



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 264 OF 2015**

**BETWEEN**

- 1. BENEDICT OJOU JUMA**
- 2. BONFACE CHESA JUMA**
- 3. SOLOMON AKOTI**
- 4. BENJAMIN WAMBUNGA NAMANO**
- 5. BENEDICT JUMA ODHIAMBO**
- 6. BENSON OTSIENO OMONDI**
- 7. FRANCIS OYOMBA ONYANGO**
- 8. MAURICE MATHINA MUNYAO**
- 9. JOSEPH OTSIENO ODHIAMBO**
- 10. ROBERT KAI MWANGUDZA**
- 11. KAHINDI NDULA NGALA .....CLAIMANTS**

**VERSUS**

**A.J. PEREIRA & SONS LIMITED .....RESPONDENT**

**RULING**

1. The Court delivered an Award dated 29<sup>th</sup> September 2016, ordering the Respondent pays the Claimants, a total sum of Kshs. 3,088,993, comprising terminal benefits and compensation for unfair termination. The amount was to be paid within 30 days of delivery of the Award.
2. The Respondent applied for certified copies of the proceedings on 11<sup>th</sup> October 2016. It filed a Notice of Appeal on 13<sup>th</sup> October 2016. An Application dated 3<sup>rd</sup> November 2016, seeking an order for stay of execution, was filed on the same date.

3. The Claimants oppose the Application and filed a Replying Affidavit sworn by Benedict Ojou Juma, the 1<sup>st</sup> Claimant herein, on the 10<sup>th</sup> November 2016.
4. The Application was heard on 28<sup>th</sup> November 2016.
5. The Respondent relies on the Supporting Affidavit sworn by Manager and Director of the Respondent Jeshmin Shah, on the 3<sup>rd</sup> November 2016. It also relies on the Further Affidavit of the same deponent, sworn on 21<sup>st</sup> November 2016.

### **Respondent's Submissions**

6. The Respondent submits it has lodged Notice of Appeal and applied for certified copies of the proceedings. Once these are supplied, the Respondent shall file its Memorandum of Appeal.
7. The Claimants have initiated the process of execution. They proclaimed Respondent's goods on 3<sup>rd</sup> November 2016. If proclamation is upheld, Respondent's business shall come to a halt. The Court's role is that of an arbiter and must ensure businesses are not brought to a standstill.
8. Claimants will not be able to repay the Respondent, if they are paid the awarded sum. The Court should weigh the Claimants' right to enjoy the fruits of their litigation, and that of the Respondent to pursue its right of appeal.
9. The Application is rightly premised on the Civil Procedure Act. The Act applies to this Court. In any case the Court has an obligation to act without undue regard to technicalities. The Court has the power under Section 12 of the Employment and Labour Relations Court Act, to grant interim orders.
10. Issues raised by the Claimants on Court of Appeal Rules should be raised at that Court.
11. The E&LR Court is not *fuctus officio*. The Civil Procedure Act allows the Court to grant stay of execution orders.
12. The Auctioneers instructed by the Claimants demand Kshs. 136,000 in fees for raising proclamation. This is extortionate and meant to cripple the Respondent. No prejudice shall be occasioned the Claimants if stay is allowed.
13. The date of the decree indicated in the Notice of Motion was given by error. The correct date is quoted in the Supporting Affidavit, and the error is not therefore fatal to the Application. There is no requirement that the Respondent files a draft Memorandum of Appeal in seeking stay of execution. A Notice of Appeal is sufficient. Authorities cited by the Claimants in opposing the Application are distinguishable. The Respondent shall be oppressed if compelled to pay the awarded sum together with untaxed Auctioneers' costs.

### **Claimants' Submissions**

14. The Claimants submit the Application is incurably defective. It seeks to stay Judgment issued on 1<sup>st</sup> July 2016. There is no such Judgment.
15. There was delay in filing the Application. The Respondent was ordered to pay the awarded sum within 30 days. Payment, or any Application for stay, should have been made within the 30 days.
16. A draft Memorandum of Appeal should be attached to the Application. The Court must be satisfied there are arguable grounds of appeal. The Claimants rely on this ***Court's Cause Number 277 of 2014 between Bernard Gonzale Lando v. Mehta Electrical Limited*** in urging the Court to find an Applicant must show arguable grounds of appeal, to be granted an order of stay of execution.

17. The Court gave 30 days within which the Award was to be satisfied. The Respondent had the leeway to move the Court of Appeal for stay. Once the Court pronounced its final judgment in became *functus officio*, as held in **CA Civil Application No NYR 21 of 2013 [UR 5/ 30] between Dickson Muricho Muriuki v. Timothy Kagundu Muriuki & 6 others**. The Court has done its duty by directing the awarded sum be paid within 30 days. It issued stay for 30 days. It is *functus officio*.

18. For the Court to consider if the Appeal shall be rendered nugatory, there likewise has to be a draft Memorandum of Appeal.

19. There are 11 Claimants. The Court found their contracts were unfairly terminated. They had worked for about 20 years. Further delay affects them, and their families.

20. The Respondent has not offered any security to the Claimants in seeking to stay execution. An Applicant for stay must offer some form of security.

21. Lastly the Claimants submit should the Court grant the Application, the full amount should be deposited in Court, with accruing interest deposited in Court quarterly. Alternatively the Court is asked to consider having part of the awarded amount paid to the Claimants, and the other half deposited in an interest earning joint account of the Advocates. In this last proposal, the Claimants rely on **H.C Milimani Nairobi, Miscellaneous Civil Application Number 78 of 2015, between Edward Kamau & Another v. Hannah Mukui Gichuki & Another**.

#### **The Court Finds:-**

21. On the applicability of the Civil Procedure Act and Rules to the proceedings of the Employment and Labour Relations Court, this Court has held it does not exercise civil jurisdiction. It exercises specialized jurisdiction. Not every jurisdiction, outside the criminal jurisdiction, is to be characterized as civil jurisdiction.

22. Section 2 of the Civil Procedure Act defines the scope of its application to include the High Court and Subordinate Courts in exercise of their civil jurisdiction. The Employment and Labour Relations Court is neither the High Court, nor a Subordinate Court regulated under the Civil Procedure Act and Rules. It has its own set of rules, peculiar to its mandate.

23. There are areas where Rules of this Court allow for application of the Civil Procedure Rules. Execution of the decisions made by the Court is one such area. The Respondent's Application is properly before the Court, as it relates to execution, and is made under the relevant execution Rules, under the Civil Procedure Rules, just as much as the Claimants sought execution adopting the Civil Procedure Rules.

23. The **Court of Appeal in Civil Application Number NAI 2001 of 2013 [UR 145/2013] between Freight in Time Limited v. Rosebell Wambui Muthee**, restated the well known principles to be considered in grant of stay of execution. The order is discretionary, and discretion must not be exercised capriciously.

24. The Applicant must first satisfy the Court that Appeal or Intended Appeal is not frivolous, that is to say, that it has an arguable Appeal.

25. Second, the Court must be satisfied that if stay is denied, and the Appeal is successful, the result would be rendered nugatory.

26. The Court of Appeal emphasized in order that the Applicant may succeed, he must demonstrate both limbs. Demonstrating one limb, and failing in demonstrating the other would lead to failure of the Application.

27. The Court of Appeal relied on other Judicial Authorities of the Court of Appeal in underscoring these

principles. These are: ***Reliance Bank v. Norlake Investments Limited [2002] E.A. 227; Githunguri v. Jimba Credit Corporation Limited [No. 2] 1988 KLR 828; and Wardpa Holdings Limited & Others v. Emmanuel Waweru Mathai v. H.F.C.K [ Civil Appeal Number 72 of 2011, unreported].***

28. The Court of Appeal has laid down the above principles in relation to its Rule 5[2]. The principles have been held to apply however, in all applications for stay of execution, across all jurisdictions. There is no Court which grants stay based on establishment of one limb.

29. In the current Application there is no draft Memorandum of Appeal. The Court has no way of forming a view on the presence of an arguable Appeal. In this ***Court's Cause Number 236 of 2013, between Ignas Mghona & 4 others v. Star of Hope International Foundation*** a similar Application was rejected for failing to show arguable grounds, a draft Memorandum of Appeal having not been attached. In the case of ***Bernard Gonzale Lando*** cited by the Claimants above, there was attached a draft Memorandum of Appeal, which the Court nonetheless found to contain insufficient material to conclude there was an arguable Appeal. In the current Application there is not a single ground of Appeal availed to the Court.

30. The role of this Court is not to determine the merits of the intended Appeal. The Respondent is not required to argue its Appeal before this Court; it is only required to show it has an arguable Appeal. The draft Memorandum of Appeal serves to establish if there is an arguable Appeal. The Applicant has the right of Appeal. In order to stay execution pending the exercise of that right however, the Court seized of the Judgment must be satisfied the principles laid down in the case of ***Rosebell Wambui Muthee*** are all satisfied. It must be satisfied there is an arguable Appeal. There is no way of assessing if there is an arguable Appeal, without the Court having the benefit of a draft Memorandum of Appeal. A typed copy of the Award was released to the Parties on the delivery of the Award. What held the Respondent back from drafting some grounds of appeal for purposes of arguing this Application?

31. Even barring the attachment of a draft Memorandum of Appeal, there are no grounds stated in the Affidavits filed by the Respondent, which would enable the Court to say there is an arguable Appeal. A Notice of Appeal does not assist in assessing whether the right of appeal is sought to be exercised reasonably. There is not a single paragraph, dedicated to showing there is an arguable Appeal.

32. The Respondent focuses on the effect execution would have on its business. The Claimants worked for as many as 20 years for the business and left employment without their benefits. The Respondent, appears not concerned that these long-serving Employees have so far, endured an empty pot at the end of their rainbow.

33. The Application seeks to stay Judgment of the Court delivered on 1<sup>st</sup> July 2016. There was no Judgment delivered on this date. There is only an Award, read to the Parties on 29<sup>th</sup> September 2016.

34. While the Court does not find that it is *functus officio*; while it does not find there was inordinate delay in filing the Application; while it does not find the Application to be in abuse of the process; it must find the Respondent has not met fundamental principles central in granting of stay of execution. It is not necessary to go into other peripheral matters in disposing of the Application. ***The Application is dismissed with costs to the Claimants. Execution shall go on.***

**Dated and delivered at Mombasa this 13<sup>th</sup> day of December, 2016.**

**James Rika**

**Judge**