicants deposits the decretal sum in an interest earning account held in joint names of Counsels on record within 30 days. In default execution to proceed.

33. Costs in the Appeal.

Dated and delivered in Chambers via zoom this **11<sup>th</sup> day of November, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Wavinya holding brief Nyabena for Claimants - Present

Ogutu for Respondent – Present