



Bakery Confectionary Food Manufacturing and Allied Workers Union (K) v Kenafric Industries Limited (Cause E687 of 2020) [2025] KEELRC 27 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 27 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E687 OF 2020
NJ ABUODHA, J
JANUARY 17, 2025

BETWEEN

BAKERY CONFECTIONARY FOOD MANUFACTURING AND ALLIED WORKERS UNION (K) CLAIMANT

AND

KENAFRIC INDUSTRIES LIMITED RESPONDENT

(Before Hon. Justice Abuodha Jorum Nelson)

RULING

1. The Appellant filed application dated 22nd February, 2022 under Under sections 1A, 1B, 3A of the [Civil Procedure Act](#), Order 22 Rule 22, Order 42 rule 6, Order 1 of the Civil Procedure Rules, 2010 seeking for Orders of stay of execution of Judgment given on 10th December 2021 and decree issued on 22nd February 2022 pending hearing and determination of this Application and the Nairobi Civil Appeal No. E077 of 2022- Kenafric Industries Limited versus Bakery Confectionery Food Manufacturing and Allied Workers Union(K) and costs.
2. The application was supported by the Affidavit of Lorna Solopian the Applicant's Head of Legal & Compliance Department who averred that the firm of Keaton & Keaton Advocates was duly authorized to come on record for the Respondent vide the consent for change of Advocates between advocates herein.
3. The Respondent/Applicant averred that the court delivered it judgment on 10th December,2021 and the Respondent being dissatisfied with the decision lodged an appeal being Nairobi Civil Appeal No. E077 of 2022- Kenafric Industries Limited versus Bakery Confectionery Food Manufacturing and Allied Workers Union(K) against the whole of the Judgment.
4. The Respondent averred that the Decree in this matter was issued on 22nd February,2022 and the Claimant/ Decree holder is about to execute the decree.



5. Respondent/Applicant averred that the Applicant will suffer substantial loss unless stay is ordered for the reasons that:
 - a. The financial position of the Respondent being a going concern Company will be imperiled if execution is to issue to the effect that the company will pay more than its financial capacity and more than what she has been paying to the detriment of key operations hence likelihood of going under receivership.
 - b. The Applicant's Appeal will be rendered nugatory.
 - c. The Applicant is prejudiced in renewal/ extension of Collective agreements unless terms are unequivocal and finally determined by the Court of Appeal.
 - d. It will be against the interest of grievants and Company if decree is executed capriciously without payment plan and restructuring of the company first in order to absorb new developments.
6. Respondent/Applicant averred that no prejudice will be occasioned to the grievants as they are still in active employment, employed by the Applicant and earning full salaries and allowances they have been earning before harmonization of salaries in accordance with Collective agreements.
7. In reply the Claimant/Respondent filed its Replying Affidavit sworn on 4th March 2022 and averred that they oppose the application for stay of execution for reasons that the Notice of Appeal dated 17th December 2021 filed and court stamped on 18th February 2022 was incompetent and ought to be struck out.
8. The Claimant/Respondent averred that at the time the Notice of Appeal was filed by the Applicant through the firm of Keaton & Keaton Advocates the said firm was not on record in this matter and hence a stranger to the proceedings. That neither was a consent procured from the firm of Chege Kibathi & Company Advocates, the previous advocates nor leave obtained from court to have the firm of Keaton & Keaton advocates to come on record.
9. The Claimant/Respondent averred that the Applicant did not file their Notice of Appeal within 14 days and only filed the same on 18th February 2022 without seeking extension of time within which to do so.
10. The Claimant/Respondent averred that the contentions that the applicant's financial position will be imperiled if execution is to issue and the company will pay more than its financial capacity, the Applicant has neither demonstrated how it stands to suffer financial loss by reason of the financial position.
11. The Claimant/Respondent averred that while the Applicant referred to an Appeal being filed in the Court of Appeal and served, the same were grossly defective and incompetent in both substance and form. That although the applicant has filed an appeal, the same does not operate as automatic stay as the applicant is obligated to place sufficient grounds to warrant grant of stay.
12. The Claimant/Respondent averred that the Applicant's contention that it would be capricious to execute the decree without a payment plan and/ or restructuring to absorb new developments is premature and speculative.
13. The Claimant/Respondent averred that they opposed stay orders as the grievants have endured employment with the Respondent on inferior terms since October 2017 when their salaries, earnings



and wages were unlawfully and capriciously slashed by the Respondent for reasons that they joined the union.

14. The Claimant/Respondent averred that the grievants continue to suffer substantial prejudice, loss and harm as they continue to work and extend their labour to the Applicant albeit at grossly reduced earnings.
15. The Claimant/Respondent averred that one of the grievants no longer works for the Applicant and the others continue to be prejudiced and victimised at the work place.

Determination

16. The court has considered the application, the grounds and supporting affidavit and submissions filed by the parties herein and proceeds to analyse them as follows.
17. 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.
18. 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 and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions.
19. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.
20. 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.
21. The main issue for determination therefore is whether the applicants have demonstrated that the orders of stay of execution pending appeal are merited.
22. Accordingly, for purposes of determining whether the applicant is entitled to the discretion of this Court, the application will be considered under the parameters set out above.



23. Regarding the length of delay, it is evident from the pleading on record herein that the judgement that the applicant is seeking to appeal against was delivered on the 10th December 2021. The instant application was filed on the 23rd February 2022 which the court finds to be without unreasonable delay.
24. The Notice of Appeal was filed on the 18th February 2022, which must be registered within 14 days of the judgment while no explanation is given as to what occasioned the delay or leave sought to file the Notice of Appeal outside time. However, since the issue of filing and service of record of Appeal at the court of Appeal is not disputed this court takes it that the Applicant's Appeal has been admitted at the Court of Appeal. This Court however notes that apart from the Notice of Appeal the Applicant did not file the said Record of Appeal to this court.
25. 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 those 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.
26. On security, the Applicant herein is willing to provide security as may be ordered by the court. However despite numerous letters since December, 2021 by the Claimant the Applicant has not computed the amount it should pay the grievants.
27. On the other condition of substantial loss 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.”
28. In *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at page 416 expressed himself on this issue as follows:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has



to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”

29. This court is of the view that since the Applicant has already filed an Appeal at the Court of Appeal in as much as the Applicant has not illustrated how failure to grant the stay would amount to substantial loss apart from stating that it was a going concern this court should avoid rendering the said appeal nugatory. This court also takes judicial notice that most of grievants are still in employment with the Applicant apart from one earning something out of it.
30. Accordingly, it is the court’s considered view that the application dated February 22, 2022 has merit and is hereby allowed
31. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF JANUARY, 2025

DELIVERED VIRTUALLY THIS 17TH DAY OF JANUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

