



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 916 OF 2018**

**(Before Hon. Justice Hellen S. Wasilwa on 16<sup>th</sup> December, 2019)**

**OSCAR JUMA.....CLAIMANT/ RESPONDENT**

**VERSUS**

**TELKOM KENYA LIMITED.....1<sup>ST</sup> RESPONDENT/1<sup>ST</sup> APPLICANT**

**SIMON LEE.....2<sup>ND</sup> RESPONDENT/1<sup>ST</sup> APPLICANT**

**LINDA ROTICH.....3<sup>RD</sup> RESPONDENT/1<sup>ST</sup> APPLICANT**

**RULING**

1. Pending for determination before me is the Notice of Motion Application dated 15<sup>th</sup> August, 2019. The Application is filed by the Respondents/Applicants under Certificate of Urgency seeking the following Orders:-

1. ***THAT*** this Honourable Court be pleased to certify this Application as urgent and the same be heard during this Honourable Court's vacation (spent);

2. ***THAT*** this Honourable Court be pleased to order a stay of execution of the Ruling delivered on 17<sup>th</sup> July, 2019 and the resultant order directing the Applicants to deposit in Court a security amount of Kshs. 10 Million pending inter-partes hearing and determination of this Application (spent);

3. ***THAT*** this Honourable Court be pleased to order a stay of execution of the Ruling delivered on 17<sup>th</sup> July, 2019 and the resultant order directing the Applicants to deposit in Court a security amount of Kshs. 10 Million pending hearing and determination of an intended appeal filed by the Applicants in respect of the said ruling;

4. ***THAT*** this Honourable Court be pleased to order that a sum of Kshs. 4 Million already held in Court as security pursuant to the Order made on 27<sup>th</sup> June, 2018 be deemed as sufficient security as a conditional stay of execution of the Order made on 17<sup>th</sup> August, 2019 pending hearing and determination of the Applicants intended appeal against the said ruling;

5. ***THAT*** this Honourable Court be pleased to order a stay of any further proceedings in this matter pending hearing and determination of the Applicants' intended Appeal;

6. ***THAT*** the costs of this Application be provided for.

2. The Application is premised on the grounds as set out on the face of the Notice of Motion Application, in which the Applicant contends that this Honourable Court in its Ruling of 17<sup>th</sup> July, 2019 directed the Applicants to deposit a sum of Kshs. 10 Million in 30 days from the date of the said Ruling as security for Judgment pending the hearing and determination of this Claim.

3. The Applicant further contends that it was dissatisfied with the said Ruling intends to Appeal and have in fact filed a Notice of Appeal. The Applicants are therefore apprehensive that if the orders sought in their Application are not granted, upon the expiry of thirty days from 17<sup>th</sup> August, 2019 the Claimant shall be at liberty to commence execution of the order against the Applicants thus rendering the intended Appeal nugatory.

4. The Applicants aver that they have a good appeal with high probability of success. They further aver that they stand to suffer irreparable loss as they have already deposited security in Court in the sum of Kshs 4 Million pursuant to an Order made on 27<sup>th</sup> June, 2018 and that they are further willing to have the same amount continue being held in Court as security for conditional stay of execution so as to secure their interests during the pendency of the Appeal.

5. The Applicants contend that no prejudice will be occasioned to the Respondent in the event the Application is allowed as his interest have already been secured by virtue of the security deposit already held in Court. They further contend that it is in the interest of justice that the instant Application be allowed as prayed.

6. The Application is further supported by the Affidavit of **NELSON MOGAKA**, the Senior Internal Counsel of the 1<sup>st</sup> Respondent herein sworn on 13<sup>th</sup> August, 2019 wherein he reiterates the grounds on the face of the Application.

7. In opposition to the instant Application the Claimant filed Grounds of Opposition dated and filed in Court on 25<sup>th</sup> September, 2019 raising the following grounds:-

*1. It has not been alleged or shown that is the Orders for stay that are sought in the instant Application are not granted, the Respondents in the Claim, who are the applicants in the instant application, will suffer substantial loss.*

*2. It has not been alleged or shown that if the stay orders sought, in the instant application, are not granted, the intended appeal upon which the instant Application is anchored, will be rendered nugatory or that the Respondents in the main claim will in any way be unable to proceed with the intended appeal.*

*3. Grant of the order will prejudice the Claimant in these proceedings.*

*4. The Application is made in bad faith.*

*5. The Application is tainted by serious material non-disclosure of the fact that the Respondents in the main claim have pursued release of deposits previously made in Court.*

*6. The conduct of the Respondents in the main Claim in these proceedings disentitles them from enjoying exercise of discretion by the Court in their favour.*

*7. No good reason or any reason for that matter has been given for staying further proceedings in this matter and progressing it to full determination on merits.*

*8. Grant of the orders sought in the instant application will not serve the interest of justice for expediting determination of the dispute while maintain equality for litigants.*

*9. There was inexplicable delay on the part of the Respondents in the main Claim in making the instant Application.*

*10. Overall, the Respondents aim is to conclude sale of its assets and business before this matter is determined so that the Claimant is left "chasing the wind". Granting the orders sought in the instant Application will aid the aforesaid nefarious scheme.*

8. Parties thereafter agreed to canvass the Application by way of written submissions.

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

9. It is submitted by the Applicant herein that it has met the threshold for granting of the stay Orders as pleaded as provided under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010. To buttress this argument the Applicant cited and relied on the decision in the case of **Butt Vs The Rent Restriction Tribunal (1982) KLR 417**.

10. The Applicant further submitted that the order made to deposit the sum of Kshs. 10 Million negatively affects its operations. It therefore averred that it is necessary for this Honourable Court to stay the order issued on 17<sup>th</sup> July, 2019 pending hearing and determination of the intended Appeal as it stands to suffer substantial loss as it risks being driven out of business due to cash flow constraints as well as reputational risks. For emphasis the Applicant relied on the cases of **Amal Hauliers Limited Vs Abdulnasir Abukar Hassan (2017) eKLR** and **Quest Resources Limited Vs Japan Port Consultants Limited (2015) eKLR**.

11. On the issue of security the Applicant submitted that the amount of Kshs. 4 Million already held by the Court is sufficient security to cushion the Claimant in respect of the Claims made in the main claim and the intended Appeal noting that the Claimant was earning a monthly salary of Kshs. 336,927/= and as such the award with respect to maximum compensation would be approximately Kshs. 4,043,214/=.

12. The Applicants further submitted that the instant Application has been filed without unreasonable delay.

13. In conclusion, the Applicants urged this Honourable Court to allow the instant Application as prayed having satisfied the conditions for granting of the orders sought.

### **Claimant's Submissions**

14. The Claimant on the other hand submitted that the Applicant has failed to meet the threshold for grant of the orders sought in its Application and therefore urged this Honourable Court to dismiss the same with costs.
15. The Claimant further submitted that this Court already held in its order of 17<sup>th</sup> July, 2019, that 10 Million would be adequate security. The Claimant urged this Court to resist the Respondents invitation to sit on appeal of its own decision on what constitutes adequate security.
16. The Claimant contends that the Respondents do not deserve this Court's discretion being exercised in their favour as they have failed to demonstrate good faith through-out the instant matter and Application now pending before this Court.
17. In conclusion, the Claimant submitted that the instant Application is void of merit and that the same ought to be dismissed with costs.
18. I have considered the averments of both Parties.
19. I note that the Applicants have already indicated that they have preferred an appeal on this Court's orders dated 17.7.2019. This is therefore an indication that the Court of Appeal is already ceased with this matter in relation to issues of stay depending on whether the Court of Appeal views the appeal arguable.
20. In the circumstances, I find the right forum to argue the instant application will be before the Court of Appeal. The Application is therefore found not merited and the same is therefore dismissed.
21. Costs in the cause.

**Dated and delivered in open Court this 16<sup>th</sup> day of December, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of**

Ochola holding brief Wangila for claimant – Present

Were for Respondent – Present