



Turgut v Nakuru Water & Sanitation Services Co Ltd (Employment and Labour Relations Cause E062 of 2021) [2024] KEELRC 5 (KLR) (23 January 2024) (Ruling)

Neutral citation: [2024] KEELRC 5 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E062 OF 2021**

**HS WASILWA, J
JANUARY 23, 2024**

BETWEEN

ANNE CHEPKORIR TURGUT CLAIMANT

AND

NAKURU WATER & SANITATION SERVICES CO LTD RESPONDENT

RULING

1. Before me for determination is the Respondent/Applicant's Notice of Motion dated 26th October, 2023, filed under certificate of Urgency and brought pursuant to sections 1, 1A, 3, 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules 2010, Article 27,43,45,46,47 and 50 of the Constitution of Kenya and all other enabling provisions of the law, seeking for the following Orders:-
 1. Spent.
 2. That this Honourable court be pleased to issue an order of stay execution of the Judgment and consequential decree in this matter, delivered on 4th May, 2023 pending hearing and determination of this application.
 3. That this Honourable court be pleased to issue an order of stay execution of the Judgment and consequential decree in this matter, delivered on 4th May, 2023 pending hearing and determination of the appeal being Nakuru Court of Appeal Civil Appeal No. E084 of 2023.
2. The basis of the Application is that on 4th May 2023, this Honorable Court delivered its Judgment in this matter in favor of the Claimant/Respondents in which the Claimant/Respondents' Claim was allowed and the claimant awarded Kshs 4,193,833 for unfair termination.
3. The Respondent/Applicant herein was also condemned to pay costs to the Claimant/ Respondent herein. Further that on 14th June, 2023, the Court tabulated the probate gratuity at Kshs. 1,798,000



- thus adding the decretal sum to Kshs. 6,128,999 and further costs in respect of this matter was taxed on 24th October, 2023 at the sum of Kshs 299,482/= thus increasing the total decretal sum to be Kshs 6,428,481/= which the Claimant is now ready to execute as against the Applicant and sell off the Applicant's movable properties before the Appeal is heard and determined.
4. That since the decree is ready for full execution as against the Respondent, it is clear that unless this Honourable Court intervenes, the applicant stands the risk of having its property attached or in the alternative pay the claimants the sum of Kshs 6,428,481/= which will now be out of applicants reach forever.
 5. He prayed for stay of execution and stated that on 24th May, 2023 the applicant filed a Notice of Appeal against the said Judgment at the Employment and Labour Relations Court at Nakuru. Subsequently, on 1st July, 2023, it filed its complete record of appeal dated 29th June, 2023 before the Court of Appeal, a clear indication that it intends to fast track the hearing and determination of the appeal, which Appeal is serialized as Nakuru Court of Appeal Civil Appeal No. E084 of 2023.
 6. It is averred that unless this application seeking a stay of execution of the Judgment and consequential decree in this matter is granted by this Honourable Court, the intended Appeal will be rendered nugatory, in addition to the Applicant suffering irreparable harm.
 7. The applicant states that the application has been brought without any unexplainable delay, as cost in respect of this matter were taxed on 24 October, 2023 thus the decree was only ready for full execution then as against the Respondent.
 8. Further that the balance of convenience clearly weighs in favour of the Applicant in this matter owing to the substantial amount of money involved, which is public money.
 9. The Application herein is further supported by the affidavit of James Gachathi Nganga, the managing director of the Applicant, sworn on 26th October, 2023, which basically reiterated the grounds on the face of the Application.
 10. The Application herein is opposed by the Respondent who filed a replying affidavit deposed upon by Respondent herein on 7th November, 2023.
 11. In the affidavit the affiant stated that the averments stated therein are aimed at misleading the Honourable Court into issuing a stay of execution of decree to frustrate her from enjoying the fruits of the Court's merited decision.
 12. She stated that the application is premised on misrepresentations that there is an apparent execution while it is clear that her advocates are yet to obtain the formal decree from this court and as such no execution can commence.
 13. The affiant stated that Judgement in this matter was delivered on 4th May 2023, while the Notice of Appeal was filed on 24th May 2023, about 20 days from the date of the delivery of the judgment, which time is beyond the 14 days required for filing a notice of Appeal after the delivery of the judgment, thus the Appeal is bad in law and a proper appeal cannot be presumed to exist to warrant the stay of execution pending appeal.
 14. Nonetheless, that the said application is premature as there is no decree that has been extracted so far and as such there cannot be a "stay of execution" as espoused by Order 42 rule 6(1) of the [Civil Procedure Rules](#). In any event that the grant of stay is a discretionary power of the Honourable Court which ought to be granted pursuant to section 1A (2) of the [Civil Procedure Act](#) which requires the



court to give effect to the overriding objectives while interpreting the provisions of the Civil Procedure Rules.

15. She states that the applicant has totally failed to argue the grounds of stay pending appeal, which include; The assumed existence of a sound Appeal with high chances of Success, the likelihood of a loss to be suffered if the stay is not granted and security for costs pending the determination of the appeal.
16. She contends that it would not be in the interest of Justice for the orders sought herein to be granted as the Applicant has absolutely no single ground of appeal and have only lodged this appeal to frustrate her from enjoying the fruits of the Honourable Court's decision.
17. The affiant states that the Appeal is marred with repetition of facts which this Court delved into and made determinations on. That notwithstanding, the instant Application has been made inordinately late.
18. She stated that she is not a person of straw and in the event the Appeal succeeds, she would be in a position to settle the entire decretal amount.
19. The Respondent took issue with the fact that the Applicant has not argued or proposed its willingness to deposit the security of costs pending the outcome of the appeal and stated that it is an indication that the application does not qualify the threshold for the grant of stay pending appeal.
20. Based on the foregoing, the Respondent urged this Court to dismiss the application with costs.
21. The Application herein was canvassed by written submission, with the Applicant filing on the 1st December, 2023 and the Respondent filing on 11th December, 2023.

Applicant's Submissions

22. The Applicant submitted on three issues; Whether the Notice of Appeal is properly on record, Whether the Respondent/Applicant has met the conditions requisite for the granting of the orders sought and Whether the Respondent/Applicant is entitled to be granted the prayers sought herein.
23. On the first issue, it was submitted that the assertion by the respondent that the Notice of Appeal was lodged on 24th May 2023 is not accurate as the Notice of Appeal was lodged on 10th May 2023, six days after judgment. Therefore, the Notice of appeal is properly on record having been filed and served as per rule 77 (2) and 79 (1) of the Court of Appeal Rules, 2022.
24. On the second issue, the Applicant submitted with regard to the first element of stay of execution by citing the that Desbro (Kenya) Limited v General Printers Limited; NCBA Bank Kenya PLC & another (Objectors) [2021] eKLR where the court referred to the case of Tropical Commodities Suppliers Ltd Vs International Credit Bank (in Liquidation) Kampala Miscellaneous Application No. 379 of 2003 where Justice Ogola held:

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”
25. Similarly, that since the Respondent herein has already taxed its costs, the Applicant is apprehensive that the Respondent is likely to proceed to execute the said decree before the hearing and determination of the Appeal, which will render the Appeal nugatory and cause them loss if their properties are sold in execution of the said decree. To further buttress their argument, the applicant relied on the case of



Bashir Godana v Fatuma Godana Tupi [2018] eKLR, in which the court in granting an order of stay of execution observed that:

“...Judge Gikonyo while dealing with the issue of stay of execution had made reference to the case of *Absalom Dora vs Turbo Transporters* (2013) eKLR, where it was stated that; ‘The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court as such order do not introduce any disadvantage but administers the justice that the case deserves’.”

26. Accordingly, that unless the judgement is stayed, the applicant will suffer substantial loss.
27. On the second element, it was argued that costs in respect of this matter were taxed on 24th October, 2023, while the Application herein was filed on 27th October 2023, 3 days after the delivery of Ruling on taxation, thus the application was filed in a timely manner. In this, they relied on the case of *Susan Wanjiru & another v Lucy Gathoni & another* [2015] eKLR, where the court found that an application of this nature after having been filed about one and a half months from the date of judgment did not amount to inordinate delay.
28. On the third element, the Applicant relied on the case of *David Kihara Murage v Jacinta Karuana Nyangi & another* [2015] eKLR, the court while considering this ground held that:

“This rule in (c) above is therefore dependent on whether or not the Court has granted the orders of stay of execution sought. If no order of stay is granted, there would be no purpose to be served by making such an order. However, it is important that in the supporting affidavit the applicant should state that he is ready and willing to abide by such orders as the Court may make on security as that is a requirement under Order 42 Rule 6 (2) of the *Civil Procedure Rules*.”
29. Similarly, that contrary to what the respondent states that the applicant has not argued or proposed its willingness to deposit the security of cost, at paragraph 15 of the Applicant’s supporting affidavit, the Applicant has demonstrated its readiness and willingness to provide any such security as the court orders for the due performance of the decree as may ultimately be binding on the Applicant.
30. Based on the foregoing, the applicant submitted that it has demonstrated that it has met the conditions requisite for the granting of the orders sought, hence they are entitled to the said orders. Accordingly, they prayed for the Application to be allowed with costs.

Respondent’s Submissions.

31. The Respondent also submitted on three issues; Whether this Application is proper before the Court, Whether the Applicants have established that the intended appeal will be rendered nugatory if the application is not allowed and Whether the Applicant should provide security as a condition for the stay order.
32. On the first issue, it was argued that Order 42 Rule 6 of the *Civil Procedure Rules* provides for a stay of execution pending appeal and a simple reading and interpretation of this provision connotes that for an order of stay to be granted, there must be a proper Notice of Appeal on record to invoke this Honourable Court’s jurisdiction in issuing an order of stay. Contrary, that in the instant Application, the Applicant has specifically stated in paragraph 8 of its Supporting Affidavit that the judgment in this suit was delivered on the 4th day of May 2023, and the Applicant proceeded to file its Notice of Appeal on the 24th day of May 2023, which is a clear indication that the Notice of Appeal was filed



20 days after the delivery of the judgment. Which notice has been filed out of time contrary to Rule 75 of the [Court of Appeal Rules](#), which provides as follows;

- (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
- (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

33. Accordingly, that since the Notice of Appeal was filed out of time without a substantive prayer for an extension of time, the Applicant cannot invoke the jurisdiction of this Court to grant an order of stay of execution. To support this argument, the Respondent relied on the case of [John N. Liboyi vs. The Board of Governors of St. John College](#) Civil Application No. Nai. 13 of 2009 (UR 92/2009) where it was expressed:

“The Court has held on occasions too numerous to recite in this ruling that it is the filing of the notice of appeal which confers on the Court the Jurisdiction to grant an order of stay, an injunction or a stay of further proceedings that is clear enough from the wording of the Rule. In [Ruben & 9 Others vs. Nderitu & Another](#) [1989] KLR 459, this Court held that if there is no notice of appeal lodged, one cannot get an order of stay of execution under rule 5 (2)(b).”

34. This position was further upheld in [James Ndungu Gethenji & 3 others v Gitabi Gethenji & 3 others](#) [2018] eKLR where the Court of Appeal dismissed an application for stay for failing to have a proper Notice of Appeal on record.

35. In light of that, the Respondent urged this Court to find that there is no proper Notice of Appeal on record to warrant this Court invoke its jurisdiction under Order 42 Rule 6 of the [Civil Procedure Rules](#).

36. On the second issue, it was submitted that the Applicant has submitted that they are likely to suffer a substantial loss if the Respondent extracts a decree and executes but failed to substantiate how they will suffer the said loss, as such this grounds has not been substantiated to warrant the granting to the orders for stay. In this, they relied on the case of [Keystone Bank Limited & 4 others Vs I&M Holdings Limited & another](#) [2017] eKLR where the Court observed as follows;

“...the applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a respondent will be unable to pay costs in the event that he is unsuccessful. The same must be proven”.

37. Similarly, it was submitted that in determining what substantial loss entails, the court in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR observed as follows;

“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...”

38. Accordingly, that the question which then arises is whether the Applicants have an arguable Appeal with a high chance of success to satisfy the court that a substantial loss may result unless the order of



stay is made. On that note, it was argued that the memorandum of appeal annexed to the application is a frivolous one which raises no triable issue at all, therefore, no substantial loss may result to the Applicant if the order sought isn't granted.

39. The Respondent also cited the case of *RWW v EKW* [2019]eKLR, where the court considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

40. Based on the above cited case law, the Respondent argued that this court should disregard the invitation by the Applicant and find that there will be no substantial loss that will arise and as a result, the intended appeal shall not be rendered nugatory.

41. On security, the Respondent cited the case of *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* [2019] eKLR, in which the court observed thus: -

“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 a 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 falls.”

42. Similarly, that since the Applicant has offered to pay security for costs to satisfy the third limb for this court to grant an order for stay of execution. The Respondent urged this Court in exercising its discretion, to find and order that the Applicant pays a total of the decretal amount into a joint escrow account in the name of the Respondent's advocates as security for costs.

43. In conclusion, the Respondent prayed for the application to be dismissed with costs.

44. I have examined the averments and submissions of the parties herein.

45. The applicants filed a Notice of Appeal before this court on 9/5/2023 after judgment in this court was delivered on 4/5/2023. It is therefore apparent that the notice was filed within a reasonable period as envisaged by law and therefore the appeal is properly before court.

46. Having cleared that out of the way, it is also clear that an appeal is pending before the Court of Appeal and it would be an injustice and a miscarriage of justice for this court to assume otherwise and proceed to deny the applicants the orders sought.

47. Under order 42 Rule 6 (2) of the *CPR*, this court has jurisdiction to grant stay orders as follows;

“(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”.

48. The applicants have in my view certified the conditions above and would suffer irreparable harm if the orders sought are not granted.

49. I therefore allow stay of execution as prayed on condition that the decretal sum is deposited in an interest earning account held in joint names of counsels on record within 60 days.

50. In default execution may proceed.

RULING DELIVERED VIRTUALLY THIS 23RD DAY OF JANUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Nyamwange for Claimant – present

Okuro for Respondent – present

Court assistant – Fred

