



**Ken Knit Kenya Ltd v Ego & another (Miscellaneous Application
E037 of 2023) [2024] KEELRC 650 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 650 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
MISCELLANEOUS APPLICATION E037 OF 2023
MA ONYANGO, J
MARCH 14, 2024**

BETWEEN

KEN KNIT KENYA LTD APPLICANT

AND

JOSEPH KIPSAINA EGO 1ST RESPONDENT

DAVID ATETWA 2ND RESPONDENT

RULING

1. Vide the application dated 14th August 2023 and filed in court on 28th August 2023, the Applicant seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this application inter partes, the Court be pleased to enlarge time for the Appellant to file its appeal out of time and be pleased to admit the Notice of Appeal filed.
 - d. That the court be pleased to issue an interim stay of execution and/or any further proceedings in Eldoret CM ELRC No. E121 of 2021 Joseph Kipsaina Ego & David Atetwa Vs Ken Knit Kenya Ltd
 - e. That the court be pleased to enlarge time for the Appellant/Applicant to file its Appeal out of time and be pleased to admit the Notice of Appeal filed.
 - f. That costs of the application be provided for.
2. The grounds upon which the application is made are contained at the foot of the application which are to wit:- that the Respondents herein were Claimants in Eldoret CM ELRC No. E121 of 2021 and



had filed a Claim against the Applicant herein demanding compensation for unfair termination; that judgment was delivered by the trial court on 19th May 2023; when the Applicant's advocates tried to log into the Magistrate's court they were unable to log in hence were not aware whether judgment was delivered or not; that subsequently, the advocate wrote to the Magistrate's Court to obtain a copy of the judgment but were informed that the file could not be traced; that after the futile attempt to obtain the court file, on or about 19th July 2023, the Applicant's counsel was served with Claimant's Bill of Costs without a taxation date and unless this court stays the Magistrates Court matter, the same shall proceed to the detriment of the Applicant.

3. The Applicant's Counsel further avers that upon receipt of the Bill of Costs, he took initiative and put more effort in obtaining the file and that on 5th August 2023 the file was retrieved. Counsel states that he thereafter proceeded to file the present appeal; that the application has been brought without undue delay since it is only 14 days since it got wind of the judgment; that there shall be no hardship visited upon the Respondents since they have not proceeded with execution of the decree, and lastly, that the Applicant has a very sumptuous appeal with commensurate chances of success hence should be allowed to ventilate its case.
4. The application is supported by the sworn affidavit of Rebecca Cheluget, the Applicant's Human Resource Manager dated 14th August 2023. In the Affidavit she reiterates the contents of the grounds upon which the application is founded.
5. The Respondents have opposed the application vide the Replying Affidavit sworn on 14th September 2023 by the 1st Respondent, Joseph Kipsaina Ego. The Respondents term the application as incompetent, a non-starter and dead on arrival. They urge that it should be dismissed or struck out since there is no authority to swear the affidavit on behalf of the Applicant.
6. According to Mr Ego, the trial court in Eldoret MELRC No. E121 of 2021 delivered its judgment on 19th May 2023 in favour of the Respondents where the 1st Respondent was awarded Kshs 97,479 while the 2nd Respondent was awarded Kshs 143,420; that they were also awarded costs of the Claim which costs have already been assessed; that there cannot be stay of taxed costs because once Certificate of Costs is issued, it is final and binding on the parties.
7. According to the Respondents, the Applicant has not demonstrated that it has a good and sufficient cause for not filing the appeal within time to be able to benefit under the proviso of section 79G of the *Civil Procedure Act*. They further aver that the draft Memorandum of Appeal does not disclose an arguable appeal with any probability of success and that the Applicant has failed to disclose material facts to this court.
8. The Respondents contend that the Applicant is hell bent to frustrate them from realizing the fruits of their judgment and that any further delay in the proceedings would occasion them insurmountable prejudice. They therefore urged the court to dismiss the instant application with costs.
9. The application was disposed of by way of written submissions. The Applicant's submissions were filed on 11th October 2023 while the Respondents' submissions were filed on 25th October 2023.

Determination

10. From the analysis of the application, the rival affidavits and the submissions of the parties herein, the only issue for determination is whether sufficient cause has been given by the Applicant for grant of leave to file its appeal against the Judgment of the trial court delivered on 19th May 2023 out of time.
11. Section 79G *Civil Procedure Act* provides:



79G. 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.

12. The judgment in respect of which the appeal is sought was delivered on 19th May 2023. The Applicant's Counsel attributed the delay in filing the Appeal within the time to the Court file missing and has explained that the file was only recovered on 5th August 2023.

13. I have looked at annexure marked RC3, in the Applicant's supporting affidavit which is a letter addressed to the Eldoret Magistrate's Court by the Applicant's Counsel requesting that he be supplied with a copy of the judgment. It is dated 27th July 2023.

14. The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied by a Court in exercise of its discretion while determining an application of this nature. It observed as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

15. Flowing from the above, I am satisfied that the Applicant has given a good and reasonable explanation for the delay; the application has been brought without undue delay and from the draft memorandum of appeal, the proposed appeal is arguable.

16. Consequently, I exercise my discretion under Section 3A of the *Civil Procedure Act* in the interest of justice and allow the Notice of motion dated 14th August 2023 in terms of Prayer (e).

17. The second limb of the Application is for stay of execution pending appeal. Order 42 rule 6(2) provides for stay of execution 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.

18. The Applicant states that should the orders not issue the Applicant will suffer prejudice by being forced to pay the decretal sum. That it is willing to abide by any conditions set by the court as it knows it has a good appeal. It relied on the decision in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR in which the court stated:

“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”

19. It is further submitted that at the time of filing the instant application execution had not commenced, that it is important for the court to preserve the status quo.
20. For the Respondents it is submitted that section 51(2) of the Advocates Act provides that a certificate of costs once issued is final and binding upon parties, relying on the decision of S. Gachukia Waigwa v Nina Marie Ltd. The Respondents further relied on the decision in Frances Kabaa v Nancy Wambui and Jane Wanjiru in which the court held

“In any case, even if that were so, the Appellant, if he succeeds in his appeal, would be refunded his costs. Furthermore, we do not think that stay can be granted in respect of costs.”
21. The authorities cited by the Respondents are not applicable to the instant application as they relate to application for stay of costs where the suit was dismissed with costs and the application was made by the plaintiff. In the instant case there is a decree and the application is made by the judgment debtor. The application is not for stay of costs but stay of judgment and decree.
22. Having granted leave to the Applicant to file appeal out of time, I find no reason to deny the Applicant an order for stay of execution especially as the Applicant has offered to abide by any conditions set by the court.
23. I accordingly grant stay of execution on condition that the decretal sum if deposited into a joint interest earning account in the names of counsel for the parties within 30 days.
24. Costs shall be paid by the Applicant in any event.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF MARCH 2024

MAUREEN ONYANGO

JUDGE

