



Ndung'u v Geoffrey Kagwanja t/a Hotel Patron (Employment and Labour Relations Cause E072 of 2021) [2024] KEMC 131 (KLR) (16 July 2024) (Ruling)

Neutral citation: [2024] KEMC 131 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
EMPLOYMENT AND LABOUR RELATIONS CAUSE E072 OF 2021
PA NDEGE, SPM
JULY 16, 2024**

BETWEEN

SERAH NDUTA NDUNG'U CLAIMANT

AND

GEOFFREY KAGWANJA T/A HOTEL PATRON RESPONDENT

RULING

1. The Application filed herein comes in the backdrop of the judgement given by this Honorable Court on 14th March 2024. This Application was filed on 28th May 2024, seeking the substantive orders for stay of execution of the judgement, the decree and any consequential orders arising therefrom, pending the hearing and determination of the Employment & Labor Relations Court Appeal Case No. E017 of 2024; and that the costs to be in the cause.
2. The applicant herein, submits that this application is premised on the grounds that: -
 - a. The judgement delivered by this Court on 14th March 2024, rendered the Applicant liable, and was subsequently condemned to pay the Claimant herein, the sum total of Kshs. 2, 383, 938.20/=.
 - b. The Applicant is dissatisfied with the said judgement and has proceeded to file an appeal, Case No. E017 of 2024, before the Employment & Labor Relations Court.
 - c. The Applicant stands in the affirmative, that the Appeal stated above is meritorious and bears a high success percentage.
 - d. The Applicant will suffer the risk of substantial financial loss, if compelled to pay the amount stated in the judgement of Kshs. 2, 383.938.20/=, before the appeal is heard and determined.



- e. The Applicant is willing and able to negotiate on fulfillment of the decretal sum due to the Claimant in the event that the Appeal Case No. E017 of 2024, filed against the judgement delivered by this Court, is unsuccessful.
3. The Applicant thus avers that this Application meets the requisite conditions that would warrant a grant of stay of execution by this Court. Notwithstanding the Applicant's submissions, the Claimant/ Respondent herein stands unconvinced by the particulars of the Applicant's claims in respect to this Application. It is the Claimant's assertion that the Applicant has unsuccessfully pleaded for stay of execution of the judgement rendered by this Court, on account that the said Applicant has not met the set-out conditions that would merit the grant of such an order. The Claimant's Replying Affidavit dated 11/06/2024, bear witness to her opposition that the application herein lacks merit and the Court be pleased to dismiss the same.
4. After perusal and scrutiny of the written submissions by both parties, I do hereby find that the main issue for determination is whether this application is merited and meets the threshold for grant of stay of execution pending appeal. In *RWW vs. EKW (2019) eKLR*, the superior court addressed itself on the issue of the purpose of an order for stay execution, opining that: -

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.
5. The law governing the granting of orders for stay of execution pending appeal is codified under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules 2010, which stipulates as follows:
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 referred may apply to the appellate court to have such order set aside.
 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.



6. Noting the above prescription, it is evident that for an application of stay of execution to succeed, the provisions of the Civil Procedure Rules ought to be adhered to. In that respect, it is paramount that the Applicant herein, remains consistent and in adherence to the conditions to be met to warrant the grant of an order for stay of execution. In view of aforementioned, the Court stands guided by the observations stated in NYATERA VRS NYAKUNDI [2023] KEHC 3086 (KLR), that: -

...an Applicant seeking orders for stay of execution to establish that he/she has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly, that he is willing to furnish security for the due performance of the decree. In addition to the above conditions, an application for stay of execution pending appeal must be made without unreasonable delay.

7. In similar fashion, it was the Supreme Court's opinion in Gatirau Eter Munya Vrs Dickson Mwenda & 2 Others, Sc Application No. 5 Of 2014, [2017] eKLR, that such an applicant must satisfy the Court that the appeal is arguable and is not frivolous; that unless the orders of stay are granted, the appeal will be rendered nugatory.

8. Bearing in mind the court's sentiments in Nyatera Vra Nyakundi (supra), I do find that the Applicant herein has sufficient cause for making an application for stay of execution, considering that he has already instituted his appeal vide the memorandum of appeal dated 28th March 2024. The issue herein is whether he has met all the other statutory conditions for the grant of the order of stay. I shall thus proceed to the other points of determination, which I shall dissect individually, accounting for the parties' submissions and the provisions of the law.

Substantial loss

9. The Applicant, vide their written submissions, professes that if condemned to pay the decretal sum of Kshs. 2,383, 938.20, before the determination of the appeal, would result to a substantial loss on his end. Justifications were also rendered in respect to the Covid-19 Pandemic and its catastrophic effects on life and business, the Applicant falling victim in the latter and is still in the recovery process. Reference was made to the case of Tropical Commodities Suppliers Ltd & Others Vrs International Credit Bank Limited (2004) E.A. LR 331, where the Court pronounced itself on the wide scope of the term 'substantial loss', citing that it may be ambiguous, not representing any particular mathematical formula, thus, can be great or small.

10. However, it is this Court's finding on this point that there ought to be a delicate balance between the alleged substantial loss to the Applicant, and the Respondents right to enjoy the fruits of their judgement. This is position taken in Jason Ngumba Kagu & 2 Others Vrs Intra Africa Assurance Co. Limited [2014] eKLR.

11. In the case of James Wangalwa & Another Vrs Agnes Naliaka Cheseto [2012] eKLR, the Court noted 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.



12. In *Machira T/a Machira & Co. Advocates Vrs East African Standard (no. 2)* [2002] KLR 63 it was held that: -

In the application of that ordinary principle, i.e. (that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage), 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 and to prevent abuse of the process of the court.

13. As is the Court's view in *Absalom Dova Vrs Tarbo Transporters* [2013] eKLR, the Court must strike a balance between the rights of the parties, in a case seeking an order of stay of execution, taking into account that both parties have rights. The balance would be to rule in favor of the party whom would be prejudicially disadvantaged if an order for stay of execution is not granted.

14. Denoting the stance taken in *Awale Transporters Ltd Vrs Kelvin Perminus Kimanzi HCCA No 161 OF 2019*, the court observed that:

In this case it was the applicant's case that unless the stay is granted, the appeal will be rendered nugatory. It was not explained in what manner the said appeal would be rendered nugatory. The Applicant has not explained what loss, if any, it stands to suffer if the stay is not granted. That the Respondent intends to proceed with execution is not reason enough to grant stay since being the successful litigant, he is lawfully entitled to enjoy the fruits of his judgement.

15. Also, in *Kenya Shell Limited Vrs Benjamin Karuga Kibiru & Another* [1986] eKLR it was held that where there is no evidence of substantial loss, it is difficult to see the need of keeping the Respondents out of their money. Similar to the matter at hand, the Applicant herein has only submitted that the Respondent would not be in a position to repudiate the decretal sum, if granted and the subsequent appeal succeeds. It is trite that the Applicant demonstrates the loss that he would suffer and how and on what basis would the appeal be held nugatory. Accounting for the same, I do find that the Applicant herein has failed to show the said substantial loss that he stands to suffer. This crucial condition for the grant of stay pending appeal has therefore not been met.

Unreasonable Delay

16. The Court stands in concurrence with the Applicant's submissions on the issue of unreasonable delay. This Court accepts the sentiments forwarded in *Utalii Transport Company Limited & 3 Others Vrs Nic Bank Limited & Anor.* [2014] eKLR, that inordinate delay should not be difficult to ascertain when it occurs. Correspondingly, in the case of *Mohsen Ali & Another Vrs Priscilla Boit & Another E&I NO. 200 OF 2012*[2014] e KLR, the Court echoed the reflection that unreasonable delay is dependent on the surrounding circumstances of each case. I do hereby find that this Application defeats the threshold of unreasonable delay, in that, the Applicant herein has filed his application in time, hence, it is not defeated due to inordinate delay.

Security

17. As per the law, it is trite that an Applicant seeking an order for stay of execution, must furnish the court with security, for the grant of such an order to be successful. In *Gianfranco Manenthi & Another Vrs Africa Merchant Assurance Company Ltd* [2019] eKLR, it was opined that: -



... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

18. In the Application herein, the Respondent's submissions are spot on in respect to this heading. The Applicant has not furnished any security in this respect and only avers in his sworn affidavit that he is a man of means and is willing to pay the decretal sum if the appeal is rendered unsuccessful. It is this Court's view that the Applicant ought to have satisfied this requirement to necessitate the grant of an order of stay of execution.
19. In *Nyatera Vrs Nyakundi*, supra, the Court commented on the need of the prerequisite conditions for grant of an order of stay of execution to be met in unison. This is to mean that an Applicant, must fully satisfy the conditions in concurrence and not just merely on an individual basis, but collectively. In this regard, it is this Court's finding that the Applicant herein has only managed to meet the threshold of Unreasonable delay. On the issue of substantial loss, the Applicant has failed to produce corroborative evidence to that effect. The Applicant as only made assertions as to the substantial loss he would suffer, thus, the said loss can not be held to be genuine, without additional evidence.
20. On the success of the applicant's appeal, the afore mentioned memorandum of appeal lays bear the grounds upon which the Applicant perceives that the appeal would be successful. Albeit noting the applicant's submissions on the same, I do concur with the Respondent that it is the appellate court that is best suited to make a determination on the same. Having regard to the findings made in the ruling herein, I do hereby make the following orders that the Application herein be and is hereby dismissed for want of merit and costs to abide the outcome of the appeal.

RULING DATED, SIGNED AND DELIVERED AT NAKURU THIS 16th DAY OF July 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Claimant/ Respondent's Counsel: Ndichu

Respondents/ Applicant's Counsel: Kamar h/b Esuchi

Claimant/ Respondent:

