



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

**CAUSE NO. 630 OF 2012**

*(Before D.K.N. Marete)*

**GEOFFREY KAMAU NJATHI.....CLAIMANT/RESPONDENT**

versus

**NAIVAS LIMITED .....RESPONDENT/APPLICANT**

**RULING**

By an application by way of a Notice of Motion dated 5th February, 2013 and supported by the supporting affidavit of David Kimani Mukuha sworn on the same date this matter was brought court. It seeks the following orders;

1. **THAT** this matter be certified as urgent and be heard *ex parte* in the first instance.
2. **THAT** this Honourable Court be pleased to grant an order for stay of execution of the decree issued herein on the 16th day of January, 2013 pending the *inter parties* hearing and determination of this application.
3. **THAT** there be a stay of execution of the decree herein pending the *inter parties* hearing and determination of the appeal against the entire Judgement herein, delivered on the 13<sup>th</sup> day of December, 2012.
4. **THAT** the costs of this application be provided for.

The claimant who at the onset appeared in person in a replying affidavit dated 18th February, 2013 and filed the following day opposes application. He further files another document bracketed as memorandum of reply to the memorandum of appeal from the entire judgement.

The respondent/applicant's case is that he is entitled to the orders sought and his application is based on the following grounds;

1. **THAT** applicant lodged a Notice of Appeal in this matter on the 27th December, 2012 in accordance with rule 74 of the court of appeal rules.
2. **THAT** the applicant's intended appeal is arguable and the intended appeal will be rendered nugatory if execution proceeds and the orders sought herein are not granted.
3. **THAT** the application for stay has been made without undue delay on the part of the

applicant.

4. **THAT** the claimant has already instructed Auctioneers who have proclaimed the applicants goods in the execution of the Judgement herein and therefore there is a real and apparent danger of the applicant's goods being carted away, anytime after the expiry of the mandatory 7 days in the proclamation which is on the 7th of February, 2013.

5. **THAT** in the event of auctioneers carry away the proclaimed goods, the applicants business will be paralysed as the proclaimed motor vehicles constitute the applicants tools of trade, which are used to transport goods to the applicants shops and the applicant will suffer irreparable loss and damage.

6. **THAT** the respondent/decreet-holder is a person of straw who will not be in a position to refund the decretal amount in the event of the appeal is successful and the said decretal-holder is not engaged in any employment that is likely to make him afford the said amount, which is colossal, and neither does he have any as sufficient to offset the decretal sum.

7. **THAT** it is therefore imperative that the applicant's application for stay be heard expeditiously.

The respondent/applicant reinforces his grounds in his supporting affidavit and avers that the claimant has instructed auctioneers who have proclaimed the company's assets and issued a seven days notice for payment of the decretal amount. That the intended appeal shall be rendered nugatory if the decretal amount is paid. Moreover, the applicant avers that the claimant is a man of straw and unlikely to be able to refund the decretal sum in the event of success at appeal. He further avers and submits that he is willing to comply with any conditions including providing a bank guarantee from a reputable bank for the decretal amount.

The claimant/applicant further submits that the reasons for the delay were beyond his control and therefore the prayer for leave out of time.

Further he avers that he will suffer loss as the payment of the decretal sum will adversely affect the claimant's operations whereas the proclaimed goods are motor vehicles which are his tools of trade and utilized for transportation of supermarket goods and trading stock.

The claimant/respondent in his replying affidavit opposes the application. He asserts that he has fully complied with the procedural aspects of execution and is now only being frustrated by this application. He submits that he after thirty days of the judgement of court he applied for a decree and served the same onto the respondent/applicant to which he did not respond, or at all.

That on 15th February, 2013 the respondent/applicant served a Notice and Memorandum of Appeal onto the claimant herein which appeal does not raise arguable issues and is out of time. Further, the supporting documentary evidence is not meritorial as the same was not signed by the Registrar of the Industrial court nor is it provided for in law. He in the penultimate avers and submits that the stay as filed is misconceived and fatally defective as an application for stay pending appeal is not available in equity. He prays that the application be dismissed with costs.

This matter/application opened with a hearing on 6th February, 2013 when the certificate was heard and orders in terms of prayers 1 and 2 issued by Justice Mbaru as follows;

1. **THAT** the application is certified as urgent.

2. **THAT** stay of execution of the decree hereby granted on 16th January, 2013 is stayed pending *inter partes* hearing of this application.

When the matter came for hearing on the 20th February, 2013, there was no appearance for the respondent and the application was dismissed with costs for want of prosecution.

On the said 20th February, 2013, the respondent filed an application for reinstatement with interim orders being granted by Onyango, J. The matter was subsequently heard on 20th March, 2013 and a ruling in favour of reinstatement delivered on 28th March, 2013.

The main application did not come for hearing until the 10th July, 2013 when it was finally heard. At the hearing, counsel for the respondent/applicant reiterated his case in submission. This did not substantially differ with the application and the affidavit in support.

The claimant/respondent in opposition to the application sought to rely on the replying affidavit of the claimant sworn on 19th February, 2013. He rubbished the respondent's claim and submission on the pecuniary position of the respondent and dismissed the same for being speculative and baseless. The respondent further does not support the applicant's deposition on the poverty, joblessness and pecuniary disability of the claimant/respondent and therefore these allegations are blanket. He sought to rely on the authority of **Radio Africa Limited Vs Lingam Enterprises & 4 Others, Civil Case No. 579 of 2008** where Okwengu, J. held that poverty cannot be a base for denial of a successful litigant from enjoying the fruits of his judgement.

The learned Judge laid the legal basis for stay of execution as hereunder and in the following terms;

6. *"I have carefully considered the application. I have also considered the submissions and the authorities cited in support and in opposition to the application. The conditions upon which an order of stay of execution pending appeal may be issued are clearly stated under Order 42 Ru3 6(2) of the Civil Procedure Rules 2010, as follows:-*

- 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.*

7. *In addition, Order 42 Rule 6(1) provides an order for stay of execution or proceedings may be issued by the court "for sufficient cause".*

8. *The applicants have maintained that they will suffer substantial loss if the order of stay is not issued because they are unlikely to recover the decretal sum if their appeal is successful. The applicants have however not laid any basis to justify this apprehension. Nor have the applicants provided anything to demonstrate that the respondent will not be able to refund the decretal sum if required to do so. The applicants' main fear appears to be that in their view the amount of the decree is substantial. However, the amount of the decree on its own is not a sufficient excuse to justify stay of execution or proceedings. Therefore, the applicants have not provided any plausible reason as to why the court should order a stay of order proceedings.*

And lastly, the Judge observed that;

8. *The court has a responsibility to balance the interest of both litigants. It would not be fair to just deny a successful litigant the fruit of his judgement unless there is good reason for doing so.*

The appeal is baseless as it is not founded on any appropriate grounds of law. It was not filed without delay and therefore lack of due diligence on the part of the respondent/applicant. It is indeed an afterthought only executed on realization that the claimant/respondent was onto execution.

The respondent/applicant has not in her application demonstrably put in a strong case of his intention to

appeal. The notice does not appear regular in that this is not originated from the Registrar, Industrial court of Kenya. The application is not clothed with an annexure of a draft memorandum of appeal as evidence of the grounds on which the appeal stands and therefore grounding for the application.

I would agree that the applicant's fear of non recovery of the amounts paid in execution thereof is not convincing. Neither is the contention that this would curtail the respondents operations is as the respondent is a large establishment that would readily meet her obligations and easily satiate the decretal amount.

The applicant has again not demonstrated that the claimant is a miserable person as alleged. Even if this was the position, the doctrine of equality before the law would come in handy and in favour of the claimant/respondent. The respondent/applicant should let go. She has miserably failed to establish a case for stay of execution and continues to linger on the interim orders for the same. This is not fair.

I am therefore inclined to dismiss this application with costs and vacate and/or discharge the interim orders of court made on 20th February, 2013.

I therefore orders as follows;

1. **THAT** this application be and is hereby dismissed with costs to the claimant/respondent.
2. **THAT** the interim orders of this court made on 20th February, 2013 be and are hereby discharged.
3. **THAT** auctioneers costs shall be determined at the time of taxation of costs of the claimant.
4. **THAT** the amount of Kshs. 50,000.00 deposited in court vide this courts orders on 2nd December, 2013 be retained until the issue is determined to finality.

Dated, delivered and signed this 17<sup>th</sup> day of July, 2013.

**D.K.Njagi Marete**

**JUDGE**

**Appearances.**

1. Mr. Kiiru instructed by Thuita Kiiru & Co. Advocates for the respondent/applicant
2. Mr. Milimo instructed by Milimo Muthoni & Co. Advocates for the claimant/respondent.