



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**

**CAUSE NO. 1800 OF 2011**

**RULING**

**ABEL MARCEL OKOTH OKELLO**

**VERSUS**

**KENYA MEDICAL RESEARCH INSTITUTE (KEMRI)**

**DELIVERED BY**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**REPUBLIC OF KENYA**

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**CAUSE NO. 1800 OF 2011**

**ABEL MARCEL OKOTH OKELLO.....CLAIMANT**

**VERSUS**

**KENYA MEDICAL RESEARCH INSTITUTE (KEMRI).....RESPONDENT**

**RULING**

This case was heard ex-parte and judgment delivered on 19<sup>th</sup> March 2013. The Respondent applied for setting aside of the judgment by Notice of Motion dated 19<sup>th</sup> July 2013 which I dismissed on 31<sup>st</sup> March 2014. The present application brought by way of Notice of Motion dated and filed on 19<sup>th</sup> May 2014 is for stay of execution pending appeal. The application was brought under Order 42 Rule 4 of the Civil Procedure Rules and all enabling provisions of the law. The application is supported by the affidavit of MARGARET RIGORO sworn on 19<sup>th</sup> May 2014 and on the following grounds.

- 1.The Respondent is dissatisfied with the whole of the ruling delivered by this Honourable Court on 31<sup>st</sup> March, 2014 and had timeously filed a Notice of Appeal.
2. Without a stay order, the Claimant herein is likely to apply for the execution of the judgment and decree herein.

3. The Respondent has an undoubted right of appeal and should be allowed to urge the same on appeal.
4. Should the decree herein be executed it will lead to substantial loss and damage, more so to the Kenya public who are the Respondents main customers.
5. The execution of the decree herein will render the outcome of the intended appeal nugatory.
6. The Respondent is prepared to comply with such reasonable terms as to security as this Honourable court may deem fit to order.

The Claimant opposed the application and filed an affidavit sworn on 28<sup>th</sup> May 2014. The main grounds of opposition in the replying affidavit are that the Respondent is not exempt from complying with the law because of its status as a Parastatal engaged in scientific research, that no memorandum of appeal is annexed, that the application is meant to delay and frustrate him in pursuing the fruits of his judgment and that the applicant has not demonstrated that it will suffer substantial loss.

The parties canvassed the application by way of written submissions.

I have considered the application and the affidavit and grounds in support thereof and also the replying affidavit and grounds in opposition thereto. I have also considered the submissions of the parties.

The Applicant referred to 2 authorities, that is **Joseph Chege vs. Gikiru Heho (2008) eKLR** and **Tropical commodities Supplies Limited and others v International Credit Bank Limited (in liquidation) (2004) EA**.

I have however not considered the authorities relied upon by the Respondent as the authorities were not filed and it is not the responsibility of the court to go and search for authorities cited by parties.

The principles for granting stay of execution pending appeal is first, that there must be an arguable appeal, and secondly that if the orders are not granted the appeal will be rendered nugatory and thirdly, that the applicant furnishes security.

In the present case there is no draft memorandum of appeal to enable me decide whether or not the applicant has an arguable appeal. The grounds of the intended appeal are not stated even in the affidavit in support of the application.

Appeals from decisions of this court are only allowed on grounds of law. It is therefore important that those grounds are set out in the application or that a draft memorandum of appeal is attached to the application to enable the court determine if the Applicant has an arguable appeal. Otherwise the court may be left with no option but to presume that the appeal is frivolous or an abuse of the process of court and intended to delay the decree holder from enjoying the benefits of his judgment. In an application for stay of appeal the court must balance both the right of the applicant to appeal and the right of the decree holder to enjoy the benefits of the judgment. This can only be done where the grounds of appeal have been disclosed to the court.

In my ruling in which I dismissed the application for setting aside ex-parte judgment I had given my grounds for so doing being that there was no valid defence to the claim and that even if I set aside the judgment and allowed the Respondent to present its case I would still arrive at the same judgment. I am still of the same opinion.

For the foregoing reasons I find that the application by the Respondent has no merit and dismiss the same with costs.

Orders accordingly.

Dated in open court this 16<sup>th</sup> day of October, 2014.

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of:**

No appearance for Claimant

No appearance for Respondent