REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 900 OF 2010

(Before D.K.N. Marete)

ERIC KIMANI ……..……1ST CLAIMANT

BERNARD NZIOKA……..……..2ND CLAIMANT

LYDIA SAYA……..……..3RD CLAIMANT

Versus

MOI UNIVERSITY ……..……..RESPONDENT

RULING

The application before court and for determination is an Amended Notice of Motion dated 12th February, 2014. It becomes efficacious by virtue of consent orders of the parties made at a hearing on 12th February, 2014 as follows;-

i. *The Respondent is awarded 14 days to make, file and serve a response to the amended Notice of Motion filed on 17th December, 2013.*

ii. *The claimant is, upon service, awarded seven days to make, file and serve written submissions on the subject.*

iii. *The Respondent is further awarded seven days upon service to make, file and serve written submissions.*

iv. *Mention on 18th March, 2015 at 900 hours to confirm compliance and other directions of court.*

This application seeks the following orders of court;-

1. ***THAT** this Court be and is hereby pleased to certify this matter as urgent, service thereof be dispensed with and the same heard ex parte in the first instance.*
2. ***THAT** pending the hearing and determination of this Application inter parties, the Court be and*

is hereby pleased to unconditionally set aside and/or vary and/or discharge the Order issued on the 24th Day of April, 2013.

3. ***THAT*** *this Court be pleased to issue a Declaration that the Order of 24th April, 2013 was unlawful, unprocedural, null and void and that the same be and is hereby set aside with costs.*
4. ***THAT in the alternative and without prejudice*** *to prayers (2) and (3) above, this Honourable Court be pleased to allow the Respondent Stay of Execution pending Appeal* ***on condition*** *that the Respondent deposits security in the form of the Claimants' accumulated salary arrears; hereby assessed at* ***Kshs.48,084,933 (Forty Eight Million, Eighty Four Thousand, Nine Hundred and Thirty Three Shillings only),*** *being the Claimants' accumulated dues as at December, 2013; which sum shall be deposited in Court within the next Thirty (30) days, in default of which execution shall issue.*
5. ***THAT*** *costs of this Application be provided for.*

It is grounded on;

a. *That the Applicants herein were never given a chance to be head in respect of the Application giving rise to the Orders of 24th April, 2013.*

b. *That the Application giving rise to the said Order fully heard without any service hereof to the Applicants herein.*

c. *That the right to be heard is a Constitutional and inalienable right, which a person ought not be deprived of.*

i. *That the said Orders were granted despite the fact that the Respondent had not fulfilled any of the legal requisites that warrant the grant of Orders of stay pending Appeal.*

ii. *That in order to remedy this great injustice, it is necessary that the said Order be set aside and/or that the amount of security be assessed and ordered to be deposited in Court.*

d. *That allowing the said Order to stand as it presently does is manifestly unjust, arbitrary and unlawful.*

e. *That it shall serve the best interests of justice to allow this Application.*

The respondents vide a Replying Affidavit sworn and filed on 24th February, 2014 oppose the application on grounds of frivolity and vexation and pray that the same be dismissed with costs.

> *30. That the applicant's application herein is frivolous and vexatious and the sane should be dismissed with costs.*

When the matter finally came for hearing on 12th February, 2014, the parties, on the prompting of the court agreed to a disposal of the application by way of written submissions with a time span of twenty-eight days all inclusive.

The applicant's case is clear and succinct. It cites orders;-

> *1. …….(spent).*
>
> *2. …….(spent).*
>
> *3. That this Court be pleased to issue a Declaration that the Order of 24th April, 2013 is unlawful, unprocedural, null and void and that the same be and is hereby set aside with costs.*
>
> *4. That in the alternative and without prejudice to prayers (2) and (3) above, this*

Honourable Court be pleased to allow the Respondent stay of execution pending Appeal on condition that the Respondent deposits security in the form of the Claimant's accumulated salary arrears; hereby assessed at Kshs.48,084,933 (Forty Eight Million, eighty Four thousand, Nine Hundred and Thirty three Shilling only).

5. That costs of this Application be provided for.

This application is based on the affidavit of Eric Kimani, the 1st Claimant/Applicant. The gist of the application is that the claimant/applicants were never given a chance to canvass and ventilate their case giving rise to the orders of 23rd April, 2013. It was indeed heard and determined *ex-parte* the same not even having been served onto the applicants. In the alternative, the applicants seek a deposit of security to the tune of their calculated undue salaries and allowances in court.

The applicant further argues that allowing these orders is unjust, arbitrary and unlawful and that the same should be set aside or varied.

The respondent on the other hand opposes the application vide their replying affidavit sworn on 24th February, 2014. The respondent, in paragraphs 5 and 6 of the said replying affidavit admits the fact and circumstances of the issue of orders made on 23rd April, 2013 now sought to be set aside but moves on to justify and support the same. The respondent further opposes a grant of the orders sought on grounds that the court order annexed and marked 1 in the Supporting Affidavit of Eric Kimani differs fundamentally with the one served on the claimant on 25th April, 2013. She argues that the contention of being condemned unheard by the claimant/Applicant can only be analysed upon a clarification of said orders of 23rd April, 2013.

The respondent rightly cites the issue in dispute as that of a determination as to whether she should or should not be granted stay of execution pending appeal. This, she argues is within the power of the court to do and bearing in mind that the respondent has an arguable appeal with high chances of success, the orders granted are indeed warranted and justified. The respondent further raises a myriad of other grounds in support of a case for stay of execution as ordered in paragraphs 14 – 21 of her written submissions but my feeling is that this is good material for the intended appeal and not this application.

Particularly, the respondent rubbishes the prayer of a deposit of Ksh.48,984,933.00 on grounds that the court failed to issue orders for a decretal sum to the claimants and further that a litigant would not be entitled to compute the figures for the decretal quantum, or at all. This is besides other averments touching on the current position of the respondent and therefore its inability to execute the judgement of court made on 21st February, 2013. She therefore prays that the application be dismissed with costs.

The Claimants/Applicants in their written submissions reiterate their case as expressed in their pleadings. They peg their submission on the circumstances subsisting at the time of the issue of the *ex-parte* and final orders of stay of execution made on 23rd April, 2013 and argue that this was not only unlawful but also unconstitutional and against the rules of natural justice – *audi alterum partern*. Further, the grant of stay of execution as made did not consider the legal criterion for issue of stay as provided by Order 42 rule 6(2) of the Civil Procedure Rules, Chapter 21, Laws of Kenya as follows;-

…it is not in dispute that the Application for stay of execution was heard and allowed ex parte without any notice thereof being given to the Claimants. The right to be heard forms the cornerstone of natural justice. Condemning a party unheard is not only unfair, but downright unconstitutional.

Furthermore, for stay of execution pending Appeal to be granted, a party must fulfill the requisites set out under Order 42 rule 6(2) of the Civil Procedure Rules. That is to say: The Court must be satisfied;

a. *That such security as the Court Orders for the due performance of the decree/order has been given by the Applicant.*

b. *That substantial loss may result to the Applicant should stay not be granted*

c. *That the Application for stay has been brought without undue delay. In addition, where the Appeal lies with the Court of Appeal;*

d. *The Applicant must show that he has an arguable appeal with reasonable chances of success.*

The Claimant/Applicant posits that these issues are and can only be canvassed *inter parties* in order to test their basis. The absence of the same in the circumstances resulted in an unprocedural order which cannot be cured and therefore the prayers for a declaration that these orders are unlawful, unconstitutional, null and void and that the same be set aside.

The claimants also pray that in the event that this court feels inclined to retain the orders for stay, the respondent should be ordered to meet the legal requirements for stay: security which this court has the power to determine and grant.

The claimant invokes the provisions of S.99 of the Civil Procedure Act, also known as the slip rule in which the court is empowered to exercise its powers and review, interpret and assess judgment. In the present case, this would enable an assessment of the decretal sum and therefore deposit payable which would essentially be in terms of the Ksh.48,984,933.00 computed and provided by themselves. They disclaim the concept and application of the doctrine of *functus officio* as applied here or underrate its application in the circumstances.

The claimants/applicants in their submissions also dispute the assertion of substantial loss to the respondent in the event of a deposit of security. The respondent has not adduced evidence of proof of emanating or even imminent loss arising thereof and therefore failure to satisfy the authority established in **Wangethi Mwangi & Nation Newspapers Ltd vs J.P. Machira T/A Machira & Co. Advocates(2005) eKLR**. The respondent also fails to disclose the ingredients and evidence of an arguable appeal in that no Memorandum of Appeal is exhibited or annexed to the application.

The claimant further submits that indeed there is no appeal on record as having been filed and sought to rely on the authority of **Nakuru Modern Feeds Limited Vs Benson Kariuki [2013]eKLR** where the court held as follows;

> *It was argued by counsel of the Applicant that an appeal is deemed filed the moment when a Memorandum of Appeal is presented in terms of Order 42, rule 10(2) of the Civil Procedure Rules and the date of presentation of the Memorandum of Appeal shall be deemed to be the date of filing the appeal (notwithstanding any dispute as to the amount of the fee payable). An appeal is thus deemed to be filed upon presentation thereof, and of course payment of the necessary filing fees……..*
>
> *Whereas this rule exists in the law, it is hardly if ever applied/observed until the requirements of Order 42, rule 13(4) have been complied with, that the Record of Appeal has been compiled and filed.*

This is therefore a gimmick by the respondent to evade execution of the decretal sum on the pretext of an appeal and should therefore be thrown out.

The respondent in response and opposition too, filed her written submission reiterating the pleadings and systematically set out to counter the Claimant/Applicant's pleadings and submissions in favour of the application and in particular the issue of deposit in the event of retention and or grant of the stay orders. It cites and argues the following as the issues for determination;-

a. *Whether the Court is functus officio on the issue of the decretal sum of Ksh.48,984,933,*

b. *Whether, the orders granted on 24th April 2013 should be set aside entirely with costs to the Respondent,*

c. *Whether the intended appeal is arguable and not frivolous,*

d. *Whether the intended appeal will be rendered nugatory unless stay of execution is granted.*

The respondent, in her submissions argues that the court's judgement was complete and conclusive as to findings and orders but defaulted on the issue and orders for a decretal amount and therefore the fallacy of calling for a deposit for Ksh.48,494,933.00. This court further has no power to re-open the case and stands *functus officio* in so far as the award of a decretal sum is concerned, the same having not been made in the judgement. S.99 of the Civil Procedure Code is not applicable or relevant in the circumstances. The respondent further argues and submits that rule 33 of the Industrial Court (Procedure) Rules, 2010 which calls for correction of errors is ousted and inapplicable in the circumstances of this case.

The respondent denies that the orders made on 23rd April, 2013 amount to a situation of being condemned unheard. They posit that the applicants would find solace in a search for a clarification of these in court and also that the applicants are still at liberty to list the respondents replying affidavit. The applicant is also emphatic on this and argues that the exclusion from participation and presentation of their case renders these orders unprocedural, irregular, unlawful and unconstitutional.

The constitution of Kenya is the brain behind legality and process. It is the basis against which the rules of natural justice as espoused earlier in this ruling are grounded. One needs not belabor the fact that the issue of absolute and final orders of stay of execution by this court on 23rd April, 2013 without recourse, response, participation and even service to the applicant herein passed a gigantic challenge to the validity, import and effacy of the orders made thereof. I therefore feel secure to find that these orders are irregular and unprocedural and therefore lacking on the basis of legality.

The 2nd issue for determination is whether in the sustenance of these orders, this court should order a deposit or even a deposit of the decretal sum or security for issue of the orders. There are as usual, opposing positions on this by the parties. This is a prayer and proposition by the applicant who argues that this would be in tandem with one of the requirements of Order 42 in 6(2)(a) of the Civil Procedure Rules. Indeed, Order 42 rule 6(2) sets out the legal requirements for a grant of orders of stay of execution as follows;

> *6.(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.*

They therefore justify a case for an issue of security in the event of sustenance of orders for stay of execution. I agree.

A case for blanket orders for stay of execution would not be sustainable in the current circumstances. This is because at issue is a substantial decretal amount calculated at Ksh.48,084,933.00 which touches on the livelihood and economic interests of the claimant/applicants and therefore the need to offer security in the event stay of execution is allowed pending appeal. The respondents had the liberty to offer security as their apparatus for the application for stay but did not exercise the same.

The respondent has a good case for sustenance of the orders and also makes a concerted effort to bring out a case for an arguable and not frivolous intended appeal. I must admit that most of the prose on the latter is material estranged from this application and should be reserved for the appeal, if at all.

The issues for determination by this court are in my humble estimation thus;

1. Whether the orders of court made on 23rd April, 2013 are apt and should be left to stand? Are these sustainable?

2. Whether in the event of sustenance of the orders of a stay of execution, this court should order a deposit or a deposit of the decretal sum as security.

3. Whether substantial loss would accrue to the respondent in the event of an order for security or issuance or sustenance of stay of execution.

4. Whether the intended appeal is arguable and not frivolous in the circumstances.

5. Whether the intended appeal would be rendered nugatory in the absence of orders for stay of execution.

6. Whether this court is *functus officio* in relation to further dealings with judgement of court made on 21st February, 2013.

The 1st issue for determination is whether the orders for stay of execution made on 23rd April, 2013 are sustainable or should be left to stand. Both parties make extremely elaborate and forceful arguments in favour of their opposing positions. From the face of the pleading and even submissions of the respective parties, it is not in dispute that the orders of court contain an error. The respondent in paragraph 27 of the submissions puts it thus;

> *27. It is not in dispute that the Orders granted on 24th April 2013 contain an error. Further, it is not in dispute that there are two versions of the said order. However, the Respondent submits that this does not amount to condemning the Claimants unheard. Refer to Exhibit 1 in the claimant's application dated 9th December 2013 and Exhibit 2 in the Replying Affidavit of Harrison Okeche dated 24th February 2014.*

A deposit of security is intended to check on respondents who may feel inclined to be indolent in processing and prosecuting an appeal to fruition with the expediency, prudence and vigour expected of such situations. I therefore agree with the applicant that in the event and circumstances of an issue of stay of execution, a deposit of security would be necessary.

The 3rd issue for determination is whether substantial loss would ensue to the respondent in the event of an order for deposit of Ksh.48,084,933.00 (the respondents submission cite this as Ksh.48,984,933.00) in court as security.

This, as expressed hereinbefore has received various reactions by the parties. The claimant/applicant rubbished this whereas the respondent supported the same. The claimant avers and submits that this allegation is not supported by any evidence on the part of the respondent and therefore ought to be thrown out as a ground in support of the application. The claimant sought to rely on the authority of **Wangethi Mwangi & Nation Newspapers Ltd vs J.P. Machira T/A Machira & Co. Advocates(2005) eKLR** where the court of Appeal observed and held as follows;

> *It is not suggested by the applicant that if the decretal amount is paid to the respondent and then reduced substantially on appeal the respondent will not be able to repay the difference between the decretal amount and that awarded by this Court.*
>
> *The applicant's case on this limb of the application is that the amount decreed is so large that the payment of that amount will cause destabilization of the applicant's financial position resulting in immediate irreparable injury to it. It is argued that if and when it receives any repayment by the respondent as a result of the appeal, that will be too late to undo the destabilization which will have occurred.*
>
> *Apart from frequently repeating the assertion of likely destabilization, the applicant's gave no*

evidence or submissions as to how and to what extent the applicant would be destabilized. No accounts were produced by the applicants to support the destabilization theory.

The only accounts produced were exhibited by the respondent. These showed the very substantial nature of the Nation Group and there was nothing in these documents to indicate that a payment of Shs.10.2 million would cause destabilization of the applicant which was part of that group.

We are therefore not satisfied that the applicant has shown that a successful appeal on quantum will be rendered nugatory if no stay is granted.

This is the case here.

I buy the arguments of the applicant. Security should be offered in the event of stay and this not necessarily negated by the evidence and submissions of the respondent.

The 4th issue is whether there is an appeal or arguable appeal by the applicant, or whether this is frivolous. This is denied by the applicant. The claimants/applicants argue that there was a memorandum of appeal annexed to the respondent's application thus putting the court in a difficult situation in a decision as to whether there was or was not an arguable appeal. The respondent's case is that he has lodged a Notice of Appeal and requested for typed proceedings. It has complied with the law and done all that is necessary in that regard. The record as exhibited in the application dated 19th April, 2013, as submitted by the applicants does not include a draft memorandum of appeal. It only includes a Notice of Appeal and therefore is incompetent for assessment of its veracity as an arguable appeal. The parties also apply and cite varied provisions for their respective cases for an arguable appeal. The applicant herein relies on S.82(1) of the Court Appeal rules while the respondent does the same on Order 42 rule 6(4) of the civil Procedure rules. Below is the claimant/applicant's version;

According to Rule 82 (1) of the Court of Appeal Rules; the institution of an Appeal is by filing a memorandum of appeal, record of appeal, payment of the prescribed fee and upon the giving of security for costs. The rules does not recognize filing of a Notice of appeal as an institution of the appeal. Indeed your Lordship, it is only with regard to High Court Appeals that the lodging of a Notice of Appeal is conclusive proof of the existence of an Appeal.

The respondent sees it this way;

35. The Respondent also submits that under Order 42 Rule 6(4) of the civil Procedure Rules, 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. Consequently, the Claimants' allegation that there exists no appeal is baseless since the Respondent herein has complied with the Court of Appeal Rules on filing of notice of appeal.

It would appear that these rules are complimentary and not opposing. The Civil Procedure Code provides a role for a presumption of an appeal whereas the court of appeal rules provide a case for an appeal properly so called. In the instant case, the application for stay of execution displays only a Notice of Appeal which indeed would not be useful in assisting the court to make a determination of the issues in dispute – whether an arguable appeal subsists. It does not either disclose the lodging of an appeal and therefore my loss at a determination as to whether an arguable appeal subsists in the premises.

The 5th issue for determination is whether the intended appeal would be rendered nugatory in the event of an issue of stay of execution. This is a matter particularly canvassed by the applicant in this cause. The respondent brings out various arguments in favour of a case for a negotiation of the appeal in the event of refusal for stay. She argues that this being a public institution, this is even the more severe. Again, the claimants have not demonstrated any ability to refund the decretal sum in the event of success in the appeal. This argument would be plausible if there was a tangible appeal. It would have been possible to assess the viability and veracity of the appeal and also answer this question. In the current circumstances, this is not easy or even possible.

The last issue for determination is whether the court is rendered *functus officio* on the issue of the decretal sum of Ksh.48,084,933.00 (Ksh.48,984,933.00?)

Various arguments have been advanced by the parties on this. The respondent argues in favour of the proposition against while the claimant/applicant makes his case against the principle. The commonality of these two is that they all seek to rely on S.99 of the Civil Procedure Act. This is as follows;-

> *99. Clerical or arithmetical mistakes in judgements, decrees or orders, or errors arising herein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.*

The claimant/applicant's position is that the slip rule enables the court to correct any errors on the judgement and on this note allows this court to entertain a calibration and computation of the decretal amount. The respondent disagrees.

The essence of S.99 is to enable the court dissolve real or imagined disputes as in the present case. A clause scrutiny of its wording would essentially clear any inadequacies occasioned by any slip in a judgement.

In the present case, and on the hind sight of these proceedings, I notice that what occasioned the confusion and massive debate is an omission on the computation and issue of orders for a decretal amount. This can be cured by the court doing the same *suo moto* or on the prompting by a party or parties. Essentially, and as argued and submitted by the respondents, the court is rendered *functus officio* on delivering and signing of a judgment. However, the slip rule comes in handy to take care of rudimentary defaults, errors and omissions in a judgement. Whereas I agree with the submission on *functus officio*, I hold that the slip rule is in the circumstances applicable and would come in handy to clear this anomaly. I, however, opt not to apply the same in the circumstances.

In the penultimate, I agree with the claimants/applicants that the orders of court of 23rd April, 2013 are anomalous and bereft of clear principles of law and procedure. I am therefore inclined to allow this application and order as follows;

1. THAT the orders of court made on 24th April, 2013 be and are hereby declared unlawful, unprocedural, null and void.

2. THAT the orders of court made on 24th April, 2013 be and are hereby set aside.

3. THAT the costs of this application shall be borne by the respondent.

Delivered, dated and signed the 9th day of July, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Ms. Sarah N. Nyoike instructed by Sarah N. Nyoike & Co. Advocates for the Claimant/Applicant.

2. Ms. Lorraine Oyombe instructed by Federation of Kenya Employers for the Respondents.