



**Ogutu v Maya Duty Free Limited (Employment and Labour Relations Cause 13 of 2020) [2024] KEELRC 299 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 299 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 13 OF 2020  
AN MWAURE, J  
FEBRUARY 16, 2024**

**BETWEEN**

**KENNEDY ODHIAMBO OGUTU ..... CLAIMANT**

**AND**

**MAYA DUTY FREE LIMITED ..... RESPONDENT**

**RULING**

1. The Respondent filed a Notice of Motion dated 24<sup>th</sup> August 2023 seeking orders that:
  1. spent
  2. there be an interim stay of execution of the Judgment and Decree of the Employment and Labour Relations Court issued on 7<sup>th</sup> November 2022 herein pending the hearing and determination of this Application.
  3. there be an interim stay of execution of the Judgment and Decree of the Employment and Labour Relations Court issued on 7<sup>th</sup> November 2022 herein pending the hearing and determination of the intended Appeal.
  4. the costs of this application be provided for.

**Respondent/ Applicant's Case**

2. The Respondent/ Applicant avers that Hon. Lady Justice Maureen Onyango delivered the judgment in this matter on 7<sup>th</sup> November 2022 in the Claimant's favour and awarded him Kshs 1,128,376 with costs.
3. The Respondent/ Applicant avers that it intends to appeal the judgment and decree and has since lodged a Notice of Appeal dated 21<sup>st</sup> November 2022 and has obtained proceedings and a certificate of delay to enable it file its record of appeal.



4. The Respondent/ Applicant avers that there is a high possibility that the Claimant/Respondent will commence the process of execution as he has already taxed his Bill of Costs.
5. The Respondent/ Applicant avers that it has an arguable appeal with a high probability of success and it is willing to comply with directions and conditions that may be imposed by this Court.
6. The Respondent/ Applicant avers that it has moved this Court within reasonable time without any undue delay considering there is a threat of execution.

#### **Claimant/ Respondent's Case**

7. In opposition to the application, the Claimant/ Respondent filed a replying affidavit dated 19<sup>th</sup> September 2023.
8. The Claimant/ Respondent avers that Rule 75 and 77 of the *Court of Appeal Rules* provides that lodging and service of a Notice of Appeal are mandatory legal steps that ought to predate the filing of the Record of Appeal. Any omission therefore on the part of an intended Appellant, ought to be rectified by way of leave of court before the appeal is filed.
9. The Claimant/ Respondent avers that his advocates were only served on the 21<sup>st</sup> November 2022 with an unfiled and unendorsed copy of the alleged Notice of Appeal by the Applicant. The alleged Notice of Appeal served is not endorsed as stipulated under Rule 77 of the *Court of Appeal Rules*.
10. The Claimant/ Respondent avers that the Notice of Appeal has not been properly secured and served hence it is an irregularity and, on that omission, alone the Applicant has breached a mandatory requirement of the law as there is no Appeal initiated by the Appellant in absence of the Notice of Appeal as stipulated under the *Court of Appeal Rules*.
11. The Claimant/ Respondent avers that the Applicant's failure to file and serve the Notice of Appeal within the stipulated time has prejudiced him as they were not aware of any intended valid appeal and was not given adequate notice to start preparing for the Appeal as well as related proceedings such as the instant proceedings.
12. The Claimant/ Respondent avers that the Respondent/ Applicant has not given a reasonable explanation for the delay in serving the Notice of Appeal within the stipulated time, therefore, this Court should not assist an indolent party who condoned delay.
13. The Claimant/ Respondent avers that this Application is incompetent as it was neither endorsed with the filing date nor was it signed by the Deputy Registrar and no explanation has been given hence the omission by the Applicant renders entire alleged appeal a nullity.
14. The Claimant/ Respondent avers that upon delivery of the judgment on 7<sup>th</sup> November 2023, the matter proceeded to taxation of the awarded costs. His advocates filed the Bill of costs dated 31<sup>st</sup> January,2023 and vide Ruling delivered on the 1<sup>st</sup> August,2023, it was taxed at Kshs 194,838.36/-.
15. The Claimant/ Respondent avers that vide a letter dated 1<sup>st</sup> August 2023, the Applicant/Respondent was informed to settle the decretal sum together with the awarded costs but Applicant failed to respond.
16. The Claimant/Respondent avers that upon the Applicant's failure to respond, he instructed his advocate to proceed with execution of the judgment and decree.



17. The Claimant/ Respondent avers that the Respondent/Applicant is guilty of inordinate delay in filing this Application as the judgement was delivered on the 7<sup>th</sup> November,2022 and no valid explanation has been given for the delay.
18. The Claimant/Respondent avers that the intended appeal is therefore frivolous and does not raise any arguable grounds of appeal.
19. The Claimant/Respondent avers that the Respondent/Applicant is guilty of inordinate delay in filing and lodging the Record of Appeal as parties were notified way back on the 8<sup>th</sup> May 2023 that the typed proceedings were ready for collection. The Applicant is seeking to delay the conclusion of the matter herein by filing the said Record of Appeal and the instant Application.
20. The Claimant/Respondent avers that the Applicant has not demonstrated any irreparable loses they stand to suffer if the application is disallowed as they have failed to disclose their financial position and how the same shall be affected if they proceed and pay the decretal sum.
21. The Claimant/Respondent avers that the Application is fatally defective as it does not meet the threshold as set out under Order 42 Rule 6 of the Civil Procedure Rules,2010 for grant of stay of execution pending appeal.

#### **Respondent/ Applicant's Submissions**

22. The Respondent/Applicant submitted that that this Court is supposed to take note of the following while determining the Application:
  - a. When the Application was filed the intended Appeal had not been filed and was later on filed and served upon the Claimant; it was filed in the Court of Appeal at Nairobi as Civil Appeal No E734 of 2023.
  - b. On 2<sup>nd</sup> October 2023, this Court made an order that this Application can be compromised by depositing a sum of Kshs 800,000 which ruling has not been varied or reviewed and there is no application which has been filed challenging that order.
23. The Respondent/ Applicant submitted that the most issues raised in the Replying Affidavit are not for the determination of this Court and have been raised in the wrong forum.
24. The Respondent/ Applicant submitted that this Court was in relation to the deposit of Kshs 800,00 to compromise this application, the Claimant/Respondent refused to participate in opening of a bank account as the amount ordered did not satisfy the whole decretal sum.
25. The Respondent/Applicant submitted that the Court exercised its discretion by ordering a deposit of Kshs 800,000 which was reasonable considering the fact that the Court should not order what can be deemed punitive when the Applicant has not exhausted its right to appeal. It relied on Harun Gikonyo & another v Martha Wachuka Kamau 2022] eKLR.
26. The Respondent/Applicant submitted that nothing could disturb this Court's decision of depositing Kshs 800,000 hence the order is valid and should be complied with since it has not been subjected either to a review or setting aside.
27. The Respondent/ Applicant submitted that the Application has been brought under Order 42 Rule 6 of the Civil Procedure Rules which grants this Court discretionary power to grant a stay of execution for sufficient reasons. The discretionary power must not be exercised capriciously but in a way that does not prevent a party from pursuing its appeal so the same is not rendered nugatory as held on Butt



*Vs Rent Restriction Tribunal* (1979) as cited in *Ena Investment Limited Vs Benard Ochau Mose & 2 Others* (2022) eKLR.

28. The Respondent/ Applicant submitted that Order 42 Rule 6(4) of the *Civil Procedure Rules* is the giving of a Notice of Appeal and not a valid Notice of Appeal hence the averment in the replying affidavit are neither here nor there being there is and admission that a Notice of Appeal was served.
29. The Respondent/ Applicant submitted that it has shown the Claimant proclaimed its goods and even after making this application another proclamation was attempted by the Claimant; this is a clear indication that if stay is not granted the Claimant shall proceed with execution which will render the appeal nugatory. This is a good ground for seeking stay as the Applicant has not exhausted its right of appeal.
30. The Respondent/ Applicant submitted that it has an arguable appeal as it has stated in its memorandum of appeal that the judgment was based on documents not produced in court.
31. The Respondent/ Applicant submitted that it has satisfied all the conditions being placed sufficient cause that there is an arguable appeal which has been filed and may be rendered nugatory and in the event the money is paid, the Claimant may not have the capacity to refund the money should the appeal succeed.
32. The Respondent/ Applicant submitted that it will suffer substantial loss as the Claimant has not shown he is in a position to refund the money in case the appeal succeeds.

#### **Claimant/Respondent's Submissions**

33. The Claimant/ Respondent submitted that Order 42 Rule 6 of the *Civil Procedure Rules* sets out prerequisite conditions to be considered jointly and not disjunctively, as such, a party cannot merely demonstrate willingness to give security and urge the court to grant stay orders.
34. The Claimant/Respondent submitted that the instant Application was filed on the 24<sup>th</sup> August 2023, 9 months after the Judgement was delivered and the Respondent/ Applicant did not give any explanation for the delay. Therefore, the delay is inordinate and unreasonable as held in the case of *Charles Mwangi Kiiru v Boniface Maina Gichomo & Joseph Mwangi Thuo* [2021] eKLR.
35. The Claimant/Respondent submitted that the Respondent/Applicant has not demonstrated substantial loss to warrant issuance of the orders of stay of execution. It is not enough to merely put forward allegations or assertion of substantial loss, the Applicant has a duty to demonstrate to the Court through documentary evidence its claim.
36. The Claimant/Respondent submitted that having obtained a judgement in his favour the Claimant/ Respondent should not be deprived of the fruits of his judgment and the Respondent/Applicant has not shown any prejudice that cannot be quantified and compensated.
37. The Claimant/Respondent submitted that the Respondent/Applicant are unwilling to deposit the entire decretal sum and have instead proposed an amount of Kshs 800,000 as security hence it has failed to meet the condition of security. The Respondent/Applicant cannot rely on the directions of the court that have now been overtaken by events since the court directed the parties to proceed with the instant Application on merit.



## Analysis and Determination

38. The threshold for stay pending appeal is set under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which states:

“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.”

39. Further, in *Butt v Rent Restriction Tribunal* [1982] KLR 417, the Court of Appeal set out the requirements for grant of stay of execution pending Appeal as follows: -

- “1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

## Inordinate delay

40. The application was filed on the 24<sup>th</sup> August 2023 whereas the Judgment and Decree was delivered on 7<sup>th</sup> November 2022, approximately 9 months after delivery of the judgment.

41. The Respondent/ Applicant attributes the delay in lodging this application on the registry as it applied for certified copies of the Judgment and proceedings on 8<sup>th</sup> and 21<sup>st</sup> November 2022 and made follow ups at the registry, however, the proceedings were ready for proceedings on 8<sup>th</sup> May 2023 but it could not be picked as the file was forwarded for the ruling on taxation of the Claimant’s Bill of Costs. The Respondent/ Applicant filed a Certificate of delay dated 15<sup>th</sup> August 2023 in support of its reasons.



42. In the Court of Appeal case, *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), Justice Mativo held:

“I find and hold that the delay in obtaining certified proceedings and judgment cannot be faulted on the applicant. I find and hold that the delay is excusable and that it has been satisfactorily explained. I also find that the application meets the tests for the court to exercise its discretion in the applicant’s favour.”

43. Accordingly, the Applicant has reasonably explained the delay in filing this application.

### **Substantial loss**

44. The Respondent/ Applicant submitted that it will suffer substantial loss as the Claimant has not shown he is on a position to refund the money in case the appeal succeeds.

45. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another* (2006) eKLR the Court of Appeal held that: -

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

46. The Claimant/Respondent did not avail any evidence in court that he will be able to refund the sum if the Appeal is successful, hence, the Respondent/Applicant has shown possibility it will suffer substantial loss if stay is not granted and execution takes place should the appeal then succeed the respondent might not be in a position to refund the same.

### **Security**

47. In the case of *Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* (2014) eKLR the court held that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor. Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

48. As submitted by the Respondent/Applicant, this Court ordered on 2<sup>nd</sup> October 2023 that parties can compromise the Application for stay of execution if the Applicant deposits Kshs 800,000 in a joint interest earning account in the name of both counsels of the respective parties.

49. When the matter came up for directions on 30<sup>th</sup> October 2023, the Respondent/Applicant informed the court that it was ready to open the joint account and deposit the amount proposed by the Court,



this confirmed the Respondent's willingness to provide security. It is not clear if the claimant was willing to have the joint account opened or not but clearly the respondent /applicant was willing.

### **Sufficient cause**

50. In *OGM (Suing as the father of KGW) v FG & another* [2020] eKLR the court held

“Mere filing of Notice of Appeal is not enough to establish sufficient cause envisaged under Order 42 rule 6 Civil Procedure Rules a Memorandum of Appeal would in my view provide cogent evidence of existence of sufficient cause.

Substantial loss was defined in Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka Cheseto that:

“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. This is what substantial loss would entail.”

In *Gitarau Peter Munya vs Dickson Mwenda Kitbinji* -Supreme Court Application No. 5 of 2014 eKLR, the Supreme Court held that conservatory orders should be granted on the inherent merit of a case. The Court reiterated the two requirements of an arguable appeal and that unless stay is granted the appeal would be nugatory/ substantial loss, it also included a third factor public interest.”

51. The Respondent/Applicant attached its draft Memorandum of Appeal and demonstrates seriousness to proceed with the appeal. Respondent has also shown the Claimant proclaimed its goods and even after making this application another proclamation was attempted by the Claimant and so there is real danger of executing before appeal.

52. Against this background, the Respondent/Applicant has established sufficient cause to be granted the interim stay of execution pending the intended Appeal.

53. However the respondent/applicant is given 30 days to file the record of file and to deposit part of the security being Kshs 800,000 in a joint interest earning account between the two respective law firms within the aforesaid 30 days and in default these orders will cease to be operational and execution will proceed forthwith.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2024.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.



A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

