



**Mediamax Network Limited v Wanjai (Cause E607 of 2022)
[2024] KEELRC 1344 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1344 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E607 OF 2022
NZIOKI WA MAKAU, J
JUNE 3, 2024**

BETWEEN

MEDIAMAX NETWORK LIMITED CLAIMANT

AND

ERIK KIONGO WANJAI RESPONDENT

RULING

1. The Respondent/Applicant vide its notice of motion application dated 3rd April 2024 seeks for the following orders:-
 - a. Spent
 - b. That the Court be pleased to stay the execution of the Judgment and Decree herein pending the hearing and determination of this Application inter-parties.
 - c. That the Court be pleased to stay the execution of the Judgment and Decree herein pending the hearing of the Appeal filed by the Respondent.
 - d. That the costs of this Application be costs in the intended Appeal.

The Application was supported by the annexed affidavit of Mr. Ken Ngaruiya the CEO of the Respondent.

2. The Claimant opposed the motion vide his replying affidavit sworn on 9th April 2024. In it he deposed that no appeal had been filed at the Court of Appeal to warrant any stay of execution. He averred that the application was fatally defective and incompetent as the same affronts the mandatory requirements of Order 42 Rule 6 of the *Civil Procedure Rules* and ought to be dismissed ex debito justitiae. He asserts the Respondent has relied on a non-existent appeal to hinge its application and hence the motion was void ab initio. He asserted that the Respondent had failed to meet the conditions for grant of stay of execution. He sought that the Court orders the Respondent to pay half the decretal sum and the other



- half be deposited in an interest earning account pending the hearing and determination of the intended appeal. The Claimant annexed a CR12 indicating his involvement in a company where he asserted he earned a good amount of money. He deposed that he was able to refund the decretal sum should the appeal be successful and declined the Respondent's offer to offer a bank guarantee for the entire sum as this would be problematic in securing payment of the decretal sum should the appeal be unsuccessful. He deposed that the Respondent had the resources to litigate his case and make it unbearable for him to continue defend his case so as to forfeit his case. He thus urged the Court to disallow the motion.
3. In response to the Replying Affidavit by the Claimant, the Respondent's CEO filed a further affidavit in which he deposed that the assertions by the Claimant that the orders sought could not be granted because the Respondent had not filed a substantive appeal were misguided since Order 42 Rule 6(4) of the [Civil Procedure Rules](#) provides that for purposes of stay in the case of appeal to the Court of Appeal, an appeal shall be deemed to have been filed when the notice of appeal has been filed. He asserted that the Claimant's assertions on ability to repay the decretal sum should have been accompanied by audited returns of the company. On the Claimant's assertions on the alleged failure for the Respondent to demonstrate an arguable appeal, the Respondent asserted that the [Civil Procedure Rules](#) are not concerned with the arguability of the appeal as to do so would be usurping the power of the Court of Appeal as provided for under Rule 5(2)(b) of the [Court of Appeal Rules](#). He asserted that the Bank Guarantee would be issued by a reputable financial institution and would be sufficient to meet the decretal sum.
 4. The motion was disposed of by way of written submissions. The Respondent/Applicant submitted that the conditions to be met by the applicant under Order 42 Rule 6 of the [Civil Procedure Rules](#) are:
 - a. The substantial loss that may be suffered by the applicant unless the order of stay is made and the application is brought without unreasonable delay.
 - b. The Court may order such security of costs for the due performance of the decree or order.
 5. The Respondent submitted that it had moved the Court expeditiously and that further, the Judgment in favour of the Claimant against the Respondent is for a cumulative sum of Kshs. 14,251,046/-. The Respondent submitted that the Claimant had testified during the hearing that he has not been employed since the Respondent terminated his employment. The Respondent submitted this goes to show that the Claimant is not financially stable to reconstitute the Judgment sum if paid to him and the Respondent's appeal were successful at the Court of Appeal. The Respondent relied on the case of [Galgalo Jarso Jillo v Agricultural Finance Corporation](#) [2022] eKLR wherein the Court stated that: "the possibility of loss in the event of non-issuance of the orders sought, I think that possibility, remote as it may seem, does in fact exist. The Claimant stated in evidence that he is currently not in any gainful employment."
 6. The Respondent further submitted that the CR12 produced by the Claimant cannot be used to prove that the Claimant is financially stable. It submitted that at least, the Claimant ought to have filed the audited returns of the said Company to show the financial worth of the Company. The Respondent submitted that there is no evidence that the Claimant has other means to refund the Judgment sum should the appeal succeed after he has executed the decree.
 7. on the decision in the case of [Meteine Ole Kilelu & 10 others v Moses K. Nailole](#) [2009] eKLR where the Court held that -

“... where the decree appealed against is a monetary decree, the Applicant has to show that either once the execution is done, after refusal of the application, the Applicant may never get back that money even if his appeal succeeds or that the decretal sum is so large *vis a vis*



his status, or business that the execution would in itself ruin his business or threaten his very existence.

8. The Respondent further placed reliance on the decision in the case of [*Sarah N. Sakwa v Elizabeth Wamwanyi T/A Namukhosi Ltd & another*](#) [2017] eKLR where the Court cited with approval the case of [*James Wangalwa & another v Agnes Naliaka Cheseto*](#) [2013] eKLR. where the Court held that: "The right of appeal is a constitutional right that actualizes the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory for anything that renders the appeal nugatory impinges on the very right of appeal." The Respondent thus submitted that there would be substantial loss unless the order of stay of execution is granted. It urged the motion be allowed with costs.
9. The Claimant in his submissions asserts that the issues for determination are
 - a. Whether this Honourable Court should grant an order for the Stay of execution of the Judgment and Decree delivered by the Court on 14th March 2024
 - b. Whether substantial loss will result to the Applicant if the stay of execution is not granted.
 - c. Whether the Applicant has provided security.
10. The Claimant submitted that an order for stay of execution of the Judgment and Decree should not be granted. The Claimant submitted that essentially, the Respondent/Applicant does not stand to suffer substantial loss if an order for stay of execution is not granted and secondly, that the Respondent/Applicant has failed to furnish sufficient security. The Claimant cited the decision of the court in [*Kenya Wildlife Service v James Mutembei*](#) [2019] eKLR, where it was opined that a stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent and ought to be granted in exceptional circumstances. The Claimant further called in aid the case of [*Turbo Highway Eldoret Ltd v Muniu \(Civil Appeal E040 of 2021\)*](#) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) where the court held that an appeal will not be rendered nugatory by the mere fact that the trial may proceed and a judgment on merits given. That a judgment given is capable of being stayed.
11. The Claimant submitted that the power to grant stay pending appeal is a discretionary power that must be exercised judiciously. It was submitted that the court in doing so must balance between the two parallel propositions that a successful litigant should not be denied the fruits of a judgment in his favour without cause and the proposition that execution would render the proposed appeal nugatory. He cited the case of [*Machira T/A Machira & Company Advocates v East African Standard*](#) (2002) 2 KLR 63, at 65-66 where the Court stated that:-

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so for successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of judicial discretion.

The ordinary principle is that a successful party is entitled to the fruit of his Judgment or of any decision of the Court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way we handle applications for stay of further proceedings or execution, pending appeal.

Of course, in the application of that ordinary principle, the Court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases



in Courts, which is to do justice in accordance with the law to prevent abuse of the process of the Court.”

12. The Claimant thus urged the motion be disallowed with costs.
13. The Court has considered the motion, affidavits filed both in support and opposition as well as the submissions of the parties. The application before the Court was premised on Order 42 Rule 6 of the [Civil Procedure Rules](#) and all other enabling provisions of the Law. The motion was preferred after the Respondent/Applicant had filed a notice of appeal signalling its intent to appeal the decision of this Court. The Claimant attacked this approach as being inadequate since no memorandum of appeal had been filed. The provisions of Order 42 Rule 6(4) of the [Civil Procedure Rules](#) makes provision as follows:-

For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the *Rules* of that Court notice of appeal has been given. [emphasis provided]

14. The Rules recognise the notice of appeal, once filed, to suffice as an appeal is deemed to have been filed when the notice of appeal has been given. The Court therefore has before it a valid appeal even if the Respondent/Applicant had not subsequently filed an Appeal COACA/E313 of 2024. The grant of stay pending appeal is a discretionary power. This power must be exercised judiciously. When a court is discerning whether to grant or deny the stay, it must balance between the two positions. One is that a successful litigant should not be denied the fruits of a judgment in his favour without cause and the second proposition is where it is argued that execution of the decree would render the proposed appeal nugatory. In determining the contest between the two, a court must balance the interests of justice since a party has a right of appeal while a successful litigant is entitled to enjoy the fruits of his judgment. In the case before me, the Respondent/Applicant has offered a bank guarantee. In my considered opinion, there is merit in granting stay but on condition. The stay is granted on condition that the Respondent deposits the entire decretal sum in an interest earning account in the joint names of the advocates of the parties within 21 days of this Ruling. Failure to comply with the condition for stay aforesaid, if wholly attributable to the Respondent or its advocates will render the stay granted automatically lapse. Costs for this motion to abide the outcome of the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

