



**Chelagat v Kabarak University (Cause 28 of 2020)
[2024] KEELRC 2178 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2178 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 28 OF 2020
DN NDERITU, J
JULY 4, 2024**

BETWEEN

REBECCA JEBICHII CHELAGAT CLAIMANT

AND

KABARAK UNIVERSITY RESPONDENT

RULING

I. Introduction

1. In a judgment delivered on 16th March, 2023 the court in found favour of the claimant and made the following orders-
 - a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful and unlawful.
 - b. The claimant is awarded a total of Kshs2,123,736/= together with interest thereon from the date of this judgment less statutory deductions. The said sum is made of-
 - i. Balance of salary for the month of September, 2017..... Kshs164,571/=
 - ii. Three months gross wage in lieu of notice..... Kshs393,633/=
 - iii. Compensation for wrongful and unlawful dismissal equivalent to 12 months gross salary.....Kshs1,574, 532/=Total..... Kshs2,132,736/=This amount is subject to statutory deductions.
- c. All the other claims are denied.
- d. The claimant is awarded costs of this cause.



- e. The respondent is ordered to issue and deliver to the claimant a certificate of service within 30 days of this judgment.
2. In a notice of motion dated 15th December, 2023 (the application) filed under a certificate of urgency through Kiplenge, Andama & Makau Advocates the respondent (the applicant) is seeking the following:-
 1. Spent
 2. That this Honourable Court be pleased to order a stay of execution of the judgment delivered in this suit on the 16th March, 2023 and rectified on the 23rd March, 2023 pending the hearing and determining of this application.
 3. That this Honourable Court be pleased to order a stay of execution of the judgment delivered in this suit on the 16th March, 2023 and rectified on 23rd March, 2023 pending the hearing and determination of the intended appeal against the said judgment.
 4. That the costs of this application be provided for.
3. The application is expressed to be brought under Order 42 rule 6, Order 51 rule 1 and Order 63 of the Civil Procedure Rules, section 3A of the *Civil Procedure Act*.
4. The application is based on the grounds on the face of it and supported with the affidavit of Mutai K. Owen, the advocate for the respondent, sworn on even date, with several annexures thereto.
5. In opposition to the application, the claimant filed grounds of opposition dated 18th January, 2024 through Raydon Mwangi & Associates stating that the same is an abuse of the court process, and a delaying tactic and thus it should be struck out with costs.
6. On 7th February, 2024, the court directed that the application be canvassed by way of written submissions and granted stay of execution pending the hearing and determination of the application. Mr. Mutai, counsel for the respondent, filed his submissions on 21st February, 2024, while counsel for the claimant did not file any written submissions.

II. Analysis

a. The respondent's supporting affidavit

7. In summary, the respondent is seeking a stay of execution of the judgment and the decree arising from the orders alluded to in the introductory part of this ruling.
8. It is deposed that on 23rd March, 2023 this Honourable Court proceeded suo moto under Rule 34 of the Employment and Labour Relations Court Rules, 2016 and rectified an arithmetical error in the decretal sum reducing the same to Kshs1,977,407.20/=.
9. Thereafter, the respondent lodged a notice of appeal. However, the claimant filed an application in the Court of Appeal in Nakuru Civil Appeal No. E037 of 2023 praying that notice of appeal to be struck out.
10. In a ruling delivered on 8th December, 2023, the Court of Appeal ruled that the notice of appeal was not served upon the claimant within seven days as per Rule 79(1) of the Court of Appeal Rules and the same was struck out. The respondent filed an application under Rule 4 of the Court of Appeal Rules seeking for extension of time to lodge another notice of appeal against the judgment in Nakuru



Civil Application [No. E114 of 2023](#). As far as the evidence shows the application is still pending hearing and determination.

11. It is deposed that the intended appeal against the judgment raises triable issues and that since there is no stay of execution against the said judgment, execution may be effected thus rendering the intended appeal nugatory. Further, it is deposed that the intended appeal is arguable and has high chances of success. It is further deposed that the respondent is willing to abide by any terms for stay of execution that the court may set.

b. The grounds of opposition

12. In the grounds of opposition dated 18th January, 2024, the claimant (the respondent in the application) is opposed to the application on the following grounds -
 1. That the application is a non-starter, having no legal foundation whatsoever -
 2. That the application is legless and expressly violates the mandatory provisions of Order 42 rule 6(4) of the Civil Procedure since it is not based on a Notice of Appeal.
 3. That the court is functus officio having delivered its judgment and there is no valid appeal or pending application for review against its decision.
 4. That In any case the application is an abuse of the court process being a delaying tactic aimed at prolonging litigation and should be struck out with the costs.

c. Submissions by the respondent's counsel

13. On the one hand, counsel for the respondent raised two issues for determination as follows - Whether the instant application satisfies the requirement for the grant of an order for stay of execution of the judgment; and, Who should bear the costs of the application.
14. Counsel cited the Court of Appeal in *Butt V Rent Restriction Tribunal* [1979] eKLR where it was held that the court has discretionary powers to grant or decline stay of execution. Counsel also cited *RWW V EKW* [2019] eKLR where the court highlighted the purpose of a stay for execution pending appeal.
15. Counsel cited Order 42 rule 6 (2) of the Civil Procedure Rules which provides for the factors to be considered in an application for a stay of execution as follows -
 - (2) No order for stay of execution shall be made under subrule (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.
16. On the issue of substantial loss, it is submitted that the respondent stands to suffer substantially in the event that execution is enforced. It is submitted that if execution is allowed to proceed and the decretal sum is paid to the claimant and the appeal ultimately succeeds, the claimant will not be in a financial position to refund the decretal sum. It is further submitted that failure to grant the stay the execution will render the appeal nugatory and a mere academic exercise. Counsel cited *Nicholas Stephen Okaka & Another V Alfred Waga Wesonga* (2022) eKLR in support of that position.



17. Counsel argues that the draft memorandum of appeal raises triable issues defined in the Black's Law Dictionary as "subject or liable to judicial examination and trial". Counsel also cited Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR wherein an arguable appeal was described as not one which must necessarily succeed, but one which ought to be argued fully before the court and which is not frivolous.
18. On the issue of unreasonable delay, it is submitted that there was an application dated 13th December, 2023 seeking for extension of time to lodge the notice of appeal after the initial notice of appeal was struck out by the Court of Appeal in Civil Appeal (application) No. E037 of 2023.
19. On the issue of security, it is submitted that the respondent is willing to comply with the conditions as may be set by the court and it has been proposed that the decretal sum be deposited in a joint interest-earning account in the names of the advocates for both parties.
20. On the issue of costs, counsel relied on Republic V Rosemary Wairimu Munene, ex-parte application V Ihururu Dairy Farmers Co-operative Society Ltd submitting that the application be allowed with costs.

III. Determination

21. The court has perused and considered the application, the grounds of opposition, and the written submissions filed by counsel for the respondent. The court identifies two issues for determination –
 - a. Whether the stay of execution should be granted,
 - b. Who should bear the costs of the application.
22. Order 42 Rule 6(2) of the Civil Procedure Rules provides for the conditions for granting stay of execution to be –

Whether there will be substantial loss on the part of the applicant; Whether the application has been filed or made without unreasonable delay; and, Whether the security for costs in the due performance of the decree or order has been provided for or an undertaking to comply with any orders that the court may issue.
23. In Butt V Rent Restriction Tribunal [1979] eKLR the Court of Appeal held that a court has discretionary powers in granting or declining an application for stay of execution.
24. On the issue of substantial loss, the respondent's counsel submitted that the respondent stands to suffer substantial loss if the stay is not granted in that the claimant has not demonstrated that she is capable of repaying the decretal sum in case the appeal ultimately succeeds.
25. In James Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR the court held that execution does not automatically amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules, and the applicant should prove that the execution shall irreparably affect or negate the applicant's core as the successful party in the appeal. In any event, a successful litigant is entitled to the fruits of a judgment.
26. On the issue of unreasonable delay, the court notes that the application in Civil Appeal No. E037 of 2023 was struck out by the Court of Appeal and this court is of the view that the application for extension of time in Civil Appeal No. E114 of 2023 is just a delaying tactic to prevent the claimant from enjoying the fruits of a lawful judgment. There is no appeal pending hearing and determination.
27. If there is no appeal pending hearing what would an order for stay be pending?



28. The respondent has not satisfied the conditions for stay of execution as set out in Order 42 Rule 6(2) of the Civil Procedure Rules thus the application lacks merits and the same is hereby dismissed. An order for stay of execution shall be synonymous to this court sitting on appeal of its own orders. There is no appeal pending and this court is functus officio in the matter having pronounced itself in the impugned judgment.
29. The court agrees with the claimant that the application has been filed in bad faith and the same amounts to abuse of court process.

IV. Costs

30. The application is dismissed with costs to the claimant.

V. Orders

31. For all the foregoing reasons, the notice of motion dated 15th December, 2023 by the respondent lacks merits and the same is hereby dismissed with costs to the claimant.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 4TH DAY OF JULY, 2024

.....

DAVID NDERITU

JUDGE

