



**Taifarm Millers Limited v Oduor (Miscellaneous Application  
62 of 2023) [2024] KEELRC 651 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 651 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
MISCELLANEOUS APPLICATION 62 OF 2023**

**HS WASILWA, J  
FEBRUARY 1, 2024**

**BETWEEN**

**TAIFARM MILLERS LIMITED ..... APPLICANT**

**AND**

**FRANCIS NYONGESA ODUOR ..... RESPONDENT**

**RULING**

1. Before me for determination is the Applicant's notice of motion dated 22<sup>nd</sup> September, 2023, brought pursuant to Order 42 Rule 6 and Order 52 Rule 1 of the Civil Procedure Rules, Section 3A and Section 79G of the Civil Procedure Act and all other enabling provisions of the law, seeking for the following Orders; -
  1. Spent.
  2. Spent.
  3. That the Honourable Court be pleased to issue an Order staying execution of the Judgement delivered on 13<sup>th</sup> July, 2023 in Nakuru CMCC ELRC No. E010 of 2023; *Francis Nyongesa Oduor Vs Tai Farm Millers Limited* pending hearing and determination of the preferred appeal.
  4. That the Honourable Court be pleased to set aside and or quash the proclamation, attachments and or warrants of attachment of movable property in execution of the decree for money and warrants of sale of movable property in execution of decree for money as listed in the proclamation dated 12<sup>th</sup> September, 2023 belonging to the Applicant.
  5. That the Court be pleased to Order unconditional release of the attached goods belonging to the Applicant.



6. That this Honourable Court be pleased to grant the Applicant leave to Appeal out of time against the Judgement delivered by Hon. Elizabeth Juma on the 13<sup>th</sup> July, 2023.
7. That costs of the application herein be provided for.
2. The Application herein is based on the fact that judgement in the primary suit was delivered on 13<sup>th</sup> July, 2023 in favour of the Respondent herein which the Applicant is aggrieved by the Judgement of the Court and intends to prefer an appeal, however the time within which an appeal can be filed has lapsed, informing the need to seek leave for enlargement of time to file the said appeal.
3. It is stated that the delay in filing the appeal was as a result of miscommunication in issuing instruction to the advocate on record. As such the delay was not intentional or inordinate, hence is excusable.
4. He stated that execution proceedings have commence as the Respondent has instructed Sanjomu Auctioneers to attach and advertise for sale the Applicant properties, including their tools of trade, in execution of the judgement of the trial Court, which Auctioneers have on 12<sup>th</sup> September, 2023, proclaimed the applicant's goods warranting the filling of this Application to stop the same until the intended appeal is heard and determined.
5. That unless the orders sought are granted, the Applicant's Intended Appeal will be rendered nugatory and they are likely to suffer substantial loss that cannot be compensated by an award of damages. Further that the Intended Appeal is arguable with high chances success.
6. The Applicant stated also that it is willing to furnish security for due performance and added that it is willing to deposit the entire decretal sum in an interest earning account in the joint names of the advocates herein.
7. The Application is also supported by the affidavit of Kenneth Mwiti, the legal officer of British-American Insurance Company Limited, the insurer of the Applicant farm.
8. The Application is opposed by the Respondent who filed a replying affidavit deposed upon on the 12<sup>th</sup> October, 2023 stating that the Application has failed in satisfying the elements provided for for enlarging time under Section 79 G of the *Civil Procedure Act* and decided case to wit; lengthy of the delay, reasons for the delay, merits of the intended Appeal and the prejudice occasioned on the Respondent.
9. Based on the foregoing, he stated that the decision of the Court was rendered on 13<sup>th</sup> July, 2023 and the Application herein was filed on 28<sup>th</sup> September, 2023, about two months, thus the delay is inordinate. He added that the allegation that there was miscommunication between the Applicant and its Counsel on record is not explained as such cannot be sufficient reason.
10. He stated that the Appeal is not merited as the only ground for appeal is on the basis that the Applicant was not served with a demand for payment and an award was made by the Director of Occupational Safety and Health in line with section 23 of the *Work Injury and Benefits Act*.
11. It is his case that the only action undertaken at the subordinate Court was adoption of WIBA award due to him, where the applicant herein challenged the jurisdiction of the Magistrate Court to adopt the award given to him by DOSH and the issue of service was never raised in the Magistrates Court.
12. The Respondent stated that the award was given on 12<sup>th</sup> January, 2023 and the Applicant as per section 51 and 52 of the *Work Injury Benefits Act*, had only 60 days to appeal, which time lapsed on 12<sup>th</sup> March, 2023, Further that since the Applicant has not invoked the provisions of WIBA, the Appeal herein cannot stand.



13. The affiant stated also that the Applicant has not complied with any of the pre-requisite conditions for stay pending appeal provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#), as such the Orders sought cannot issue.
14. He elaborated further that there is no appeal on record and thus the Court cannot issue orders pending appeal, which is non-existent, the application was not filed timeously and the fact that the Applicant has not provided security for due performance of the decree.
15. He stated also that the Application herein is an afterthought as the Applicant has committed to settling the award and even issued post-dated cheques to the Respondent, an indication that it has no appeal to pursue.
16. In conclusion, he stated that the application herein is an abuse of Court process, which ought to be struck out.
17. The Application herein was canvassed by written submissions with the applicant filing on 20<sup>th</sup> December, 2023 and the Respondent filed on 31<sup>st</sup> October, 2023.

### **Applicant's Submissions.**

18. The Applicant submitted on one issue; whether the prayer for extension of time is merited and argued that section 79 G of the [Civil Procedure Act](#) provides that every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order; Provided that an Appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
19. The Applicant listed the factors that the Court need to consider whenever an application for extension of time is presented before it as was listed in the case of [Edith Gichungu Koine Vs Stephen Njagi Thoithi](#) [2014] eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
20. He submitted that the Court of Appeal further guided that there is also a duty imposed on courts to ensure that proceedings are just, expeditious, proportionate and affordable resolution of disputes before the court. on that note, he submitted that the reason for filing this appeal out of time was occasioned by the delay in reverting with the instructions by the Applicant to its advocates on record, which delay was neither intentional nor inordinate hence excusable. In this. The Applicant relied on the case of [Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others](#) [2015] eKLR, the Court of Appeal articulated that:-

“It must be realized that courts exist for the purpose of dispensing Justice. Judicial officers derive their judicial power from the people, or as we are worn to say in Kenya, from Wanjiku by dint of Article 159 (1) of the [Constitution](#) which succinctly states that Judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution. Judicial officers are also state Officers, and consequently, are enjoined by Article 10 of the [Constitution](#) to adhere to national values



and Principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, Inter alia, that the rule of law, human dignity end human rights and equity, are upheld for these reasons decisions of the courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, its incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of Justice.”

21. Accordingly, that courts of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. In any event that Article 48 of the Constitution guarantees every person access to justice, while Article 50(1) of the Constitution provides for fair hearing. Therefore, it follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. He added that the Respondent will not be prejudiced by the extension of time.
22. On the prayer for stay of execution, it was submitted that the prayer invokes the discretionary powers of this court under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers the court to stay execution pending appeal on conditions that 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 such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant.
23. On substantial loss, the Applicant defined what substantial loss entails by citing the case of *Tropical Commodities Suppliers Ltd & Others Vs International Credit Bank ltd (in liquidation)*, Misc. Application No. 3379/2003, (unreported) that relied on the case of *Antoine Nolfaye v African Virtual University* [2015] eKLR the That:

“,..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...”
24. Further in the case of *Daniel Chebutul Rotich & 2 Others v Emirates Airlines* Civil Case No. 368 of 2001 Musinga J (as he then was) rendered himself on the issue of substantial loss, thus:

“...substantial loss” is a relative term and more often than not can be assessed by a the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted (emphasis added) and that. applicant is therefore forced to pay the decretal sum.”
25. On that basis, the Applicant submitted that the Judgment entered against the Applicant is of a substantial amount being Kshs. 485,755.40 , which in the event such stay is denied the Respondent is at liberty to execute the said Judgment against the Applicant, when the said decretal amount is still accumulating interest which costs will be transferred to the Applicant, thus it will be in the economic interest of the Applicant to have this court grant it stay of execution of the Judgment delivered on 13<sup>th</sup> July 2023.
26. He submitted in conclusion that justice can still be done between the parties if the Applicant is granted an opportunity to file its appeal out of time and without undue pressure of threatened execution.



## Respondent's Submissions.

27. The Respondent submitted on three main issues being; whether the Applicant has met the threshold for leave to appeal out of time, whether the Applicant has met the threshold for stay of execution pending appeal and whether the Applicant is demonstrated sufficient cause for the court to exercise discretion.
28. On the first issue, it was submitted that appeals from a subordinate Court to the High Court ought to be filed within thirty (30) days of the making of the decision sought to be challenged and extension of time is a matter of discretion, which the law gives this Court jurisdiction to extend time under section 79 G of the *Civil Procedure Act* provided the appellant satisfies the Court that he had good and sufficient cause for not filing the Appeal in time. He argued that the extension, thereof, must be exercised within the established principles of the law and in consideration of factors which were discussed by the Court of Appeal in the case of *Omar Shurie Vs Marian Rashe Yafar* Civil Application No. 107 of 2020 being:
- a. The length of the delay.
  - b. The reason for the delay.
  - c. The chances of the appeal succeeding if the application is granted.
  - d. The degree of prejudice to the respondent if the application is granted.
29. On delay, the Respondent submitted that the judgment in Nakuru CMCC ELRC No. E010 of 2023 was delivered on 13<sup>th</sup> July 2023 in presence of Counsel for the applicant, however that the instant application was filed on 27<sup>th</sup> September 2023, about three months, which is an affront to the requirement that an appeal ought to be filed within 30 days. Therefore, that the delay is inordinate and unexplained.
30. He argued that reason given for delay, on alleged miscommunication in issuing instruction to Counsel is not sufficient, given that throughout the proceedings, the Applicant was represented by counsel and ought to have known better. He argued that it's important to give sufficient reason as was underscored by the Court of Appeal in *Susan Ogutu Oloo & 2 others v Doris Odindo Omolo* [2019] eKLR where Otieno-Odek JA held as follows: -
- “The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted.”
31. Accordingly, that the Applicant has not advanced any good or sufficient cause for the delay. In this he relied on the case of *London Distillers K Ltd v Philip Kipchirchir & 2 Others* [2007] Eklr;-
- “In my view delay is affront to the administration of justice, delay is something to be deplored, delay is repugnant to justice, delay spoils the image of the judiciary, delay foments public outcry against the judiciary, delay creates disharmony between the consumers of justice and the courts. Delay is a disguised disinterest in the disposal of the suit. Delay creates desolate and despair in the minds of the party affected by the delay. It is a despicable attempt to



enslave a party to an endless contest. That contest must come to an end if the instigator is unwilling to end it.”

32. On chances of appeal succeeding, the Respondent argued that the Applicant has annexed a draft Memorandum of Appeal raising grounds of appeal which raises issues that were never for determination at the subordinate court. He stated that section 23 of *WIBA Act 2007* purportedly not complied with has no relevance whatsoever in respect to the Director’s award dated 12<sup>th</sup> January, 2023. Further that the forums of challenging the said award are well established in law. The applicant invoked none and is now before this court seeking to waste its precious time and try and halt execution and delay the Respondent from enjoying his fruits of judgment. He added that there are no triable issues but only designed to introduce misleading issues that clearly have no chance of success.
33. On prejudice that will be visited on the Respondent, it was submitted that execution in this matter is well advanced and the Respondent is in the final stages of execution. In fact, that the Applicant herein has already signed a consent with the Respondent dated 30<sup>th</sup> September 2023 to pay Kshs. 50,000 per month until payment of the decretal sum in full and even remitted the first two instalments of Kshs. 50,000 each through post-dated cheques from Credit Bank.
34. It was argued that the only issue remaining is legal fees which the Applicant’s advocates seek to enhance by ensuring the matter perpetually remains in court. Therefore, granting the application would only serve to benefit the Applicant’s advocates at the expense of the Applicant and the Respondent. As such, that the Applicant has failed to meet the threshold for grant of leave to appeal out of time and therefore the Application dated 22<sup>nd</sup> September 2023 be dismissed with costs to the Respondent.
35. On whether the applicant has met the threshold for stay of execution pending appeal, it was argued that the principles for granting an order for stay of execution pending appeal are set out under Order 42 Rule 6(2) of the *Civil Procedure Rules* which 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 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.
36. It was submitted that none of the conditions has been met, because, with regard to delay, the application herein was filed on 27<sup>th</sup> September, 2023 and the Judgement subject of stay was delivered on 13<sup>th</sup> July, 2023, close to 2 months after the lapse of 30 days from the date of judgment. Therefore, unreasonably delayed in moving the court and the said delay is clearly inordinate, unexplained and inexcusable.
37. On substantial loss, it was submitted that if the instant application is allowed, the Respondent will be kicked off the seat of justice and unfairly disallowed from enjoying his fruits of judgment. This he argued is because the Respondent followed all legal mechanisms and procedures before the Director as well as before the subordinate court and the only Honourable thing to do is for the Applicant to pay the decretal sum. In any event that the Applicant has not shown how it will suffer substantial loss of the orders of stay is not granted. In fact, no substantial loss will be suffered as the Applicant has already consented to settling the full decretal sum vide monthly installments of Kshs. 50,000.
38. On security, it was submitted that for stay of execution to be granted an applicant has to render security for the due performance of the decree but that the applicant has not provided security for the due performance of decree that may be binding ultimately on it. To support this argument, the



Respondent cited the case of *Vista Holdings International Limited v Span Image(K) Limited* [2014] eKLR elucidated the objective of security for the due performance of the decree as follows:

“The aim is to make sure, in an even-handed manner that the appeal will not be prejudiced and that the decretal sum is available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the appeal... Nor will either party lose if the sum is actually paid with interest at Court rates...In our view, the principles set out in Rosengren’s case are eminently worth adopting.”

39. Accordingly, that the Respondent stands unprotected as no security has been offered by the Applicant. This condition is primary.
40. In conclusion, the Respondent submitted that whereas the Applicant is seeking for discretionary orders from this Honourable Court, it is approaching the Court with unclean hands and in bad faith. The Applicant has already agreed to settle the decretal sum, has signed a consent and already issued cheques in payment of the decretal sum. However, its advocates are insistent on keeping the matter in court against the wishes of both parties. Further, that the delay has been inordinate and the Applicant has failed to wholly meet the criteria under Order 42 Rule 6 of the *Civil Procedure Rules* as well as Section 79 G of the *Civil Procedure Act*. As such the application herein is an abuse of court process, vexatious to the Respondent and the delay herein is inexcusable and stands to cause great injustice to the Respondent.
41. He therefore implores this Court to spare the Respondent from further vexatious proceedings and to maintain the Court’s integrity by dismissing the application with costs and allow the parties to comply with the terms of the existing consent in so far as settlement of the decretal sum is concerned.
42. I have examined all the averments and submissions of the parties herein.
43. The applicants seek orders of stay of execution and an order extending their time within which to file an appeal.
44. The applicants aver that the delay in filing an appeal was occasioned by lack of instruction from their client.
45. They aver that their appeal is indeed arguable and the delay is not inordinate hence excusable.
46. In considering that the judgment in this case was delivered on 13<sup>th</sup> July, 2023 in CMCC ELRC No. E010 of 2010 and that the application was filed on 7<sup>th</sup> September 2023, the time for filing of an appeal had indeed lapsed.
47. It is however discovered from the draft Memo of Appeal that the appeal raises triable issues which must be laid to rest by this court.
48. Coupled with the principal that the applicant should not be locked out of the justice system which advocates for access to justice, I will allow the application granting the applicants leave to file their appeal within 14 days.
49. The execution is forthwith stayed but the applicants will pay any attendant execution charges already incurred upon assessment or agreement between the parties.
50. In the interim the entire decretal sum shall be deposited in an interest earning account held in the joint names of counsel on record within 60 days from today.
51. In default of any one of these conditions, execution may proceed.



52. Costs will abide the outcome of the appeal if at all.

**RULING DELIVERED VIRTUALLY THIS 1ST DAY OF FEBRUARY, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

**Miss Kamau holding brief for Ngure for the Respondent**

**Nganga holding brief for Ndumia for the applicant**

**Court Assistant – Fred**

