REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 846 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BANKING INSURANCE AND FINANCE UNION.....CLAIMANT/RESPONDENT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT/APPLICANT

RULING

Judgment in this suit was delivered on 21st February 2020. Dissatisfied by the judgment, the Applicant (Respondent in the suit) filed the instant application seeking the following orders –

(a) Spent.

(b) spent.

(c) Pending the hearing and determination of the intended appeal, the Court be pleased to grant an order staying execution of the Judgment and resultant decree of Onyango J. delivered on 21st February 2020.

(d) The costs of this Application be provided for.

The application is supported by the grounds on the face thereof and affidavit of STEPHINE OPIYO OBONGO, the Applicant's Employee Relations Advisor sworn on 22nd June 2020.

The grounds as on the face of the application and in the affidavit in support thereof are in summary, that the applicant is dissatisfied with the judgment delivered herein and has preferred an appeal to the Court of Appeal which in the opinion of the Applicant raises serious arguable points with high chances of success. That if stay is not granted the appeal will be rendered nugatory as the Applicant will not be able to recover the money should the appeal be successful as the (grievants) are currently unemployed and with no steady source of income.

The Applicant states it is willing to abide by any conditions and terms as to security as the court may impose.

Applicant/Respondent Submissions

In the submissions in support of the application the Applicant submits that the principles to be considered by the Court are those set out under Order 42 Rule 6(1) and (2) being that he Applicant satisfies the Court that it will suffer substantial loss should the orders of stay not be granted and that such security as the court may order has been given by the Applicant. Further, that the application is made without delay.

The Applicant submitted that it is apprehensive that it will be unable to recover the decretal sum should it be successful in the appeal as the grievants are unemployed without not steady source of income and thus the appeal will be rendered nugatory thus defeating the object of the appeal.

That the Claimant/Respondent has already filed an application for tabulation of the award to Kshs.20,729,940 which it seeks to enforce even before the Court hears and determines Applicant's application for stay. That the Applicant has opposed this application and has computed the award to be Kshs.19,750,860.

The Applicant relied on the case of **Meteine Ole Kilelu & 10 Others v Moses K. Nailole Civil Appeal No. 340 of 2018**, where the Court held that: -

> *"where the decree appealed against is a monetary decree, the Applicant has to show that either once the execution is done, after refusal of the application, the Applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large visa a vis his status, or business that the execution would in itself ruin his business or threaten his very existence."*

The Applicant also relied on the case of **Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another [2017] eKLR** which referred with approval to the case of **Mukuna v Abuoga (1988) KLR 645,** where the Court of Appeal referring to the exercise of discretion by the High Court and the Court of Appeal in granting stay of execution under Order 42 of the Civil Procedure

Rules and Rule 5(2)(b) of the Court of Appeal Rules respectively, emphasized the centrality of substantial loss thus:

> *"… the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."*

It submits that despite the averments by the Claimant (Respondent in the application) that the Applicant is a huge institution, the loss if suffered would not be recoverable.

The Applicant further submits that the intended appeal is arguable as the compensation awarded of 12 months' gross salary to each grievant is excessive. It relied on the case of **John Mwangi Ndiritu v Joseph Ndiritu Wamathai [2016] eKLR** where the court observed that –

> *"...Even though I am not determining the appeal, it is important to note that the applicant must demonstrate that he has an arguable appeal. I am fully aware that I cannot go into the merits of the appeal at this stage but for purposes of the application before me, it is necessary to satisfy myself that the applicant has arguable grounds."*

The Applicant urges the Court to exercise its discretion in favour of the Applicant relying on the decision in **Congress Rental South Africa v Kenyatta International Convention Centre: Co-operative Bank of Kenya Limited and Another (Garnishee) (2019) eKLR**.

On whether the application was made without unreasonable delay, the Applicant submitted that following delivery of judgment on 21st February 2020 it filed notice of Appeal on 24th February 2020 and on the same date wrote to the Deputy Registrar be speaking typed proceedings and certified copy of decree to enable it file appeal. The respondent relied on the case of **Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR** where it was stated:

> *"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter…"*

That the Claimant's averments that the prosecution of the case was delayed from the time the suit was filed to when judgment was finally rendered is misplaced and does not apply in this circumstance. That despite suspension of court operations to curb the spread of COVID-19 from March 2020 to May 2020, the Applicant made every reasonable effort to file the application for stay as soon as possible.

On security for costs, the Applicant states that it has unequivocally stated that it is ready and willing to offer security on whatever terms as may be imposed by the court in order to protect its interests.

For the claimant it is averred that there is no valid reason for the intended appeal, that the employees continue to suffer even after judgment was delivered in their favour. It urged the court to exercise its discretion in favour of the grievants. It is submitted for the claimant that the application is a misuse of court process that should not be entertained.

The Claimant relied on the case of **Kenya Shell Limited v Benjamine Karuga Kibiru and Ruth Wairimu Karuga**, **Civil Appeal No. Nai 97 of 1986 (KAR 1982-88)**, where the Court of Appeal held that it is not normal in money decrees for the appeal to be rendered nugatory if payment is made **(purse page 4 marked, page 5 last three paragraph)** –

> *"But this court must look at the matter from the point of view of rule 5(2) of court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent's circumstances, but the information that was forthcoming did not confirm the applicant's misgivings.*
>
> *It is usually a good rule to see if order xli rule 4 of the Civil Procedure Rules can be substantiated. It there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.*
>
> *It is not sufficient by merely stating that the sum of Kshs.20,380.00 is a lot of money and the Applicant would suffer loss if the money is paid. What sort of loss would this be 'in an application of this nature, the Applicant should show the damage it would suffer if the order for stay is not granted? By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be the appeal succeeds. On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement. The applicant has not given to the court sufficient materials to enable it to exercise its discretion in granting the order of stay.*

On my part I cannot find possible evidence to persuade me to grant the order prayed for. It is unfortunate that the High Court passed remarks that may have annoyed the applicant, but that by itself would not be sufficient reason to grant the stay.

I too would dismiss the Application with costs."

The claimant relied also on **Civil Appeal No. Nai 201 of 2013 (UR145/2013), Freight in Time Limited v Rosebell Wambui Muthee**, where the Court of Appeal observed as follows at page 4 and 5.

"The above two principles applicable to the determination of the application under Rule 5 (2) (b) of the Court of Appeal Rules are well settled. This court clearly reiterated the said principles in the case of ***Republic v Kenya Anti-Corruption Commission and Others (2009) KLR 31*** *as follows:*

> *The law as regard the principles that guide the court in such an application brought pursuant to Rule 5(2)(b) of the rules are now well settled. The court exercise unfettered discretion which must be exercised judicially. The Applicant needs to satisfy the court first, that the Appeal or Intended Appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the Application may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb.*

The learned judges held that satisfaction of only one of the twin principles will not avail the applicant the order sought. Thus having succeeded in demonstrating the arguability of the intended appeal without satisfying the nugatory principle, the application had to fail.

As the applicants were obliged to satisfy the two conditions above even assuming they were able to satisfy the nugatory aspect, still, they would not have met the threshold for the granting of a stay or the status quo order, they are seeking. In the result, the application dated 20th April 2011 and filed in court on 26th April 2011, must fail and accordingly it is dismissed with costs.

In this case, we are not persuaded that the applicant has demonstrated that the appeal if successful, will be rendered nugatory if the orders sought are not granted.

We note from the circumstances of this Application that the applicant has not shown that the respondent has no capacity to repay the sums paid if the appeal succeeds. In the circumstances, it is our finding that the appeal will not be rendered nugatory if the appeal succeeds.

From the circumstances of the application before us, although the applicant has demonstrated that the appeal is arguable it has, however, failed to demonstrate that the appeal will be rendered nugatory if the instant application is dismissed. The applicant has therefore failed to demonstrate the existence of both limbs as required by Rule 5 (2) (b) of this Court's Rules.

The upshot is that we decline to grant a stay of execution, pending the hearing and final determination of Civil Appeal No. 234 of 2013. The application is accordingly dismissed with costs to the Respondent."

The Claimant also relied on **Civil Appeal No. 18 of 2017, Amal Hauliers Limited v Abdulnasir Abukar Hassan** where Korir J. observed at page 4 as follows: -

"The applicant has indicated its readiness to furnish security for the due performance of the decree. The respondent asserts that he is entitled to equal treatment before the law and the fact that the applicant is insured by a big company should not be used to trample on his rights. The answer to the respondent's concern is that his interests will be taken care of by the applicant depositing the decretal amount. Once the appeal is determined, the winner will have ready access to the money.

A perusal of the memorandum of appeal shows that the applicant is appealing against the decision on liability and quantum. Much as I do not want to speculate on the outcome of the appeal, I don't think that the respondent will leave this court empty handed. He says he needs the money for treatment. His proposal that he gets half the decretal amount is therefore reasonable.

In the circumstances, I direct that half the decretal amount be released to the respondent's counsel within 30 days from the date of the delivery of this ruling. The other half of the decretal amount shall be deposited in an interest earning account in the joint names of the advocate for the applicant and the respondent within 30 days from the date of the ruling."

The claimant prays that the application be dismissed.

Determination

I have considered the application and the grounds and affidavits in support and in opposition thereof. The only issue for determination is whether the Applicant meets the threshold for grant of the orders sought in the application.

Although the Applicant relies on Order 42 Rule 6(1) and (2) as setting the principles for grant of stay orders pending appeal, the threshold should be both the principles set out under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules as well as Rule 5 of the Court of Appeal Rules, this being an intended appeal to the Court of Appeal.

Order 42 Rule 6(1) and (2) Civil Procedure Rules provides as follows:

[Order 42, rule 6.] Stay in case of appeal.

> **(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.**

Further, Rule 5(2)(b) of the Court of Appeal Rules provides as follows –

> **(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—**
>
> > **(a) …;**
> >
> > **(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75,**
> >
> > **order of stay of execution, an injunction or stay of any further proceedings on such terms as the court may think just.**

The principles have been well enunciated in judicial opinions.

In **Republic v Kenya Anti-Corruption Commission and Others (supra)** the court stated as follows –

> *"The law as regard the principles that guide the court in such an application brought pursuant to Rule 5(2)(b) of the rules are now well settled. The court exercise unfettered discretion which must be exercised judicially. The Applicant needs to satisfy the court first, that the Appeal or Intended Appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the Application may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb."*

The Applicant has stated that it has an arguable appeal and has listed its reasons.

It is not for this Court to determine an arguable appeal as this is to be determined by the Court of Appeal. However, from the grounds set out in both the supporting affidavit and the submissions of the Applicant, it is clear that it only contests the award of 12 months' compensation to each of the grievants.

The proposed grounds of appeal are that –

> *i. In making a finding that the Respondent was unfairly terminated, the Judge erred in that she failed to take cognizance of the fact that the termination was in fact based on poor performance after a management review process following the introduction of the performance management policy which was in line with the undertaking by the parties to the suit contained in the Memorandum of Agreement dated 4th October 2005.*
>
> *ii. The Learned Judge erred in failing to appreciate that the Applicant dismissed the grievants using fair procedure set out in the CBA and the Respondent's policy while terminating grievants on grounds of poor performance as such the procedure followed by the Applicant cannot be termed as unfair.*
>
> *iii. The Learned Judge erred in awarding 12 months' compensation which ought not to be given except where the matter has been fully explained and justified.*
>
> *iv. The Learned Judge erred in awarding 12 months' compensation to each grievant whereas each grievant was terminated on account of varying degrees of poor performance with some grievants even participating in PIP and still scoring low in performance thus giving the Respondent fair and valid reason for termination.*
>
> *v. The Learned Judge erred in failing to consider the various factors under section 49 (4) of the Employment Act, 2007 when awarding damages for each grievant rather than a uniform award for all.*

In the judgment I found as a matter of fact that the grievants were not taken through any disciplinary process, a fact admitted by the Applicant's witness under cross examination.

In view of this fact, the only valid grounds for appeal are those on the quantum of compensation. For this reason, I would conclude that the Applicant has an arguable appeal. The appeal is thus not frivolous. Whether or not it would succeed is a matter for the Appellate Court to determine after hearing the parties.

The second principle is whether the appeal would be rendered nugatory. The Applicant has stated that it will not be able to recover the decretal sum as the grievants are jobless and have no reliable source of income. This averment has not been backed by any evidence, though

the Claimant also made no attempt to controvert the same by showing that the grievant are not men and women of straw and would be able to refund the decretal sum should the appeal succeed.

The foregoing notwithstanding, it is my view that the terminations having been unfair at least under Section 41, the grievants would not be left empty handed by the Court of Appel. As was stated in **Amal Hauliers Limited v Abdulnasir Abukar Hassan (supra)**

> *"A perusal of the memorandum of appeal shows that the applicant is appealing against the decision on liability and quantum. Much as I do not want to speculate on the outcome of the appeal, I don't think that the respondent will leave this court empty handed. He says he needs the money for treatment. His proposal that he gets half the decretal amount is therefore reasonable.*
>
> *In the circumstances, I direct that half the decretal amount be released to the respondent's counsel within 30 days from the date of the delivery of this ruling. The other half of the decretal amount shall be deposited in an interest earning account in the joint names of the advocate for the applicant and the respondent within 30 days from the date of the ruling."*

The Court is required to balance both the interest of the grievants who have a valid decree and who have been in court since 2014, as well as those of the Applicant who has a right to fair hearing which envisages a right to ventilate its case to the highest court in the land. As I have already observed above, the grievants herein are unlikely to be left empty handed even if the Appeal succeeds.

I will therefore make the following orders: -

1. **The Applicant is granted stay of execution pending appeal on the following terms: -**

   (i) That they deposit 50% of the decretal sum which has been agreed upon by the parties to be Kshs.20,669,412/- into a joint interest earning account in the name of the Claimant Union and Counsel for the Applicant. In view of the fact that the Applicant is a Bank, the money can be held in an account at the bank.

   (ii) 50% of the decretal sum to be released to the grievants within 30 days from date of this ruling.

   (iii) Costs of the application shall be in the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF DECEMBER 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 15th March 2020 and subsequent directions of 21st 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