



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1093 of 2012**

**MICHAEL MWALO.....CLAIMANT**

**VS**

**THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY  
FUND.....RESPONDENT**

### **RULING**

#### **Background**

1. On 18th March 2013, I delivered a ruling in which I dismissed the Respondent's application for review of a consent judgment filed by the parties on 19th November 2012 and adopted by the Court on 20th November 2012. Being dissatisfied with the decision of the Court the Respondent filed a Notice of Appeal on 20th March 2013 and applied for typed proceedings.

2. This ruling emanates from the Respondent's application for stay of execution pending appeal dated 25th March 2013. In the Draft Memorandum of Appeal attached to the application the Respondent raised the following grounds of appeal:

- a) The learned judge erred in law and fact in her Ruling by primarily being driven and basing the same upon her observance of the conduct of the Appellant.
- b) The learned judge erred in law and fact in her judgment by totally failing to appreciate the primary issue of illegality of the consent that was raised in the application and authorities cited to support the same.
- c) The learned judge erred in law and fact in her Ruling by failing to appreciate the law particularly the provisions of sections 3, 4 and 33 of the National Social Security Fund Act, in order to appreciate the functions of the Board vis-à-vis the powers and functions of the Managing Trustee.
- d) The learned judge erred in law and fact in her Ruling by failing to totally address her mind as regards the gravity of the issues raised by the Appellant and the totality of the evidence adduced by the Appellant.

#### **The Respondent's Submissions**

3. Mr. Muchoki for the Respondent submitted that the Respondent has an arguable appeal and that if stay is not granted the appeal would be rendered nugatory. He asked the Court to take notice that of the magnitude of the decretal sum which would be almost impossible to recover from the Claimant were the Respondent's appeal to succeed. Counsel also asked the Court to bear in mind that the Respondent had continued to pay the Claimant his monthly salary even beyond the ruling of the Court on 18th March

2013. The Respondent was ready to abide by whatever conditions the Court would attach to the stay of execution.

4. In reference to a letter dated 26th March 2013 by the Managing Trustee of the Respondent seeking to re-assign the Claimant, Counsel for the Respondent apologised to the Court and undertook to have the said letter withdrawn pending conclusion of this case. At the time of writing this ruling the said letter had indeed been withdrawn.

### **The Claimant's Submissions**

5. In reply, Mr. Onyony for the Claimant submitted that this Court was *functus officio* in as far as this matter is concerned pointing out that the Respondent had filed multiple stay applications before the Court and that the current application amounts to an appeal over which the Court had no jurisdiction. He also asked the Court to note that the Respondent had in the past been in contempt of the orders of the Court.

6. In reference to the authorities cited by Counsel for the Respondent, Mr. Onyony noted that the said authorities were remote to the issues at hand as none of them related to consent judgments. Counsel was of the view that the Respondent would not suffer any substantial loss if the stay was not granted. Conversely, the Claimant stood to suffer great hardship if the stay was granted.

### **Findings and Determination**

7. I will first address myself to the issue raised by Mr. Onyony that this Court is *functus officio* courtesy of the multiple applications for stay made before it by the Respondent. While it is true that the Respondent has indeed appeared before this Court in the past seeking stay of execution, this is the first application for stay pending appeal as provided for under Order 42 Rule 6 of the Civil Procedure Rules. Again, although the Respondent has attached the Draft Memorandum of Appeal to his application, the Court is certainly not sitting on appeal of its decision delivered on 18th March 2013. The Respondent is therefore properly before this Court.

8. The conditions on which the Court may grant a stay of execution pending appeal were restated in the case of **Reliance Bank Limited Vs Noriake Investments Limited [2002] 1EA 227 (CAK) Case No. 937 of 2002** as follows:

***a) That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal;***

***b) That if an order for stay or injunction as the case may be, is not***

***granted, the appeal or the intended appeal, were it to eventually succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.***

9. In making a determination whether an appeal or intended appeal would be rendered nugatory, the Court will have regard to the magnitude of the decretal amount and the circumstances of the Claimant. In the case of **Attorney General Vs Equip Agencies (Civil Application No Nai 432 of 2001)** the Court of Appeal considered the amount of the decretal sum in making a decision to grant a stay of execution. No doubt, a Claimant who receives a huge award would find it much more difficult to refund the decretal amount in the event of a successful appeal at the instance of the Respondent. The cost of recovery must also be borne in mind.

10. With regard to the question whether an appellant has an arguable case, the Court of Appeal in the case of **Syner-Med Pharmaceuticals Ltd Vs Glaxo Group Limited [2010] eKLR** rendered itself as follows:

***“It is not to be forgotten that an arguable point does not in any way connote a point that will succeed if***

***and when it is fully ventilated.”***

11. Back to the circumstances of the current case. The decretal amount is in excess of Kshs. 15 million, a large sum of money by any standard. I therefore agree with Counsel for the Respondent that the Claimant would find it difficult to refund this kind of money were the appeal to succeed. I have also taken into account that the Claimant remains on salary and that the Respondent's letter that threatened to rock the boat has been withdrawn.

12. On balancing the scales of justice I have therefore decided to grant a stay of execution pending appeal. The Respondent is directed to keep the Claimant on full salary pending determination of the appeal.

I make no order for costs.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF MAY  
2013**

**LINNET NDOLO  
JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**