



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI  
CAUSE NO. 144 OF 2011

MOSES WANYONYI WESONGA.....1<sup>ST</sup> CLAIMANT  
MOSES WAINAINA MBUGUA.....2<sup>ND</sup> CLAIMANT  
PETER CLAVERS OWUOR.....3<sup>RD</sup> CLAIMANT  
DAVID MOGIRE NYABUTI.....4<sup>TH</sup> CLAIMANT

VERSUS

ABDUBA QALLA.....1<sup>ST</sup> RESPONDENT  
JAMES MBURU.....2<sup>ND</sup> RESPONDENT  
MUHUMED A. ABDI.....3<sup>RD</sup> RESPONDENT  
JOSEPH MBUGUA.....4<sup>TH</sup> RESPONDENT  
PAUL M. KURIA.....5<sup>TH</sup> RESPONDENT  
MICHAEL MUGAH.....6<sup>TH</sup> RESPONDENT  
REGISTRAR OF TRADE UNIONS.....7<sup>TH</sup> RESPONDENT

**RULING**

1. The Application before me is one dated 13<sup>th</sup> June 2013 and seeks stay of execution pending appeal. It is supported by the Affidavit of Moses Wanyonyi the 1<sup>st</sup> Claimant. To the affidavit are attached copy of the Ruling appealed against, the Memorandum and Record of Appeal as well as the warrants. Mr. Kandere appeared for the Claimants and urged the Application. He submitted that the Claimants have appealed against the decision of Judge Madzayo made on 10<sup>th</sup> May 2012. He contended that the decision of Hon. Madzayo was contra statute and *per incuriam*. He proceeded to demonstrate what he called substantial loss. The Review Application was struck out for non compliance of Sections 34 and 35 of the Advocates Act in that the advocate at that time did not possess a practicing certificate. Costs were awarded and the Claimants are therefore to pay costs on a matter in which Mr. Kandere submits the decision was not based on law. In aid of the submissions he cited the case of **Riziki Binti Abdalla & Anor. v. Shariffa Binti Mohamed & Onters [1959] 1 EA 1035** based on that and Section 40 of the Advocates Act, Mr. Kandere urged the Court to grant the Application for stay pending the determination of the matter before the

Court of Appeal. He submitted that his learned opponent had only raised the issue of the Court being *functus officio*. He cited the case presented by the Respondent's being Cause 1449 of 2011 a decision by Rika J. The learned judge states that the Court is to consider the rights of the party and equity. He urged the Court to consider the matter as a whole and the Constitution Article 159 and overriding objectives – the oxygen principle.

2. The Application was opposed. Mr. Onyony for the Respondents submitted that the Application was not merited. He relied on the Affidavit of Muhumed A. Abdi the 3<sup>rd</sup> Respondent sworn on 24<sup>th</sup> June 2013. He submitted that the Court is being urged to stay the matter without the certificate of taxation dated 27<sup>th</sup> July 2012 being attached. He stated that Application for stay is not seeking to stay generally, award or ruling or damages but party to party costs. They are seeking stay of the costs. Whether the proceedings were proper or not, the critical issue to be considered is substantial loss. He referred to **Cause 361 of 2012 Martha Muyandazi v. Kenyatta University & 3 Others** and the decision of Marete J. in support of submissions that there is no substantial loss. He submitted that the threshold had not been met. Stay, he stated, is not a right, it is a discretionary remedy based on the merits. He cited the decision of Mary Kasango J. in **George Gikubu Mbuthia v. Peter Njeri & 3 Others [2004] eKLR, Cause 1449 of 2011 Kenya National Private Security Workers' Union v. Kenya Kazi Services Limited**. Counsel submitted that the payment will not render the appeal nugatory. He submitted that he has the ability to pay should there be contrary orders in the Court of Appeal.
3. Mr. Onyony stated that the Appeals emanating from the Tribunal that preceded this Court are not appeals for the Court of Appeal. He cited the case of **Director KEMRI v. Agnes Muthoni & 35 Others [2013] eKLR** where the Court of Appeal held as much. He said that the Appeal before that Court will be dismissed as it cannot stand. Regarding security he stated that if the Claimants are willing to furnish security the Claimants should furnish such security to enjoy the stay sought. The amount should be equivalent to the amount they seek to stay.
4. The Court has a discretion to grant a stay pending appeal if it is satisfied that:-
  - a. *Substantial loss may result unless the order sought is granted*
  - b. *The application has been made without un-reasonable delay*
  - c. *Such security as the Court orders for the due performance of the decree or order appealed from has been given by the applicant.*
5. In the case before me, the Applicants state they will suffer substantial loss if they are condemned to pay costs. The loss contemplated in the law is not confined to the decretal sums. It is loss and loss may take many forms. The Application was made upon issuance of warrants which was without unreasonable delay. No security however has been furnished. In the case, the amount in question is approximately Kshs. 118,000/-. The Appeal may well be a weak one but the Court of Appeal is more than competent to handle the Appeal and the decision will be without doubt of interest to both the Applicant and the Respondent herein. The cases cited were persuasive. The decisions by Marete J. and Rika J. were particularly insightful on the grant of orders. In the decision cited being **Cause 361 of 2012 Martha Muyandazi v. Kenyatta University & 3 Others** the Hon. Marete J. cited with approval a decision in the unreported case of **James Wangalwa & Anor v. Agnes Naliaka Cheseto High Court Misc. Application No. 42 of 2011** as follows:-

**“that the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail....”**

Further in the same decision the Hon. Marete J. cites the reported case of **Mukuma v. Abuoga 1988 [KLR] 645** where the Court held that “substantial loss is what would render the appeal nugatory”

6. I am in agreement with Hon. Marete J. and the learned judges before us. Substantial loss is what

would negate the success in the appellate Court. In this matter, the interests of justice lean toward the grant of an interim relief pending the resolution of the Appeal. In the event the Claimants succeed in the Court of Appeal, their Appeal will be empty and devoid of any success if on the way to victory they have had to pay substantial amounts to the Respondents.

7. In the end result, I will grant conditional stay on terms that the Claimants deposit a suitable security bond from a reputable financial institution for the sum of Kshs. 118,000/- or the cash equivalent in Court within 14 days of today. Failure to provide the security aforesaid will lead to automatic lapse and vacation of the stay order.

Orders accordingly.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of December 2013**

**Nzioki wa Makau**

**JUDGE**