



**Changawa v Gertrude’s Children Hospital (Cause 2203 of 2016)
[2024] KEELRC 1292 (KLR) (27 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1292 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2203 OF 2016**

JK GAKERI, J

MAY 27, 2024

BETWEEN

JEROME CHANGAWA CLAIMANT

AND

GERTRUDE’S CHILDREN HOSPITAL RESPONDENT

RULING

1. Before the Court for determination is the Respondent’s Notice of Motion dated 21st February, 2024 filed under Certificate of Urgency on even date seeking Orders That:-
 1. Spent.
 2. Spent.
 3. Spent.
 4. This Honourable Court be pleased to issue a stay of execution of its Award delivered on 6th July, 2022 and all consequential orders thereto pending the hearing and determination of the Appeal against the Award being Nairobi CA No. E708 of 2023 *Getrude’s Children Hospital v Jerome Changawa*.
 5. The costs of this application abide the outcome of the Appeal.
 6. This Honourable Court be pleased to issue such order or further orders that it may deem fit and just to grant to meet the ends of justice.
2. The Notice of Motion is expressed under Articles 159, 162(2) 164(3) of the Constitution, Section 12(3) (i) and (viii) of the Employment and Labour Relations Court Act 2011 and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and based on the grounds set out on its face and the Affidavit of Kenneth Afwande sworn on 21st February, 2024 who deposes that the applicant had



filed an appeal against the Award made on 6th July, 2022 and the Claimant was aware of its pendency and had acquiesced to the processing and determination of the appeal without execution but has commenced the execution process during the pendency of the appeal and has taken out warrants and served the same on the applicant on 16th February, 2024.

3. The affiant deposes that execution pending the hearing and determination of the appeal would occasion the applicant irreparable loss and damage and the Claimant may not be in a position to refund the Respondent if the appeal is successful as his wherewithal to refund the sum plus interest is unknown and the order of stay of execution sought would not occasion irreparable damage or prejudice to the Claimant if the appeal is eventually dismissed.
4. That the Notice of Motion was filed without inordinate delay and it is in the interest of justice that the stay of execution sought be granted pending the hearing and determination of the appeal.

Response

5. In his grounds of opposition dated 22nd February, 2024, the Claimant states that the instant application is an abuse of the court process and it is incompetent, fatally defective and frivolous and filed in bad faith to delay the Claimant from realizing the fruits of the Judgment dated 6th July, 2022.
6. That the applicant has met the requirements for grant of stay of execution pending appeal and has not indicated whether it has an arguable appeal with chances of success.

Applicant's Submissions

7. Counsel for the applicant submits that as the Judgment-Debtor has liquidated the decretal sum, execution need not proceed and the only remaining aspect is house allowance for which a review was sought and declined.
8. Counsel urges that a Notice of Appeal was filed and served on time as is the Record of Appeal and what remains are the court's directions on disposal of the appeal and the Claimant has not contested the facts as captured by the applicant.
9. Regarding the financial status of the Claimant, counsel urges that it is unknown and the amount paid may be irrecoverable if the appeal succeeds and the amount sought is significant.
10. Counsel submits that the balance of convenience tilts towards maintaining the status quo to enable parties pursue the appeal and the applicant is a reputable medical institution in Kenya.
11. According to counsel, all that the court needs to satisfy itself is that steps have been taken to pursue the appeal.
12. Regarding provision of security, counsel submits that the applicant is a renowned medical facility and there is no risk of disappearing from the court's jurisdiction should it lose the appeal.

Respondent's Submissions

13. As to whether the applicant has met the threshold to warrant a stay, the Respondent submits that the instant application is a back door attempt to persuade the court on an application already dismissed on 16th February, 2023 and the court has no jurisdiction to entertain the instant application as adverted to at paragraph 41 of the Ruling.
14. Reliance was made on the sentiments of the court in *Obadiah Mugambi v Joyce Ncoro* [2021] eKLR, *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR and *Mwaura Karuga t/a Limit*



Enterprises v Kenya Bus Services & 4 others [2015] eKLR to urge that the applicant has not fulfilled the requirements of Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010 as it had not demonstrated willingness to deposit security for costs, or the substantial loss it stood to lose and execution is a lawful process.

15. Finally, counsel submits that the instant application is brought almost 2 years after the judgment was delivered and is arguably an afterthought.
16. Counsel urges the court to dismiss the application.

Analysis and Determination

17. The only issue for determination is whether the applicant's Notice of Motion dated 21st February, 2024 is merited.
18. Analogous to the Ruling delivered on 8th May, 2023 on the applicant's Notice of Motion dated 16th March, 2023, I will start by recapitulating the history of this suit so as to contextualize the instant application.
19. The Claimant commenced this suit against the Respondent on 28th October, 2016 and the Respondent filed its Statement of Defence on 20th February, 2019 more than two and half years later.
20. As early as December 2018, the suit was scheduled for Formal Proof on 3rd May, 2019. This may have been the notice which led to the filing of the Notice of Motion dated 29th April, 2019 which sought a stay of proceedings for the Respondent to be granted leave to file a defence and the Defence filed be deemed properly filed.
21. The application was allowed by consent on 15th May, 2019.
22. On 30th September, 2020, the Deputy Registrar fixed the hearing date on 18th November, 2020 by consent of the parties on which date the court did not sit and hearing was fixed for 2nd February, 2021 but did not take place as the Claimant was indisposed. The court granted an adjournment.
23. From 26th July, 2021, parties attempted negotiations but by 13th April, 2022 the efforts appear to have fallen through on which date counsels for the parties agreed to proceed by way of affidavit, evidence and submissions and the Respondent was accorded 21 days to comply by 17th May, 2022 on which date judgment was slated for 6th July, 2022 and was delivered on even date.
24. The Respondent applied for review of the judgment vide an application dated 21st July, 2022 and stay of execution was granted.
25. Ruling was delivered on 16th February, 2023 and a 21 day stay of execution was granted.
26. By a Notice of Motion dated 6th March, 2023, filed under Certificate of Urgency, the Respondent sought a stay of execution of the Ruling delivered on 16th February, 2023 pending the hearing and determination of the Notice of Motion as well as the intended appeal.
27. Similarly, the Respondent prayed for such further orders as the court deemed fit in the interest of justice.
28. The Claimant filed grounds of opposition dated 16th March, 2023.
29. In essence, the applicant was seeking a stay of a Ruling that dismissed its application for stay of execution. The court could not fathom what it was being requested to stay as the Ruling granted no positive orders.



30. After a review of the relevant case law on stay of execution and Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010, the court was not persuaded that the applicant had made a case for the order of stay pending the hearing and determination of the intended appeal.
31. Specifically, the court was not persuaded that the applicant had demonstrated the substantial loss it stood to suffer if the orders sought were not granted and as evidenced by the instant application, no substantial loss was suffered.
32. In paragraph 41 of the Ruling, the court expressed itself as follows:
- “Finally, since the proposed appeal is to the Court of Appeal, an eminently Superior Court in Kenya, second only to the Supreme Court, the apex Court of Judicature, although Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 gives this court jurisdiction to grant the order of stay, it is only fair that the court defers to the Court of Appeal which will have a wider spectrum of issues to consider including the Memorandum of Appeal which this Court does not.”
33. Earlier in this ruling, I adverted to the orders sought in the Notice of Motion dated 16th March, 2023 which included an order of stay of execution of the Ruling delivered on 16th February, 2023 pending the hearing and determination of the intended appeal.
34. In the instant Notice of Motion, the applicant seeks as the Principal relief, a stay of execution of this court’s award delivered on 6th July, 2022 pending the hearing and determination of the Appeal against the award.
35. Although the applicant has filed a copy of the Notice of Appeal dated 21st February, 2023, certified record of Appeal and statement of address of service, it has not disclosed the status of the Appeal which is uncommon.
36. Similarly, a copy of the Memorandum of Appeal was not attached.
37. It requires no emphasis that Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010 prescribes the threshold for the grant of a stay of execution pending appeal as follows;
- No order for stay of execution shall be made under Sub-rule (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.
38. It is trite law that as the conditions prescribed by Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010 are conjunctive and not disjunctive. All the conditions must be met for the court to exercise its discretion favourably.
39. It is common ground that whether or not to grant a stay of execution under Order 42 Rule 6(2) of the *Civil Procedure Rules* involves the exercise of judicial discretion as underscored in legions of decisions including *Butt v Rent Restriction Tribunal* [1982] KLR 417 as follows:
- “Although stay may be granted as a matter of discretion, the discretion must be exercised judiciously and only as circumstances of each case may require.”
40. (See also *Global Tours and Travels Ltd* HCWC No. 43 of 2000 URT).



41. First, as to what constitutes substantial loss, one of the leading pronouncements is that in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR reproduced in the earlier Ruling of this court.
42. The other enduring authority on substantial loss is the decision in *Kenya Shell Ltd V Kibiru & another* (1986) KLR 410.
43. In the earlier Notice of Motion, the court found that the applicant had not demonstrated that execution would occasion substantial loss if the appeal was successful and as held by the court, no substantial loss has occurred since then, 9 months later.
44. The court is not persuaded otherwise.
45. Second, concerning unreasonable delay, in his Supporting Affidavit, Mr. Kenneth Afwande deposes that “there has been no inordinate delay in bringing this application for stay of execution of the award.
46. The Claimant/Respondent on the other hand submits that the applicant has not met the requirements for grant of stay of execution pending appeal. What amounts to unreasonable delay is dependent on the circumstances of each case and its peculiarities.
47. As held in *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR,

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir* (18) the applicant had been given 14 days. The application was denied, the court holding that the application ought to have come before expiry of the period given to vacate the land.”
48. In the instant Notice of Motion, the Award which the applicant wants stayed was awarded on 6th July, 2022, about 1 year and 6 months ago.
49. However, as captured earlier in this Ruling, the applicant filed an application for review of the judgment dated 20th July, 2022 and thereafter an application for stay pending appeal dated 16th March 2023 and a Ruling delivered on 8th May, 2023.
50. It is evident that between 8th May, 2023 and 21st February, 2024, the applicant took no step to further its cause, otherwise than pursuing its appeal, a duration of more than 9 months, which the court considers inordinate in cases of application for stay of execution pending appeal and as adverted to above, the award or judgment sought be appealed against and stayed was delivered on 6th July, 2022. The court is not satisfied this requirement has been met.
51. Finally as regards security, neither the grounds relied upon by the applicant nor Supporting Affidavit sworn by Mr. Kenneth Afwande demonstrate its readiness or desire to furnish any security as by law required, a fact captured by the Claimant/Respondent in his grounds of opposition dated 22nd February, 2024.
52. It is trite that the applicant for stay is the one required to volunteer the security it wishes to provide.



53. In *Mutabi Kiranga v Margaret Waweru & another* [2015] eKLR, Mativo J. (as he then was) stated as follows:

“There is therefore an offer of security coming from the applicant in satisfaction of the said requirement. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of discretion in granting stay. However, the offer for security must come from the applicant as a price for stay. See *Carter & Sons Ltd v Deposit Protection Fund Board & 2 others* Civil Appeal No. 291 of 1997.”

54. The applicant’s offer to provide security signifies good faith and its absence may be construed to mean that the applicant is not ready to forgo anything for the stay of execution notwithstanding the fact that judgment has already been entered into against the applicant.

55. The foregoing is fortified by the sentiments of O.K. Mutungi J. in *Equity Bank Ltd v Taiga Adams Co. Ltd* [2006] eKLR where the learned Judge expressed himself as follows;

“ . . . of even greater impact is the fact that the applicant has not offered security at all, and this is one of the mandatory tenets under Order 41, especially Sub-rule 2(b) of the *Civil Procedures Rules* under which the application is brought. As a matter of fact security is not mentioned either in the grounds of the application nor in the Supporting Affidavit of the appellant/Applicant.

Accordingly, I find that the applicant has not satisfied two of the four mandatory requirements under Order 41 Rule 4, which are precedent to a grant of a stay order . . . Let me conclude by stressing that all the four, not one or some must be met before this court can grant an order of stay.”

56. These sentiments apply on all fours to the facts of the instant Notice of Motion.

57. Having fully considered the facts of this case, submissions by parties and relevant authorities, the court is satisfied that the applicant has failed to demonstrate that the threshold prescribed by Order 42 Rule 6 (2) of the *Civil Procedure Rules*, 2010 has been met.

58. Flowing from the foregoing, it is the finding of the court that the motion for stay of execution is without merit and is for dismissal.

59. Consequently, the Notice of Motion dated 21st February, 2024 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF MAY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

