



**Matseshe v Kenya Institute of Management (Cause 303 of 2017)
[2024] KEELRC 2289 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2289 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 303 OF 2017
NJ ABUODHA, J
SEPTEMBER 25, 2024**

BETWEEN

JOHN MATSESHE CLAIMANT

AND

KENYA INSTITUTE OF MANAGEMENT RESPONDENT

RULING

1. The Appellant filed application dated 14th February, 2024 under Under Article 159, 162(2), 164(3) of the Constitution, Section 12(3) (i) and (viii), 17(1) & 2 of the Industrial Court Act 2011 Rule 16 of the Industrial Court Rules and all the enabling provisions of the law seeking for Orders stay of execution of Award of court delivered on 30th June 2022 and all consequential Orders thereto in the first instance pending hearing and determination of Appeal against the award of Nairobi C.A No. E311 of 2023- *John Matseshe v Kenya Institute of Management* and this Honourable Court be pleased to make directions that as a security for the decretal sum, the Applicant be at liberty to deposit part of the award sum as a condition for granting Orders of stay of execution pending hearing and determination of Nairobi C.A No. E311 of 2023- Kenya Institute of *Management v John Matseshe* being the Appeal of the award.
2. The application was supported by the grounds set in the application and the Affidavit of Raymond Mwangi the Head of shared services of the Respondent/Applicant.
3. Respondent/Applicant averred that the Respondent herein being aggrieved by the Award of this Honourable Court delivered on 30th June, 2022 has filed an Appeal against the said Award by filing a Notice of Appeal. That the Claimant was as well served with a record of Appeal on 18th Maay,2023. It awaits the Directions of the Court of Appeal.



4. Respondent/Applicant averred that the Claimant has proceeded to demand for the payment of the judgment sum vide its letter dated 26th January, 2024 within a 7-days period in default of which it shall proceed with execution.
5. Respondent/Applicant averred that in the event that the Claimant executes the Award before the hearing and determination of the Appeal against the Award, the subject matter of the Appeal would be rendered nugatory and the Respondent would suffer irreparable loss and damage as the Claimant may not be in a position to refund to the Respondent if the Respondent is successful in its Appeal.
6. Respondent/Applicant averred that the Claimant's means as to his ability to refund the Respondent the judgment sum is not known to the Respondent should the appeal succeed.
7. Respondent/Applicant averred that the Orders of stay of execution sought herein would not occasion irreparable damage or prejudice to the Claimant in the event that the Respondent's Appeal is dismissed since this Honourable Court has extensive jurisdiction in making an award for compensation of any loss that the Claimant may suffer as a result of the stay, which compensation the Applicant has the means of satisfying the same.
8. Respondent/Applicant averred that it is in the best interest of justice that the stay of execution sought herein be granted pending the hearing and determination of Appeal against the Award.
9. Respondent/Applicant averred that there has been no inordinate delay in bringing this application for stay of execution given the Claimant's advocate's indulgence on the Respondent's filing of an appeal against the decision delivered on 30th June, 2024.
10. The Respondent/Applicant averred that they be allowed to deposit Kshs 300,000/- as security for costs since their business was affected by COVID 19.
11. In reply the Claimant/Respondent filed its Replying Affidavit sworn on 19th April, 2024 where he averred that that the application lacks merit and should be dismissed.
12. The Claimant/Respondent averred that the Application dated 14th February 2024, seeking a stay of execution order, is inordinately late, spanning over twenty (20) months from the date of the judgment delivered on 30th June 2022, with no prior application for stay from the Applicant/judgment-debtor.
13. The Claimant/Respondent averred that merely filing a notice of appeal dated 14th July 2022 does not qualify as an automatic right to order staying the execution for the release of the decretal sum.
14. The Claimant/Respondent averred that the timing of the application for a stay of execution is flawed. On its face, the application appears to be an afterthought, as it was not filed until after the crucial date of 14th February 2024, when he requested the release of the decretal sum on 26th January 2024.
15. The Claimant/Respondent averred that the delay from 30th June 2022 to the application for the stay of execution, illustrates a lack of genuine urgency or necessity on the part of the Applicant, thereby undermining the credibility of their request.
16. The Claimant/Respondent averred that currently, there is no stay preventing the release of funds to him as the decree-holder and any delay in releasing the decretal amount will only prolong the suffering and injustice faced by him.
17. The Claimant/Respondent averred that the Applicant/judgment-debtor has received several emails sent to them and are yet to comply.



18. The Claimant/Respondent averred that granting stay of execution will lead to the fruits of judgment being delayed as the time for the application is unreasonable.
19. The Claimant/Respondent averred that the Applicant's/judgment debtor's bold claim that it will be difficult to recover the decretal sum if the appeal is successful is without basis as no cogent evidence had been presented that he cannot refund the decretal sum and that he has the ability to repay the decretal sum in case the appeal in the Court of Appeal succeeds.
20. The Claimant/Respondent contended that the Applicant had failed in its to attempt to demonstrate and failed to prove in which material respect the intended appeal risked being rendered nugatory nor had it proved the risk of substantial loss if the stay of release of the funds is declined.
21. The Claimant/Respondent averred that stay pending appeal should not be granted as the Applicant's/judgment debtor has failed to demonstrate or provide any evidence of substantial loss.
22. The Application was dispensed of by written submissions.

Determination

23. The court has considered the application, the grounds and supporting affidavit and submissions filed by the parties herein and proceeds as follows.
24. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:
 - “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.
25. Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay, have in mind the overriding objectives stipulated in sections 1A and 1B of the *Civil Procedure Act*.
26. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2) and buttressed in *Antoine Ndiaye v African Virtual University* [2015] eKLR namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
27. The main issue for determination therefore is whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited as per the three requirements above. Regarding the length of delay, it is evident from the pleadings on record herein that the judgment that the Applicant is seeking to stay was delivered on the 30th June 2022. The instant application was filed on the 14th February 2024. This is a delay of about 20 months. What then is the excuse for this delay?



28. It is the Claimant/Respondent's case that this Application was not filed until 14th February 2024, when he requested the release of the decretal sum on 26th January 2024. It is the Applicant's case that it filed a Notice of Appeal dated 14th July 2022 but delayed in filing this application.

29. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) *Civil Procedure Rules*. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates:-1

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

30. The applicant herein stated in his application that he is willing to provide security as may be ordered by the court. The court has already discussed herein above that the delay in bringing the instant application was unreasonable and further that the unreasonable delay has not been sufficiently explained. The only thing remaining is to consider whether substantial loss may result to the applicant if the order is not made.

31. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

32. In *Jason Ngumba Kagu & 2 Others vs. Intra Africa Assurance Co. Limited* [2014] eKLR where it was held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether



by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.”

33. The Respondent alleged that there is already an Appeal in the Court of Appeal as CA No E311 of 2023 *Kenya Institute of Management v John Matseshe*. This court is of the view that since the appeal is continuing in the Court of Appeal it would be proper that stay is allowed in order not to render the appeal nugatory but on conditions.
34. This notwithstanding the court in granting stay has to carry out a balancing act between the rights of the parties. The issue that arises is whether this court should maintain the status quo and allow the Applicant to prosecute the appeal at court of Appeal by allowing this application.
35. Having found that the Applicant approached this court with inordinate delay but balancing with the right to be heard and not rendering the Appeal nugatory this court will allow this Application but on condition that the Applicant deposits the decretal sum in Court within 30 days of this ruling failure to which the stay orders shall stand vacated.
36. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION.

