



**REPUBLIC OF KENYA**

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

**PETITION NO. 27 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: ARTICLES 19, 20, 22, 23, 28, 41, 47 AND 162(2)(a) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF: THE EMPLOYMENT ACT**

**AND**

**IN THE MATTER OF: THE EMPLOYMENT AND LABOUR RELATIONS ACT AND THE RULES MADE THEREUNDER**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES 28, 41 AND 47 OF THE CONSTITUTION OF THE  
CONSTITUTION OF KENYA, 2001**

**BETWEEN**

**KENYA NATIONAL FARMERS FEDERATION**

**(Suing through its Registered Officials namely**

**Hon. Nduati Kariuki (Chairman)**

**Prof. Kaburu M'Ribu (Secretary) and**

**Grace Ngambi (Treasurer)**

**suing on its own behalf and in**

**the interest of the 23 petitioners listed herein.....1<sup>ST</sup> PETITIONER**

**GEORGE NYAMU.....2<sup>ND</sup> PETITIONER**

**BENARD M. MULANDI.....3<sup>RD</sup> PETITIONER**

**COLLINS ODHIAMBO ONDIEK.....4<sup>TH</sup> PETITIONER**

**DORCAS ATIENO WAMBIA.....5<sup>TH</sup> PETITIONER**

**MUGAMBI EDWARD NKUBIRI.....6<sup>TH</sup> PETITIONER**

FAITH NZESE MAITHYA.....	7 <sup>TH</sup> PETITIONER
BEN RONO.....	8 <sup>TH</sup> PETITIONER
GILBERT KIPKORIR TANUI.....	9 <sup>TH</sup> PETITIONER
ISAAC THURANIRA.....	10 <sup>TH</sup> PETITIONER
JOHN OKARI OKIOGA.....	11 <sup>TH</sup> PETITIONER
KELVIN MURITHI NJERU.....	12 <sup>TH</sup> PETITIONER
LABAN KAARA MWANIKI.....	13 <sup>TH</sup> PETITIONER
MISHECK KIOGORA.....	14 <sup>TH</sup> PETITIONER
NANCY NTINYARI MWONGELA.....	15 <sup>TH</sup> PETITIONER
PERVINCE ONYANGO OGUTU.....	16 <sup>TH</sup> PETITIONER
PETER KAHENI.....	17 <sup>TH</sup> PETITIONER
PETER MWANGI GAKUU.....	18 <sup>TH</sup> PETITIONER
PHILIPS OWITI MINUDI.....	19 <sup>TH</sup> PETITIONER
RODA MBANDI KILONZI.....	20 <sup>TH</sup> PETITIONER
ROBERT KAMAU.....	21 <sup>ST</sup> PETITIONER
ROSE KAMBURA NJILU.....	22 <sup>ND</sup> PETITIONER
TOM OCHIENG.....	23 <sup>RD</sup> PETITIONER
MUTAVA XAVIER MASILA.....	24 <sup>TH</sup> PETITIONER

**VERSUS**

**HUMANIST INSTITUTE FOR CO-OPERATION WITH**

**DEVELOPING COUNTRIES (HIVOS).....1<sup>ST</sup> RESPONDENT**

**SNV NETHERLANDS DEVELOPMENT**

**ORGANIZATION IN KENYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

Judgment herein was delivered on 10<sup>th</sup> August 2018. The court awarded the 23 petitioners a sum of Kshs.13,898,200.00/= plus costs. The applicants/the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the suit felt aggrieved and are desirous of appealing the decision. The applicants commenced the appeal process by lodging notices of appeal. The 1<sup>st</sup> applicant (1<sup>st</sup> respondent in the suit) lodged its notice of appeal on 22<sup>nd</sup> August 2018 while the 2<sup>nd</sup> respondent lodged its notice of appeal on 23<sup>rd</sup> August 2018. Both respondents also wrote to the Deputy Registrar seeking certified copies of proceedings and judgment. The 1<sup>st</sup> respondent wrote on 16<sup>th</sup> August 2018 while the 2<sup>nd</sup> respondent wrote on 23<sup>rd</sup> August 2018. Both of them filed applications for stay of execution. The 1<sup>st</sup> respondent's application is dated and filed on 27<sup>th</sup> September 2018 while the 2<sup>nd</sup> respondent's application is dated 4<sup>th</sup> September 2018. Both applications were filed under certificate of urgency but no orders of stay were granted.

The applications were heard together on 12<sup>th</sup> November 2018.

**2<sup>nd</sup> Respondent's Submissions**

Mr. Omogeni for the 2<sup>nd</sup> respondent submitting on the application dated 4<sup>th</sup> September 2018 stated that the application is brought under Order 42 of the Civil Procedure Rules. He informed the court that the notice of appeal filed by the 2<sup>nd</sup> respondent was received in the Court of Appeal on 23<sup>rd</sup> August 2018 and was duly served on all the parties to the suit.

Mr. Omogeni submitted that the 2<sup>nd</sup> respondent has an arguable appeal as reflected in the draft memorandum of appeal at pages 49 to 52 of the 2<sup>nd</sup> respondent's application. He submitted that the major reason for appeal is that the 2<sup>nd</sup> respondent was not accorded a fair hearing as envisaged under Article 50 of the Constitution. That the trial Judge totally ignored the evidence of the 2<sup>nd</sup> respondent, that the Judge relied on an affidavit of the 2<sup>nd</sup> petitioner George Nyamu and presented the same to be the evidence of the 2<sup>nd</sup> respondent. That the court did not take into account the evidence of the 2<sup>nd</sup> respondent as presented through the affidavit of Henry Peterson Mugane filed in court on 6<sup>th</sup> May 2017. That the error is evident at page 7 of the judgment (page 30 of the application) which makes reference to a totally different affidavit dated 19<sup>th</sup> May 2017. He further submitted that there is no privity of contract between the 2<sup>nd</sup> respondent and the petitioners. He submitted that on these facts the appeal is arguable and there is justification to grant the orders of stay.

Mr. Omogeni further submitted that the liquidated sum in the decree is a colossal Kshs.13 million, that the person who has sworn the affidavit opposing the application Mr. Bernard Mugambi, the 3<sup>rd</sup> petitioner has not demonstrated the ability to refund the same in the event the appeal succeeds. That Mr. Mugambi has not explained his financial status or that of the other 22 petitioners.

Mr. Omogeni referred to the case of *Amal Hauliers Limited –V- Abdulnasir Abukar Hassan (2017) eKLR* where Korir J. stated that in an appeal the burden shifts to the claimant to demonstrate ability to refund should the appeal succeed. That if that burden is not discharged the court may be persuaded to grant stay. He submitted that this is the situation in the instant case.

He submitted that although the 2<sup>nd</sup> respondent has not filed a substantive appeal, it has applied for proceedings which should suffice where pleadings have not been supplied. For this he relied on the case of *Housing Finance Company of Kenya –V- Sharok Kher Mohamed Ali Hirji and Another (2015) eKLR* where the court concluded that a notice of appeal is a good demonstration of the intention to appeal.

He submitted that under Rule 22 of the Civil Procedure Rules once an applicant demonstrates sufficient grounds the court has discretion to consider stay pending appeal.

He further submitted that the 2<sup>nd</sup> respondent is a reputable organisation registered in Kenya operating under the Privileges and Immunities Act, that it owns premises where it is located and there is no risk of leaving jurisdiction.

He prayed that the application by the 2<sup>nd</sup> respondent be granted.

### **1<sup>st</sup> Respondent's Submissions**

Mrs. Ouma for the 1<sup>st</sup> respondent aligned herself to the submissions of Mr. Omogeni. She submitted that the 1<sup>st</sup> respondent has an arguable appeal and has commenced the process as demonstrated at pages 25 to 27 of the 1<sup>st</sup> respondent's application. That the appeal is arguable as demonstrated in the application at pages 28 to 31. That in the judgment there was misapprehension on the law as relates to constitutional violations especially breach of Article 41, that the trial Judge misdirected himself in finding an employer–employee relationship between the petitioners and the 1<sup>st</sup> respondent.

She submitted that unless the orders of stay are granted the 1<sup>st</sup> respondent will suffer irreparably as there was no relationship between it and the petitioners. That in the event the appeal succeeds the petitioners are not likely to refund the decretal sum. She relied on the case of *Butt –V- Attorney General*. She submitted that the principles set out in the case being that each application is considered on a case by case basis.

She submitted that the threshold for stay pending appeal has been met by the 1<sup>st</sup> respondent and urged the court to grant the orders of stay.

### **Submissions by the Petitioners**

For the petitioners Mrs. Kashindi submitted that the applications are opposed. She relied on the replying affidavit of Bernard Muhindi, the 3<sup>rd</sup> petitioner and grounds of opposition filed on 1<sup>st</sup> October 2018.

She submitted that the applications have been made under Order 42, Rule 6 of the Civil Procedure Rules and the principles applicable which are well known, are that an applicant must demonstrate substantial loss, must offer satisfactory security for due performance and thirdly, that there should be sufficient reasons.

Mrs. Kashindi submitted that the 2<sup>nd</sup> respondent had not met the test. That when the court is looking at substantial loss the court considers whether there is an arguable appeal. That the proposed grounds of appeal have no chance of success as the appeal is focusing on an error that did not affect the ultimate outcome.

Mrs. Kashindi submitted that since a substantive appeal has not been filed there is a long way to go before it is filed and there was no guarantee that the 2<sup>nd</sup> respondent will be in this county at the time of arguing the appeal. She submitted that the issue of the 2<sup>nd</sup> respondent owning the premises it operates from is not pleaded in the affidavit in support of the application and that the affidavit in support of the application describes the 2<sup>nd</sup> respondent as a foreign entities; a Non-Governmental Organisation (NGO). She submitted that it is a matter for judicial notice that programs run by NGOs do not run in perpetuity, that the agreement for the 2<sup>nd</sup> respondent was to run until 2017 and there

is great risk that the respondents will run away from jurisdiction. That this was a matter of concern to the petitioner at the inception of these proceedings and an application for deposit of security was made though later abandoned. She referred to previous affidavits which deposed of attempts to dispose of property by the 2<sup>nd</sup> respondent. She submitted that the applicants have not offered security which is a key requirement in an application for stay.

On the issue of lack of employer–employee relationship and privity of contract, she submitted that these were considered by the trial court but the court was not persuaded.

Mrs. Kashindi relied on the case of **Butt –V- Rent Restriction Tribunal, Oraro –V- Co-operative Bank** and **JSC –V- Maxwell**. In the three cases the court held that the particular circumstances of each case should be considered (Butt Case); that the court should consider the interests of both parties (Oraro Case) and alleged impecuniosity of the petitioners (JSC Case). She submitted that the Court of Appeal held that an applicant must demonstrate why it alleges an applicant is unable to pay.

She further referred to the case of **Kennedy Makasembo –V- Kenya Union of Post Primary Education Teachers (2017) eKLR**. In which the court held that a successful litigant has a right to enjoy the fruits of his judgment. She also relied on the case of **James Wangalwa and Another –V- Agnes Naliakacheseto (2012) eKLR** on what amounts to substantial loss.

Mrs. Kashindi relied on the case of **George Wekesa –V- Multimedia University** where the court observed that it is not enough to file an appeal.

On the application dated 2<sup>nd</sup> September 2018 Mrs. Kashindi submitted that the applicant has not met the test of substantial loss and sufficient reasons for grant of stay. She submitted that just because the Judge did not agree with the 1<sup>st</sup> respondent’s position is not sufficient ground.

She prayed that the application be dismissed with costs.

### **Determination**

I have considered the applications and submissions by the parties. The issue for determination is whether the applicants merit the orders of stay of execution pending appeal.

The applicable law is Order 42 Rule 6(1) and (2) and (4) which provide 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.**

**2. No order for stay of execution shall be made under sub rule (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.**

**(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.**

In the applications before the court, the applicants state that they have an arguable appeal with high chances of success, that the appeal would be rendered nugatory unless stay of execution is granted and that the petitioners are impecunious. It is further the applicants’ position that the petitioners will not suffer prejudice as the applicants are ready to comply with any conditions/terms as to provision of security.

In the case of **Chris Munga N. Bichage –V- Richard Nyagaka Tongi and 2 Others (2013) eKLR**, the Judges of appeal stated the principles to be applied in considering an application for stay of execution as follows –

“..... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.....”

In **Mohammed Salim T/A Choice Butchery –Vs- Nasserpuria Memon Jamat (2013) eKLR**, the court upheld the decision of **M/S Portreitz**

**Maternity –Vs- James Karanga Kabia Civil Appeal No. 63 of 1997** and stated that:-

*“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right ....”*

In the instant applications what the court ought to consider is substantial loss, security and arguable appeal.

On substantial loss the applicants have submitted that the decretal sum of Kshs.13 million is colossal and that the petitioners have not demonstrated ability to refund. In the replying affidavit of Bernard Mulandi, the 3<sup>rd</sup> petitioner, he states that they are apprehensive the applicants may stop operations in Kenya any time. He does not mention the issue of ability to refund the decretal sum should the appeal be successful.

In the case of **Housing Finance Company –V- Sharok Properties**, the court observed as follows –

*“Turning to the second limb as to whether the appeal could be rendered nugatory if stay orders are not granted, we note that this is a money decree. Whereas the judgment was for an aggregate sum of Shs.20,434,226.54, the amount due as sought in the warrants of attachment and sale of property in execution of the decree is Shs.722,581,646.60. This is a colossal sum and there is reasonable apprehension as to the ability of the 1<sup>st</sup> respondent to repay the same in the event that the appeal is successful as no material is availed in proof thereof. In relation to a money decree, this Court in the case of **Kenya Hotel Properties Limited –v- Willesden Properties Limited Civil Application Nairobi. No. 322 of 2006 (UR 178/06)** stated thus:-*

*“The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not a “man of straw” but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree”.*

*The 1<sup>st</sup> respondent did not indicate his willingness and/or ability to repay the decretal amount in the event the appeal was successful. Considering that the computation of the decretal sum is subject to the intended appeal, we are of the view that there is a likelihood of the appeal being rendered nugatory if we do not intervene at this stage.*

*In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded. In our view, the balance tilts in favour of the applicant in this application.”*

In the instant applications, the petitioners have not demonstrated ability or willingness to refund the decretal sum although this was raised in both applications.

The second limb is security. Order 42 Rule 6(2) provides that security for the performance of the decree is one of the considerations to be taken into account in granting stay of execution. The 1<sup>st</sup> respondent has expressed willingness to comply with any conditions that may be set by the court.

The 2<sup>nd</sup> respondent has however not offered to deposit security.

The final limb is an arguable appeal. An arguable appeal has been defined as in **Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Application Nairobi No. 72 of 2001** wherein the Court addressed what is considered to be an arguable appeal thus,

*“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision”*

It is trite too that demonstration of the existence of even one arguable point will suffice in favour of the applicant.

I have considered the memorandum of appeal annexed to the 2<sup>nd</sup> respondent’s application as well as the grounds stated by both applicants that they are of opinion that there was no employer–employee relationship or privity of contract between the petitioners and respondents. This is an issue that is worthy of consideration by the appellate court. The respondents have a right to ventilate their case to the highest court in the land. It is my view that the respondents’ application disclose an arguable appeal.

The petitioners have however raised concern over the possibility of flight from jurisdiction of the court by the applicants who are both foreign NGOs. This was demonstrated from the very inception of this petition when they filed application for deposit of security on the grounds that the agreements that were being executed by the respondents had timelines ending in 2017 and that the 2<sup>nd</sup> respondent put up its property for sale. The respondents have not denied these facts, only pointing out that the application was withdrawn and that the petitioners cannot approbate and reprobate at the same time. It is the opinion of the court that all parties’ concerns are genuine and that the court must address them. This can only be done by allowing the applicants to appeal while at the same time securing the concerns of the petitioners.

In the circumstances I make the following orders –

1. The applications for stay by both the 1<sup>st</sup> and 2<sup>nd</sup> respondents are granted subject to the deposit of the decretal sum in joint interest earning account in the names of the counsels for the petitioners and the respondents.
2. The respondents shall each deposit Kshs.6,500/= within 60 days.

The costs of the application shall be in the appeal

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**