



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

*(Before Hon. Lady Justice Maureen Onyango)*

**CAUSE NO. 884 OF 2015**

**PETER WANYAMA OJIAMBO.....CLAIMANT**

*VERSUS*

**THE TECHNICAL UNIVERSITY OF KENYA.....1<sup>ST</sup> RESPONDENT**

**PROF. F. W. O. ADUOL.....2<sup>ND</sup> RESPONDENT**

**PROF. JOSEPH KIPLANG’AT.....3<sup>RD</sup> RESPONDENT**

**CONSOLIDATED WITH CAUSE NO. 943 OF 2015**

**ALBERT PETER WERE ACHOKA.....CLAIMANT**

*VERSUS*

**THE TECHNICAL UNIVERSITY OF KENYA.....1<sup>ST</sup> RESPONDENT**

**PROF. F. W. O. ADUOL.....2<sup>ND</sup> RESPONDENT**

**PROF. JOSEPH KIPLANG’AT.....3<sup>RD</sup> RESPONDENT**

**RULING**

Judgment in this suit was delivered on 17<sup>th</sup> July 2019. The court awarded each of the claimants the following; -

*“In the final analysis I enter judgment for each of the claimants against the respondents as follows –*

*1. Unpaid Salary Kshs.....545,872*

*2. Gratuity Kshs.....420,966*

*3. Compensation.....Kshs.341,170*

*The total award for each claimant is Kshs.1,308,008”*

The Respondent being aggrieved by the decision, filed a Notice of Appeal on 30<sup>th</sup> July 2020. The same is dated 24<sup>th</sup> July 2020.

The costs of the suit have not been assessed as the claimants Bill of Costs filed on 7<sup>th</sup> September 2020 has not yet been taxed.

By an application dated 21<sup>st</sup> September 2020, ALBERT PETER WERE ACHOKA, the claimant in Cause No. 943 of 2015 seeks the

following orders –

1. Spent.

2. That the Court be pleased to order that the decree issued on 4<sup>th</sup> September 2020 be executed forthwith, pending the taxation proceedings.

3. That costs of the application be provided for.

The grounds in support of the application as set out on the face thereof are that –

1. That the 2<sup>nd</sup> Claimant is in dire need of medical treatment and having exhausted all means to purchase and acquire vital medicines and drugs, his health is at immediate risk of further deterioration.

2. That previous requests to the Respondents to release the decretal sums pending the taxation have come to nought.

3. That it is trite law that claimants are entitled to fruits of judgement upon conclusion of a trial process with a determination in their favour.

4. That is just and within the ambits of the law for the court to grant the orders sought

The application is further supported by the affidavit of the Applicant in which he states that he has throughout the proceedings been incapacitated by a serious medical condition. He annexed the medical reports which disclose that he is 73 years old and was diagnosed with multiple myeloma in 2016 and is currently on treatment for the same. There are several discharge summary and clinical abstract sheets reflecting that he has been admitted to hospital on several occasions since 2018 and currently attends medical review clinics monthly. His doctor has in a report dated 16<sup>th</sup> September 2020 indicated that the medication the Applicant is required to take is expensive and has a significant financial burden to him and his family as the treatment period is indefinite. The doctor appeals for financial assistance to the Applicant.

When the application came before me for inter partes hearing, I requested the Respondent to consider the plea of the Applicant on humanitarian grounds and gave the parties time to try and come up with some partial agreement that would relieve the Applicant of his current medical and the related financial burdens. The parties however failed to reach any agreement and it now falls upon the court to make a determination on the application.

In the replying affidavit of Okinyo Byron Barrack, Counsel for the Respondents, sworn on 14<sup>th</sup> October 2020, he states that the Respondent was aggrieved by the judgment and filed a Notice of Appeal. That the Respondent proceeded to file an application for stay before the Court of Appeal which has been certified urgent and is awaiting allocation of a hearing date.

He deposes that upon receipt of the Applicant's letter dated 1<sup>st</sup> September 2020, the 1<sup>st</sup> Respondent instructed Counsel to advise the Applicant that due to COVID-19 the Respondent's revenues which are normally realised from students had been immensely affected. That in view of the application before the Court of Appeal the matter should be left for the Court to decide.

In a rejoinder by way of a further affidavit sworn on 19<sup>th</sup> October 2020, the Applicant takes issue with the averments in the replying affidavit of Okinyo Byron Barrack. That it is not true that the respondent's application for stay of execution has been certified urgent by the Court of Appeal citing communication from the Deputy Registrar, Court of Appeal vide email dated 9<sup>th</sup> October 2020 informing the parties that the Court of Appeal vide email dated 9<sup>th</sup> October 2020 declined to certify the application urgent.

He accused the Respondent's advocates of failing to serve the application for stay filed in the Court of Appeal upon the Applicant, stating he only learned about the same while perusing the replying affidavit.

The Applicant further states that the averments about lack of revenues by the Respondent are not backed by evidentiary material. He also doubts the chances of success of the appeal.

#### **Determination**

The parties did not file any written submissions or make oral submissions in Court and opted to rely entirely on the grounds on the face of the application and the supporting and replying affidavits on record. The issue for determination is whether the prayers of the applicant are merited.

Section 94 of the Civil Procedure Act and Order 49 Rule 5 of the Civil Procedure Rules upon which the application is premised provide as follows –

#### **94. Execution of decree of High Court before costs ascertained**

**Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to**

**the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.**

**[Order 49, Rule 5.] Execution may be Registrar.**

**5. Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and ordered by imprisonment in execution of a decree of the High Court may be made by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge.**

The prayers sought by the Applicant are in my view invoking the inherent powers of the Court to do justice to the parties in accordance with the particular circumstances of each case. The general rule is that a decree holder is entitled to enjoy the fruits of his judgment unless there are orders of stay. In this case there are no orders of stay. However, the only reason the Applicant seeks relief from the court in the manner he has done is because he is in urgent need of money and cannot wait for taxation.

I have perused the file herein and do not find any letter applying for certified copy of proceedings and judgment for purposes of appeal. As the Applicant has deposed in his affidavit, the Respondent has not served the application filed at the Court of Appeal for stay upon the Applicant or his Counsel. The said application has not been certified urgent and there is no indication when it is likely to be heard by the Court of Appeal. In the copy of the application for stay filed in the Court of Appeal, the Respondent has not attached any letter seeking certified copies of proceedings and judgment for purposes of appeal. It has further not attached a Memorandum or Draft Memorandum of Appeal. It is now more than 60 days since judgment was delivered and there is no indication that a Memorandum of Appeal has been filed. No leave has been sought to lodge the appeal out of time or for extension of time for lodging the appeal. The file does not have typed proceedings.

All these can only signify that the Notice of Appeal and application for stay of execution filed by the Respondent are intended to delay the Applicant from benefiting from the fruits of his judgment. The mere fact that an application for stay of execution is pending in the Court of Appeal or that the Judgment Debtor has filed or intends to file an appeal like in the instant case is not a bar to execution as was stated by the Court in the case of **African Commuter Services Ltd v Kenya Civil Aviation Authority & 2 Others [2014] eKLR**, where Seron, J. stated that:

*“To my mind, I am satisfied that for whatever it is worth, that application said to be pending in the Court of Appeal cannot be a bar to the decree holder as a successful litigant from seeking to enforce its right to enjoy the fruits of its litigation...”*

*The decree sought to be executed is a lawful one issued by the Court of Appeal.”*

Further, in the case of **Mercedes Sanchez Rau Tussel v Samken Ltd & 2 Others [2002] eKLR**, Kuloba, J. (as he then was) stated as follows:

*“True, aspects of the judgments may still be in question on appeal or review application; but it would be wrong to hold as a principle, that once there is an appeal, threatened appeal, or an application for a review to apportion liability amongst judgment-debtors, no part of a judgment is executable until after determination of the review or appeal. Such a view would permit any person desirous of jamming the justice process or merely to postpone pay-day simply to lodge a notice of appeal or to file an appeal itself, or to pretend anything, and thereby deny a party the whole judgment.”*

The rationale of Section 94 of the Civil Procedure Act was explained by the Court in the case of **Mercedes (Supra)** in the following terms: -

*“The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a judgment debtor to hold up execution of a decree for a known sum or a sum to which there can be no sensible contest, section 94 provides that the court may permit the execution of a decree except as to so much thereof as relates to unsettled costs.”*

The Applicant herein has explained that he needs money for medical attention. He has a decree which would ease his financial and medical burden. I find this justification for execution of the decree before judgment. I further find that there is no demonstrated intention by the Respondent to file an appeal against the judgment of this court.

For the forgoing reasons, I find the application merited and make the following orders –

- 1. That the Respondent do release to the Applicant the sum of Kshs.1,308,008 as awarded in the judgment immediately pending taxation of the claimant’s bill of costs. Should the Respondent not pay within 14 days, the Applicant is at liberty to execute the decree.**
- 2. That the rest of the decree awaits taxation and/or hearing and determination on the Respondent’s application for stay of execution, whichever is earlier.**
- 3. That the Respondent pays the costs of this application.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF NOVEMBER 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, the 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 the 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**