



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 994 OF 2011**

(Before Hon. Justice Hellen S. Wasilwa on 16<sup>th</sup> May, 2018)

ANASTASSIOS D. THOMOS.....CLAIMANT

VERSUS

CMC AVIATION LIMITED.....1<sup>ST</sup> RESPONDENT

TRIDENT ENTERPRISES LIMITED.....2<sup>ND</sup> RESPONDENT

**RULING**

1. There are 2 Applications before me.
2. The 1<sup>st</sup> application is one dated 11/12/2017 which Application was filed by the Respondents herein through a Notice of Motion dated on even date and brought under Section 12(3) of the Employment and Labour Relations Court Act and the Inherent Jurisdiction of the Court.
3. The Application sought orders for stay of execution of the final award dated 20<sup>th</sup> May 2016 made by Mr. Mwaniki Gachoka in the matter of an Arbitration between **Anastasios D. Thomos versus CMC Aviation Limited and Trident Enterprises Limited** whose enforcement as a judgement of the Court was allowed on 17.11.2017.
4. The Applicant/Respondents seek stay of execution pending an intended appeal to the Court of Appeal.
5. The Application is made on the grounds that:-
  - a. **By an application dated 25<sup>th</sup> November 2016, the Respondents sought to set aside the arbitral award dated 20<sup>th</sup> May 2016 on the basis, inter alias, that:-**
    - i. **It is in conflict with the public policy of Kenya as it amounts to unjust enrichment of the Respondent;**
    - ii. **It is in conflict with the public policy of Kenya as it is inconsistent with the law of Kenya to the extent that it applies the evidentiary threshold of the Evidence Act, contrary to the express provisions of Section 2(1) of the Evidence Act; and**
    - iii. **It and/or its effects are contrary to established principles of law and justice, and therefore against public policy.**
  - b. **By a ruling delivered on 17<sup>th</sup> November 2017, the Court dismissed the Respondents' application to set aside the arbitral award and allowed the Claimant's application dated 23<sup>rd</sup> September 2016 for enforcement of the arbitral award.**
  - c. **The Respondents intend to appeal the ruling of this Court of 17<sup>th</sup> November 2017 and have filed a notice of appeal in this regard.**
  - d. **The Respondents have good grounds of appeal with reasonable prospects of success as set out in the supporting affidavit of Thomos Pilgrim in support of this application.**

**e. The Claimant has already obtained warrants of attachment and has instructed auctioneers to proceed with the attachment of the Respondents' property. The auctioneer has however threatened to attach property in the hands of the 1<sup>st</sup> Respondent but belonging to third parties.**

**f. Unless a stay of execution is granted, the Respondents will suffer substantial loss and irreparable harm which they may not recover even if they are successful on appeal.**

**g. The intended appeal will be rendered nugatory if the execution of the arbitral award and the decree therefrom is not stayed pending the hearing and determination of the appeal.**

**h. This application is filed without any unreasonable delay.**

**i. The Respondents are willing to provide security for the decretal amount, preferably in the form of an insurance bond.**

**j. It is in the interest of justice that the execution of the arbitral award and the decree therefrom.**

6. The Application is supported by the supporting affidavit of one Thomos Pilgrim the Respondent's Managing Director who has deponed on facts set out in the grounds above. They have deponed that the signed decree obtained for execution was not availed to them by the Respondent.

7. They also aver that they have paid 30000 UD to the Respondent towards the decretal sum and they wish to have the same amounts paid deemed as fulfilment of any condition for stay that the Court may be inclined to grant.

8. They aver that unless this Court grants a stay, the appeal will be rendered nugatory. They aver that they are willing to comply with any order that this Court may give as security for due performance of the decree in the event that the appeal is unsuccessful.

9. The other Application before Court is the one dated 18/12/2017. The Application was filed through a Notice of Motion brought under Section 1A, 1B and 3A of the Civil Procedure Act, Order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the law.

10. The Applicant sought orders that the orders issued by this Court on 13.11.2017 staying execution of the decree issued on 1.12.2017 be set aside.

11. The Applicant's Application is grounded upon the following grounds that:-

**a. The Respondents obtained Court Orders on 13<sup>th</sup> November, 2017 staying execution of the Decree issued on 1<sup>st</sup> December, 2017 through material alteration of facts and deceit.**

**b. The Respondents have not settled the Decretal sum or any part thereof.**

**c. The Respondents were not directed to deposit the decretal amount in Court neither was order for security for Courts issued against the Respondents despite the issuance of the Orders.**

**d. The intended appeal by the Respondents have no chances of success since the law on appeals to the Court of Appeal on matters dealing with Arbitral Awards is well established and settled.**

**e. The application dated 11<sup>th</sup> December, 2017 by the Respondents was filed with ulterior motives and clearly meant to steal a march over the Claimant and deny him the fruits of his Award.**

**f. The Respondents are in the business of operating aircrafts and the continued pendency of the order staying execution of the Decree issued on 1<sup>st</sup> December, 2017 will enable the Respondents remove the proclaimed goods from the jurisdiction of this Honourable Court thus rendering the Award moot.**

**g. The application by the Respondents dated 11<sup>th</sup> December, 2017 was brought with undue delay and with unclean hands with the aim of frustrating the dissemination of justice for the Claimant.**

**h. It is in the interest of justice that this application is allowed and the Order issued on 13<sup>th</sup> December, 2017 is set aside.**

12. The Application is also supported by the supporting affidavit of the Claimant/Applicant herein one Anastassios D. Thomos who has deponed that he filed his claim on 22.6.2011. That subsequently by consent of both parties herein and with the blessing of this Court the dispute was referred to Arbitration. That the arbitration process was concluded and an award made on 20.5.2016.

13. He avers that he subsequently filed an application dated 23.9.2016 to have the Arbitral Award enforced. That the Respondents also filed an Application dated 25.11.2016 to set aside the Arbitral Award. He avers that both Applications were heard simultaneously and a ruling was delivered on 17<sup>th</sup> November 2017 by Justice Ndolo dismissing the setting aside of the Award and allowing enforcement of the award with costs.

14. The Applicant avers that he proceeded to obtain warrants of attachment of movement property of the Respondents on 6.12.2017 and an Auctioneer in the name of Multi-Concepts Auctioneer was instructed who proceeded to proclaim the Respondent's goods in fulfilment of the decree.

15. The Respondents then approached Court on 13.12.2017 through an Application dated 11.12.2017 and obtained orders staying execution of the decree issued on 1.12.2017.

16. The Applicant avers that the Respondent have neither deposited any security in Court nor advanced him any money. He avers that though the Respondents seek to appeal the Judgement of the Court the intended appeal has no chances of success since the law in regard to appeals to Court of Appeal on Arbitral Awards is well established and settled.

17. The Applicant avers that he is a man of means and works as a pilot at Wilson Airport and in the event the appeal succeeds, the Respondents can recover their money.

18. The Applicant therefore avers that the Application has no merit, it is an abuse of the Court process and is aimed to frustrate him and hence should not be allowed.

19. In essence the Claimant's Application is in opposition to the Respondent's Application which in effect seeks setting aside of orders given by Court.

20. The Respondent also opposed the Application by the Claimant.

21. Both parties filed their respective submissions. The Claimant submits that the Respondent's Appeal has no chances of success as the Court of Appeal cannot sit on appeal on Arbitral Awards. They cited Nyutu Agrovet Limited vs Airtel Networks Limited (2015) eKLR, Anne Mumbi Hinga vs Victoria Njoki Gathara (2009) eKLR and Kenya Shell Limited vs Benjamin Karuga Kibiru and Another (1986) eKLR where the Court of Appeal affirmed that Section 10 of the Arbitration Act prevents the Court of Appeal from interfering with the arbitral process in any other manner except in cases cited in circumstances cited in Section 39 of Arbitral Act.

22. The Respondents on the other hand submitted that in determining this Application, the Court cannot determine whether the Respondents have an arguable appeal or not. They submitted that the issue for Court's determination is solely on whether there can be substantial loss if Application is not allowed, whether the Application has been made without reasonable delay and whether such security as the Court may decree can be made.

23. The law of stay of execution is provided for under Order 42 rule 6(2) which states 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.**

24. The consideration by the Court on whether or not to grant stay orders is therefore determinable based on the above orders. On the issue of substantial loss, the Respondents have indicated that the aircraft attached do not belong to them. They have also shown to Court vide evidence that they are leased from 3<sup>rd</sup> parties.

25. In this case, indeed if sold, the ripple effect will be grievous extending to 3<sup>rd</sup> parties who are not parties to this suit.

26. The Respondents approached this Court within good time without delay and therefore satisfy condition No.2. They are also willing to deposit security that may be ordered by Court.

27. In this case, it is my finding that this Court guided by provisions of Order 42 rule 6(2) would in the interest of not rendering any appeal nugatory order for stay on condition that the Respondent deposits decretal sum in an interest earning account held in the joint names of Counsel on record within 30 days. In default execution to issue.

28. Each Party to bear its own costs.

**Dated and delivered in open Court this 16<sup>th</sup> day of May, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Makori for Respondent/Applicant – Present

Chakaila for Clamant – Present