



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 364 “B” OF 2014**

(Before Hon. Lady Justice Maureen Onyango)

**DOMINIC MUTHUSI MBITHI.....CLAIMANT**

VERSUS

**KENYA POST OFFICE SAVINGS BANK.....RESPONDENT**

**RULING**

Judgment in this case was delivered on 19<sup>th</sup> January 2018 in favour of the claimant. The judgment was by Ndolo J. who has since moved to Employment and Labour Relations Court in Mombasa and delivered by myself on her behalf. The judgment was in favour of the claimant. The respondent was aggrieved by the judgment and filed a notice of appeal dated 24<sup>th</sup> January 2018 on 25<sup>th</sup> January 2018. The respondent further applied for certified copies of proceedings and judgment by letter dated 22<sup>nd</sup> January 2018 and filed in court on 2<sup>nd</sup> February 2018.

The claimant filed his party and party bill of costs on 21<sup>st</sup> February 2018 and a notice of taxation dated the same date was issued by the Deputy Registrar setting 26<sup>th</sup> February 2018 as the date for taxation.

By an application by way of notice of motion dated 27<sup>th</sup> February 2018 filed under certificate of urgency on the same date, the respondent seeks the following orders –

1. That this application be certified urgent and heard ex-parte in the first instance.
2. That the status quo be maintained pending the hearing and determination of this application and appeal.
3. That this court be pleased to order a stay of execution of the judgement and all consequential orders pending the final determination of the intended appeal.
4. That this court be pleased to issue an injunction order restraining the claimant from executing the decree issued herein pending the hearing and determination of the intended appeal.
5. That the respondent be at liberty to apply for any other or further orders and or directions as the honourable court may deem fit and just to grant.
6. That the costs of this application be in the cause.

The application is filed under Section 12 of the Employment and Labour Relations Court Act, Rule 17 and Rule 32 of the Employment and Labour Relations Court (Procedure) Rules 2016, Order 42 Rule 6 of the Civil Procedure Rules 2010 and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. It is supported by the affidavit of PETER KIONI, the respondent's Assistant Manager, Legal and Security sworn on 27<sup>th</sup> February 2018 and the following grounds –

1. The applicant is aggrieved with the judgment and decree of this honourable court delivered on 19<sup>th</sup> January 2018 and intends to appeal to the court of appeal.
2. The claimant has since extracted the decree and has further set down the matter for taxation on 26<sup>th</sup> February 2018.

3. The applicant is willing to provide reasonable or such security as the court may order.

4. This application has been made without unreasonable delay and this honourable court has the discretion to grant the prayers sought.

5. Unless the orders sought are granted the appeal shall be rendered nugatory and the applicant shall suffer irreparably in event the stay orders are not issued.

In the replying affidavit, Mr. Kioni traces the history of the case from date of filing suit and reiterates the grounds on the face of the application in support thereof.

The claimant/decree holder opposes the application by his replying affidavit sworn and filed on 2<sup>nd</sup> July 2018. In the replying affidavit he deposes that the respondent has not demonstrated that it will suffer substantial loss if stay of execution is not granted, that the application is intended to frustrate him from realising the fruits of his judgment, that the time for filing records of appeal has lapsed and the respondent has not filed its appeal, that court proceedings were prepared last year and were ready by January 2018 as advised by a Legal Clerk in the offices of Anjarwalla and Khanna one Paul Ochieng who claims to have seen them on record when he went to file the bill of costs and to extract the decree.

The claimant further deposes that his counsel was able to obtain an uncertified copy of proceedings and judgment, which are annexed to the affidavit and marked DM. He avers that it is clear from the respondent's conduct that it does not intend to file an appeal and the offer to deposit security should not be allowed. He deposes that should the court grant the prayer for deposit of security only half the decretal sum should be deposited while the other part should be released to him.

The application was disposed of by way of written submissions.

### **Respondent's Submissions**

The respondent submitted that it is apprehensive that the claimant may not be in a position to refund the decretal sum which is a colossal amount and that the claimant has not addressed this in his replying affidavit by indicating his ability and willingness to pay in the event the appeal is successful. That should the appeal succeed it would be rendered nugatory and the court should intervene at this stage. The respondent relies on the decision of the Court of Appeal in **NATIONAL INDUSTRIAL CREDIT BANK LIMITED -V- AQUINAS FRANCIS WASIKE** in which the court held –

"This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge."

The respondent further relies on the case of **CARTER AND SONS LIMITED -V- DEPOSIT PROTECTION FUND BOARD AND TWO OTHERS** in which the Court of Appeal stated –

"... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay."

It is submitted that the application was filed without delay, that the notice of appeal was also filed without delay, that the Deputy Registrar has been requested to supply certified copies of proceedings and judgment by letter dated 2<sup>nd</sup> February 2018 and the claimant's averments that the respondent has not taken any steps to collect the proceedings and lodge appeal are unfounded as the certified copies have not been supplied.

### **Claimant's Submissions**

For the claimant it is submitted that the applicant has not submitted any evidence to establish it will suffer irreparable or substantial loss should orders of stay not be granted, that it is not enough to simply state that it will suffer substantial loss without providing specific details.

That in the case **ANTOINE NDIAYE V AFRICAN VIRTUAL UNIVERSITY [2015] eKLR**, the court stated that –

"...substantial loss occurring to the Applicant is the cornerstone of the jurisdiction of the High Court in granting stay of execution..."

That in that case, the court further cited the case of **MACHIRA T/A MACHIRA & CO. ADVOCATES V EAST AFRICAN STANDARD (NO. 2) (2002) KLR 63** where the court stated that –

"...In these kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."

That the Court in **NORTHWOOD SERVICE LTD V MAC AND MORE SOLUTION LIMITED [2015] eKLR** agreed with the finding in Civil Appeal No. 772 of 2005 **EQUITY BANK LIMITED V TAIGA ADAMS COMPANY LIMITED** which held that:

"In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent that is execution is carried out - in the event the appeal succeeds, the Respondent would not be in a position to pay - reimburse - as he/it is a person of no means. Here, no such allegation is made, much less established, by the Appellant/Applicant."

That in the case of **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR**, the court cited the **Machira case (supra)** where it was held as follows:

...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

It is further submitted that the purpose of stay is to frustrate the claimant from realising the fruits of his judgment, relying on the case of **SELESTICA LIMITED VS GOLD ROCK DEVELOPMENT LIMITED [2015]** where court held that –

"The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."

It is submitted that no prejudice will be occasioned to the applicant that cannot be compensated by an award of costs.

That the Court in **Selestica Limited** (supra) quoting the decision in **WANGALWA & ANOTHER -V- AGNES NALIKA CHESETO Misc. Application No 42 of 2011 [2012] eKLR**, stated that –

"...No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail a question that was aptly discussed in the case of **Silverstein Vs. Chesoni [2002] 1KLR 867**, and also in the case of **Mukuma Vs. Abuoga** quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR 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."

The claimant submits that the notice of appeal was lodged on 27<sup>th</sup> February 2018 and proceedings were ready by 20<sup>th</sup> February 2018 yet no appeal has been filed, that it is unconscionable for the applicant to benefit from its delays and the application should be dismissed.

## **Determination**

Several issues arise for determination from the application and submissions by the parties. The first is whether there has been delay in filing the appeal and the second is whether the applicant has satisfied the conditions for granting stay of execution pending appeal.

The principles for grant of stay of execution pending appeal are embodied in Order 42 Rule 6 (1) and (2) 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 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. [Emphasis added]**

The provisions of Order 42 Rule 6(1) and (2) were summarised by the court in the case of **CARTER AND SONS LIMITED -V- DEPOSIT PROTECTION FUND BOARD AND TWO OTHERS** as follows –

"... the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . .the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay."

Order 42 Rule 6(4) states that an appeal is deemed to have been filed when a notice of appeal has been lodged. Rule 6(4) states that –

**(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.**

The notice of appeal herein was filed on 25<sup>th</sup> January 2018, only six days after the delivery of judgment on 19<sup>th</sup> January 2018. Rule 75 of the Court of Appeal Rules provides that the notice of appeal be filed within 14 days from the date of the decision against which the appeal is sought. Having filed the notice of appeal within six days, I find that there was no delay.

It is further the claimant's argument that the proceedings herein have been ready since February 2018 and that the respondent has deliberately not filed the record of appeal in time.

I have looked at the record and it is true that there is a draft of proceedings in the court file. However the instant application was filed before the proceedings had been proofread for purposes of certification. It is therefore not true that the respondent deliberately failed to obtain the certified copies of the proceedings. The claimant's averment that proceedings are ready is therefore unfounded.

On the second issue, the claimant has argued that the applicant has not demonstrated substantial loss and has relied on several authorities. In the case of **NATIONAL INDUSTRIAL CREDIT BANK LIMITED –V- AQUINAS FRANCIS WASIKE AND ANOTHER** (supra) the Court of Appeal stated that it is unreasonable to expect an applicant to know in detail the resources of the decree holder and that the evidentiary burden must then shift to the decree holder to show what resources he has as this is a matter peculiarly within his knowledge. The claimant has in his replying affidavit not contested the respondent's contention that he may be unable to refund the decretal sum should the appeal succeed or demonstrated that he has resources to refund the same.

Appeal is a right of a party enshrined under the right to a fair hearing and access to justice (Articles 48 and 50 of the Constitution) and should the decretal sum be paid to the claimant, the appeal is likely to be rendered nugatory if the claimant is unable to demonstrate his ability to pay back the same should the appeal succeed. The respondent has in addition offered to deposit security in the decretal sum.

For the foregoing reasons I find merit in the application and make the following orders –

1. An order of stay of execution of the judgment dated 19<sup>th</sup> January 2018 be and is hereby granted pending the hearing and determination of the applicant's appeal.
2. The stay of execution is conditional upon the applicant paying 50% of the decretal sum to the claimant and the balance thereof being deposited into a joint interest earning account in the names of E. K. Mutua and Company Advocates and Abbas Esmail c/o Anjarwalla and Khanna Advocates within 14 days for the date of ruling.
3. Costs of the application shall be in the appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF OCTOBER 2018**

**MAUREEN ONYANGO**

**JUDGE**