



REPUBLIC OF KENYA



**DPL Festive Limited v Okuny (Appeal E070 of 2024)
[2025] KEELRC 892 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 892 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E070 OF 2024
JK GAKERI, J
MARCH 20, 2025**

BETWEEN

DPL FESTIVE LIMITED APPELLANT

AND

JORIM OWUOR OKUNY RESPONDENT

RULING

1. Before the court for determination is the appellant's Notice of Motion dated 22nd October, 2024 filed under Certificate of Urgency on 18th November, 2024 seeking Orders that: -
 1. Spent.
 2. Spent.
 3. There be an order of stay of execution of the Judgment delivered on 7th October, 2024 in CMELRC Cause No. E067 of 2023 pending the hearing and determination of the intended appeal.
 4. The costs of this Application be in the cause.
2. The Notice of Motion is expressed under Order 42 Rule 6 and 32 of the Civil Procedure Rules. Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya 2010 and is based on the grounds set out on its face and the Supporting Affidavit of Joy Impano sworn on 22nd October, 2024.
3. The affiant deposes that the 14 days stay of execution granted by the court on 7th October, 2024 lapsed on 21st October, 2024 and demand for payment was made on 22nd October, 2024.



4. The affiant further deposes that a review of the judgment reveals that the applicant has strong grounds to justify an appeal and intends to do so but is apprehensive that if the decretal sum is paid, it may be irrecoverable if the appeal succeeds, hence the need for a stay of execution as execution is also imminent.
5. That the applicant had already requested for copies of typed proceedings filed the Memorandum of Appeal and was ready and willing to comply with any conditions the court may set for the grant of a stay of execution.

Response

6. In opposition to the Notice of Motion, the respondent filed a Replying Affidavit sworn on 22nd November, 2024, deposing that Notice of Motion lacked merit, was misconceived and did not meet the threshold for the grant of stay of execution and the appeal is an afterthought and the applicant has not furnished security for the due performance of such decree or Order as may ultimately be binding on it.
7. That the applicant had not demonstrated any substantial loss it is likely to suffer if the Orders sought are not granted and is in a fishing expedition to deny the respondent from enjoying the fruits of his judgment, and the application should be dismissed.

Applicant's submissions

8. On arguability of the appeal counsel for the appellant relied on the decision in Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2023] eKLR to urge that the applicant's appeal was not frivolous and had sufficient grounds to challenge the decision of the trial Magistrate.
9. As regards timing of the application, counsel submitted that as the judgment was delivered on 7th October, 2024 and the application was made after 22nd October, 2024 the same was made without undue delay.
10. On substantial loss, counsel cited the decision in Kenya Shell Ltd v Kibiru & Another [1986] eKLR to submit that the appellant stood to suffer substantial loss in that the respondent admitted that he was not in gainful employment, the claim was statute barred and was doubtful of the respondent's ability to refund the decretal sum if the appeal is successful. Reliance was placed on Johnson Mwiruuti Mburu v Samuel Macharia Ngure, HCCA No. 716 of 2003.

Respondent's submissions

11. Counsel submitted that the appellant was directed to furnish security but did not do so.
12. Reliance was made on the provisions of Order 42 rule 6(2) of the Civil Procedure Rules on the requirements of an order of stay of execution pending appeal.
13. Counsel submitted that the applicant must approach the court with clean hands and the applicant had sufficient time to deposit the requisite security but had not done so.
14. Counsel, nevertheless admits that the instant application was filed timeously but argues that the appellant's inability to provide security as directed by the court disentitles it to the Orders sought.
15. Reliance was also made in the decision in Kenya Shell Ltd V Kibiru and Another (Supra) to urge that the fact that a decree holder is not a man of means does not necessarily justify preventing him from enjoying the fruits of his judgment which the applicant was out to do.



16. Counsel cited the sentiments of the court in *Machira t/a Machira & Co. Advocates V East African Standard (No.2)* [2002] KLR 63 on the need to balance the interests of the parties and ensure justice is done in accordance with the law.
17. Counsel prayed for dismissal of the instant application.

Analysis and determination

18. The singular issue for determination is whether the applicant's Notice of Motion dated 22nd October, 2024 is merited.
19. The instant application was filed on 18th November, 2024 almost one (1) month after it was prepared and signed and on even date the court granted temporary stay of execution of the Judgment delivered on 7th October, 2024 in CMCELR No. E067 of 2023 and gave directions on service of the Notice of Motion.
20. During the hearing on 3rd December, 2024, the applicant's counsel indicated that 7 days were sufficient for the applicant to provide security but did not and on 16th December, 2024, counsel for the applicant was absent and a mention was slated for 27th January, 2025 to confirm the status of the security, but again counsel for the applicant was absent and hearing of the application was scheduled for 5th February, 2025 when counsels agreed that the application be canvassed by way of written submissions and directions were given and by 25th February, 2025 both parties had complied and a ruling date was set.

PARA 21.

The principles that govern the grant of stay of execution are well settled.

22. Order 42 Rule 6(2) of the Civil Procedure Rules 2010 provides: -
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.
23. It is trite law that the court's power to grant or decline an application for stay of execution is discretionary, which must be exercised in the context of the principles of Order 42 Rule 6 of the Civil Procedure Rules, 2010. See *RWW v EKW* [2017] eKLR.
24. As regards substantial loss the applicant deposed that as the respondent was not in gainful employment, a fact the respondent did not contest, the applicant was apprehensive that recovery of the decretal sum would be impossible if the appeal succeeded.
25. In determining this issue, the court is guided by the sentiments of the court in *James Wangalwa & Another v Agnes Naliaka Cheseto* 2012 eKLR, as follows:
...The applicant must establish other factors which show that 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".
26. Further in *Kenya Shell Ltd v Kibiru* (Supra) the Court of Appeal stated: -



27. It is not sufficient by merely stating that the sum of Kshs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement...”
28. In this case, the applicant deposed that execution was imminent and although it is a lawful process, because the respondent has no source of income as he is not in gainful employment, there is a possibility of the applicant not recovering the decretal sum if the appeal is successful and would render the appeal nugatory.
29. In the court’s view the applicant has demonstrated that it would suffer substantial loss if the decretal sum was paid to the respondent.
30. On the timing of the application, it is common ground that it was made without unreasonable delay, less than 2 months after the judgment was delivered.
31. It is trite law that what amounts to unreasonable delay is dependent on the peculiar circumstances of each case as held in *Jaber Mohsen Ali & Another v Priscillah Boit & Another* [2014] eKLR.
32. Concerning security, the sentiments of the court in *Mwaura Karuga t/a Limit Enterprises Ltd v Kenya Bus Services Ltd & 4 Others* [2015] eKLR are instructive:
33. First of all, the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick”.
34. See also *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates, Mutahi Kiranga v Margaret Waweru & Another* [2015] eKLR, *Carter & Sons Ltd v Deposit Protection Fund Board & 2 Others*, Civil Appeal No. 291 of 1997 and *Equity Bank Ltd V Taiga Adams Co. Ltd* [2006] eKLR.
35. Although the applicant herein did not offer security specifically, it deposed through counsel that it was “ready and willing to comply with any conditions the court may set for the grant of a stay of execution” and because security is one of the requirements under Order 42 Rule 6(2)(b) of the Civil Procedure Rules 2016, the applicant impliedly agreed to provide adequate security in due performance of such decree or Order.
35. The upshot of the foregoing is that having fully considered the facts of the instant application, submissions by counsels for the parties and relevant case law, the court is satisfied that the applicant has met the threshold prescribed by Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 for the grant of a stay of execution pending appeal.

Consequently;

- (a) The applicant shall deposit the entire decretal sum in an interest earning account in a reputable bank in Kenya in the joint-names and managed by the advocates of the parties within 30 days.
- (b) Provided that if the applicant fails to fulfil condition (a) above, the stay of execution in force shall lapse and the respondent will be at liberty to execute the decree as necessary.

Parties shall bear their own costs.



It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 20TH DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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