



**Mwai v Semi-Conductor Technologies Ltd (Cause E001 of 2023)
[2024] KEELRC 1956 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1956 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E001 OF 2023
ON MAKAU, J
JULY 19, 2024**

BETWEEN

ANDREW WAIGWA MWAI CLAIMANT

AND

SEMI-CONDUCTOR TECHNOLOGIES LTD RESPONDENT

RULING

Introduction

1. This ruling determines the Respondent's Notice of Motion dated 23rd January 2024, brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 40, 42 Rule 6, and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law. The application seeks the following orders:
 - a. That the Honourable Court be pleased to grant an order of stay of the execution of judgment and decree delivered on 22nd September 2023 pending the hearing and determination of the appeal against the impugned judgement.
 - b. Costs of the application be provided for.
2. The Application is premised on the grounds that judgement was entered in this matter against the applicant for the sum of Kshs. 683,000 together with costs assessed at Kshs. 170,700; that the applicant has preferred an appeal against the said judgement; that if stay is declined, execution will proceed and may occasion it substantial loss; that the Claimant may not be able to reconstitute the same in event the appeal is successful; that the Respondent is ready and willing to deposit security; and that the application has been brought without delay.
3. The Claimant opposed the Application vide his replying Affidavit sworn on 30th January 2024. His point of contention was that the application was filed four months after the delivery of the judgement



without any plausible explanation for the delay; that the applicant has not demonstrated any prejudice or substantial loss to be suffered if stay order is declined nor has it shown that the appeal will be rendered nugatory; that he is in a position to refund the decretal sum if the appeal was successful as he is currently employed as a Store Manager earning Kshs. 100,000 per month; and that the applicant is only out to frustrate him from enjoying the fruits of his judgement.

4. The Application was canvassed by way of written submissions.
5. In its submissions, the Respondent raised the following issues for determination:
 - i. Whether there will be substantial loss.
 - ii. Whether the Applicant is ready to furnish security for performance of decree.
 - iii. Whether there has been inordinate delay in filing the Application.
6. On the first issues, reliance was placed on the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR to urge the Appeal would be rendered nugatory if successful as there was no proof that the Claimant is in gainful employment since the offer letter he has exhibited is not proof that he works in the stated company and upon at the alleged terms.
7. It was submitted that the application was brought within four months of the judgement hence there was no inordinate delay in seeking stay.
8. As regards security, it was submitted that there is need to balance the interests of both parties, namely, those of the successful party to enjoy fruits of their judgement, and the losing party not have its appeal rendered nugatory. It was further submitted that the Respondent had complied with the court's direction to deposit the entire decretal sum in court as security and by so doing it met the legal muster for granting of the orders sought.
9. On the other hand, it was submitted for the claimant that the application is not merited on grounds that there was inordinate delay and that the Respondent did not demonstrate the substantial loss to be suffered in the event the orders are not granted. It was submitted that the delay of four months before making the application was inordinate delay and it renders the application an afterthought triggered the process of execution.
10. It was submitted that the Respondent did not demonstrate how it would suffer irreparable loss if the sums were paid to the Claimant or how the appeal would be rendered nugatory. It was argued that the Claimant was a man of means and capable of refunding the decretal amount should the appeal succeed. It was further argued that the Appeal lacks merit as it does not demonstrate how the Court erred in its judgement. Consequently, it was submitted that it is in the interests of justice that the application be dismissed with costs and the amount deposited in court be released to the Claimant to enjoy the fruits of his judgement. For emphasis, reliance was placed on the case of *John Kabaguri Maina v Premier Tavern Hotel & 2 others*; ELRC Case No. 2158 of 2016.

Analysis and Determination

11. Having considered the Application, the response and the rival submissions, the main issue that arises for determination is whether the application is merited. The principles for granting stay of execution pending appeal are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides 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.”

Substantial loss

12. Substantial loss was well explained by the Court in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR as follows:

“ 11. No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process.

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...”

13. In the case of *National Industrial Credit Bank Limited V Aquinas Francis Wasike and Another* [2006] eKLR, the Court of Appeal held that:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

14. Again, in *ABN Amro Bank N v Lemond Foods Limited* Civil Application No.15 of 2002 the Court Appeal held that:

“... the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land cash in bank and so on.”

15. In the instant case, the applicant has alleged that the claimant may not refund the decretal sum if the appeal succeeds after execution of the decree. However, the claimant has demonstrated that he is a man of means by adducing an offer letter showing that he is in a gainful employment earning a monthly salary of Kshs.100,000. The applicant has not adduced any evidence to rebut that exhibit.
16. However, the offer letter shown indicated that the claimant was to serve a probation period of six months and no confirmation letter was adduced. Without any other evidence to prove ability to refund the decretal sum if the appeal succeeds, there is likelihood of substantial loss being occasioned to the



applicant if the whole decretal sum is released to him and it turns out that the claimant is no longer in gainful employment.

Inordinate delay

17. Upon perusing of the annexures to the Application, I note that the Memorandum of Appeal was dated 23rd January 2024 and had never been filed before the Court of Appeal despite the notice of appeal having been filed on 6th October 2023. The applicant argued that four months did not amount to inordinate delay. The claimant contended that the instant application was an afterthought as the applicant was awakened from its slumber by his demand letter dated 12th January 2024.

18. I have considered the rival submissions and the court record. It is clear that the costs of the suit were not determined until 4th January 2024. In the case of *Eldoret Grains Limited v. National Cereals Produce Board* [2014] eKLR Fred Ochieng J (as he then was) held that: -

“In my considered view, the period to be taken into account when determining whether or not there had been inordinate delay is the period from when the Defendant became aware of the Ruling on taxation.

The reason for that is that although the Judgment was delivered on 8th May, 2012, execution could not issue immediately thereafter. Execution of a decree can only proceed after the Bill of costs had been taxed or after the Decree-Holder has obtained the leave of the court to proceed with execution prior to taxation.

Therefore, had the Defendant sought an order for stay of execution prior to the issuance of Certificate of Taxation, it could have been premature. In the circumstances, there is no inordinate delay by the Defendant, in seeking the order of stay of execution.”

19. I concur with the foregoing reasoning and proceed to hold that as long as the costs had not been determined, the said delay of four months cannot be described as unreasonable.

Security

20. The third requirement for an applicant for stay to fulfil, is the willingness to offer security for the due performance of decree should the appeal fail to succeed. In the case of *Portreitz Maternity v James Karanga Kabia* Civil Appeal No 63 of 1997 (UR) the Court emphasized the need for a court to balance the interests of parties as follows:

“That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

21. The applicant has already deposited the decretal sum in court as a condition for interim stay and therefore there is no dispute that it is willing to abide by court’s order to deposit security. The claimant has demonstrated that he is in a gainful employment and therefore he is not a man of straw. He prays for the whole decretal sum to be released to him but the applicant is doubtful about his employment status. To balance the interest between the two parties, that is the claimant’s right to enjoy the fruit of the judgment and the applicant’s right to be heard on appeal, I will grant a conditional order of stay pending determination of the appeal.



Conclusion

22. I have found that the applicant has largely met the legal threshold for granting stay of execution pending appeal as envisaged under order 42 rule 6 (2) of [Civil Procedure Rules](#). Consequently, I grant stay pending appeal on following conditions:
- a. That 50% of the decretal sum plus 100% costs determined on 4th January 2024 are paid to the claimant forthwith. Through Wambui Mwai & Associates Advocates.
 - b. That while 50% of the decretal sum will be deposited in court as security for the due performance of the decree in the event that the appeal fails to succeed. The depositing is to be done within 14 days of today and in default the stay order shall lapse automatically.
 - c. Costs of the application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JULY, 2024.

ONESMUS N MAKAU

JUDGE

ORDER

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

