



REPUBLIC OF KENYA



Olemuteke v Jiwa (Cause 35A of 2018) [2024] KEELRC 671 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 671 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 35A OF 2018**

**JW KELI, J
MARCH 7, 2024**

BETWEEN

RAJAB BARASA OLEMUTEKE CLAIMANT

AND

SHAIWAZ S JIWA RESPONDENT

RULING

1. This Ruling determines the Claimant/Applicant's Notice of Motion dated 24th January 2024 and filed on the 26th January 2024 brought under the provisions of Sections 3A and 63(e) of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules as well as Article 159(2) of the Constitution.
2. The Applicant seeks the following orders: -
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to grant temporary stay of execution of the Court's Decree and judgement in Bungoma Employment and Labour Relations Court ELRC Cause No. 35 A of 2018 pending the hearing and determination of the Appeal in the Court of Appeal.
3. The Applicant states that judgement was entered against the Claimant on 9th March 2023 and being dissatisfied with the Court's Judgment and Decree, he filed a Notice of Appeal on 22nd March 2023(RBO-1) and applied for the proceedings through the letter of 17th March 2023(RBO=2) which were served upon the Respondent.
4. That he is yet to be supplied with copies of the Court proceedings.
5. The Applicant argues that he has an arguable Appeal with an overwhelming chance of success and urges that unless a stay of execution of the Decree is granted, he stands to suffer irreparable loss and



damage if the Respondent proceeds to execute the Decree which will render his appeal a mere academic exercise.

6. The Applicant states despite the pending appeal in the Court of Appeal, the Respondent has proceeded and proclaimed his property (RBO-3).
7. The Applicant argues that he is willing and ready to provide security for the performance of the Decree and abide by any direction that the Court will grant and direct.
8. That the grant of the Orders shall not prejudice the Respondent in any way as the status quo obtaining can be maintained and that the application has been made in utmost good faith and without undue delay.
9. The Respondent in response on 6th February 2024 filed the Grounds of Opposition dated 5th February 2024 stating that:-
 - a. The Application is frivolous, vexatious and an abuse of the due process of Court.
 - b. That the application does not meet the requirements of Order 42 Rule 6(2) of the Civil Procedure (Amendment) Rules 2020;
 - c. There is no appeal filed by the claimant in the Court of Appeal;
 - d. The Claimant has not explained the delay in filing the application.
 - e. Prejudice will occasion to the Respondent if the orders sought are made
 - f. That there can be no stay of execution of costs; and
 - g. Litigation must come to an end.

Written Submissions

10. The Court directed the application be canvassed by way of written submissions. Parties filed their respective submissions. The Claimant/Applicant's submissions were dated 19th February 2024 and were filed on 20th February 2024 by Makokha Wattanga & Luyali Associates. While the Respondent's Submissions dated 5th February 2024 were filed on 6th February 2024 by Omundi Bw'Onchiri Advocates.

Determination

11. The Applicant in his submissions addressed the following issue:-
 - a. Whether the Application meet the Conditions for Stay:-
 - i. As to whether Substantial loss will occur
 - ii. Application filed with no delay
 - iii. Offer of security
12. The Respondent in his submissions addressed the following issues: -
 - a. Whether the claimant has met together all the Requirements for a stay of Execution set out under Order 42 Rule 6(2) of the Civil Procedure (Amendment)Rules 2020.
 - b. Whether there can be Stay of Execution on costs.



13. The Court having perused the pleadings by the parties and their submissions was of the considered opinion that the issue placed before the Court by the parties for determination is:- Whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.

Issue a) Whether the applicant has demonstrated that the grant of Orders of stay of execution pending appeal is merited.

14. In his written submissions, the Applicant points to Orders issued by the Court on 29th January 2024 directing the Applicant to pay the decretal sum; serve the application to the Respondent, and serve the judgement delivered on 9th March 2023. The Applicant also states that he complied with the Order on payment of the decretal sum and with the proof of the payment receipt of Kshs. 312, 630 was marked as RBO-1.
15. The Claimant submits that according to the principles under Order 42 rule 6(2) of the Civil Procedure, the Applicant has demonstrated that if the execution by the Respondent proceeds a state of affairs will occur that will irreparably affect and negate the very essential core of the applicant as the successful party in the appeal. The Applicant states that substantial loss will occur in that account if the status quo is not maintained as it will render the appeal nugatory.
16. The Applicant states that he will suffer the loss of Kshs. 312,630, as well as cost and interest if the stay of execution is not granted, and the Respondent, has not shown means he can refund the same if the appeal succeeds and additionally, the Respondent is not within the jurisdiction of this Honourable Court.
17. The Applicant states that he has complied with the directions of the Court by Depositing the entire decretal amount as security of costs and the same is deposited in the judiciary account. The Applicant relies on the decision in RWW V EKW (2019).
18. The Applicant further submits that there was no inordinate delay on the part of the Applicant in bringing the instant appeal as the judgment was entered on 9th March 2023 and a notice of appeal was filed on 22nd March 2023 and he applied for typed proceedings on 17th March 2023.
19. The Applicant further submits that he has complied with the directions of the Court on depositing the entire decretal sum as security of costs and the same deposited with the Judiciary as evidenced by annexed evidence.
20. The Applicant submits that all the factors considered and in order not to render his intended appeal nugatory and to give effect to the overriding objectives of the Civil Procedure, the Applicant has fulfilled the grounds for grant of stay of execution.

Respondent's Submissions

21. The Respondent submits that the Applicant has not met the Conditions for a stay of execution set out under Order 42 Rule 6(2) of the Civil Procedure (Amendment) Rules 2020 as he has not proved the particulars of loss he will suffer should stay not be granted. The Respondent submitted that judgment was delivered on 9th March 2023 and costs taxed off on 25th October 2023, and the Claimant had only moved to Court upon being proclaimed by the Auctioneer on 16th January 2024. The Respondent submits that the Applicant has not shown why he did not file the present application immediately after judgment and thereafter costs taxed.
22. The Respondent submits that the application was filed 11 months after the delivery of judgment and no reason has been given for delaying to file. That costs were taxed and a ruling was delivered



on 25th October 2023 and a stay of execution of 30 days on stay lapsed on 25 November 2023. That the Applicant was only woken when they proclaimed his properties. The Respondent stated that the Applicant has not shown which security he is ready to offer for costs now standing at Kshs. 312, 630/-.

23. The Respondent to buttress these assertions relied on the decisions in *David Kihara Murage v Jacinta Karuana Nyangi and Another* [2015] eKLR; *Mossy Khaemba Muchanga & Davis Wabwile Muchanga v Paul Lutoto Khawanga* [2020] eKLR; *Antoine Ndianye v African Virtual University* [2015] eKLR.
24. The Respondent also submits that there can be no stay of Execution on costs. The Respondent submitted costs were taxed on 25th October 2023 and a stay of 30 days was issued. The Respondent submits that it is now four months since the temporary stay orders were issued. The Respondent submits that the Applicant is mandated to pay taxed costs and there can be no stay of execution on costs in any event, the Respondent is a person of means in case the appeal succeeds he can refund the taxed costs and prays that the application be dismissed with costs. To this end, the Respondent relied on the authority in *Francis Kabaa v Nancy Wambui & Another* [1996] eKLR.

Analysis

25. I have considered the application for stay, grounds of opposition thereof, and annexures. I have also considered submissions together with case law cited by both counsel for their respective clients.
26. The main issue for determination is whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.
27. Before delving into the determination, the Applicant addressed himself to orders allegedly issued by the Court on 29th January 2023 directing the applicant to pay the decretal sum and serve the application to the respondent, and serve the judgement delivered on 9th March 2023. The Applicant also stated that he complied with the payment of the decretal sum and the proof of the payment receipt of Kshs. 312, 630 marked as RBO-1 attached.
28. The correct position is that, on 29th January 2024, the Court directed the Applicant to serve the application and a response be filed in seven days, and a hearing inter partes was slated for 7th February 2024. No orders as to paying the decretal sum were issued. Additionally, the document RBO-1 attached to the application is the Notice of Appeal dated 22nd March 2023. No proof of the payment of Kshs.312,630/- is provided.
29. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides: -
 - “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.
30. Further to the above, a stay may only be granted for sufficient cause, and the Court in deciding whether or not to grant the stay and in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.



31. Section 1A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
32. As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”
33. The Execution proceedings before the Court are pursuant to a ruling on the Taxation of the Bill of Costs dated 29th March 2023 by Hon. Getenga on 25th October 2023, against which a Decree and Warrant of attachment were obtained on 10th January 2024 and issued to Eshikhoni Auctioneers. The Proclamation of Attachment was on 16th January 2024.
34. The Notice of Appeal was filed on 22nd March 2023 on account of the Judgment and Decree of this Court of 9th March 2023.
35. In the instant case, the Applicant avers that despite the Appeal in the Court of Appeal, the Respondent has proceeded to proclaim his property which will occasion untold suffering on his part.
36. The Applicant states that no prejudice will occasion on the Respondent that cannot be compensated with costs.
37. The Respondent submitted that the application is an abuse of the process and frivolous as there can be no stay on costs and submits that he is a man of means and can refund the taxed costs should the appeal succeed.
38. The Applicant has indicated that he has paid the decretal sum on account of costs and is willing to comply with any orders of the Court. The proof of payment has not been provided.
39. The Respondent states that there can be no stay orders on payment of costs but the applicant seeks a stay of execution of the judgment and Decree of the Court issued on 9th March 2023.
40. The costs which the Respondent proceeded to tax and the ruling on them issued on 25th October 2023 were awarded by the Judgment and Decree of 9th March 2023 and not the certificate of costs or ruling thereof. Taxation is not an independent proceeding and it emanates from the judgment and the contemplated Decree and is thus part and parcel thereof.
41. The Respondent states that there is no Appeal and the applicant’s application is an abuse of the Court process.



42. The intended appeal by the Applicant is to the Court of Appeal. The [Court of Appeal rules, 2022](#) provide: -

“77.

- (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior Court. (2) Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which the appeal is lodged.

78. On receipt of a notice of appeal under rule 77, the registrar of the Court shall send one copy of the notice to the appropriate registry.

79.

- (1) An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior Court.

- (2) Where any person who is required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior Court and has not subsequently given any other address for service, the copy of the notice of appeal may be served on that person at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.”

43. The Applicant produced the Notice of Appeal (RBO-1) and the Letter received in Court on 17th March 2023(RBO-2) requesting for typed Proceedings and states that he served the notice and the letter on the Respondent, though no proof of the said service is shown. The Respondent has however not denied that he was ever served with any notice or letter requesting for proceedings.

44. Under Rule 84 of the [Court of Appeal rules](#), “(1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged

—

- (a) a memorandum of appeal, in four copies;
- (b) the record of appeal, in four copies;
- (c) the prescribed fee; and
- (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior Court has been made in accordance with sub-rule (2) within thirty days after the date of the decision



against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior Court as having been required for the preparation and delivery to the appellant of such copy.

- (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.
- (3) The period specified in sub-rule (1) for the institution of appeals shall apply to appeals from superior Courts in the exercise of their bankruptcy jurisdiction.

85.

- (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.

45. The Applicant states that he is yet to receive the typed proceedings having applied for them on 17th March 2023 after the Judgment was delivered on 9th March 2023. There is no proof that he has withdrawn his Notice of Appeal, the Respondent has neither produced any application seeking to withdraw the Notice of Appeal. The Appeal can only be filed upon obtaining the Proceedings of the trial Court.

46. The Court of Appeal has settled the principles for stay of execution in the case cited by Justice Ongudi in *MFI Document Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR of *Butt v Rent Restriction Tribunal* [1982] KLR 417 where the Court of Appeal gave guidance on how a Court should exercise discretion in an application for stay of execution and held that: -

- “ 1. the power of the Court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle is granting or reusing 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. (sic) (trial Court judgement).
3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
4. 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 of costs as ordered with cause the order for stay of execution to lapse”.

47. The Respondent has pleaded that he is a man of means and able to pay the decretal sum on the taxed costs if the appeal succeeds. No accounts as proof of these means, as pleaded, were provided and in light of the depositions by the Applicant. The Court finds and holds that the Applicant is likely to suffer



substantial loss if execution proceeds. The Respondent should have provided proof of the means to refund the decretal sum.

48. The Applicant filed a Notice of Appeal which has not been withdrawn and whose filing is dependent on the availing of the typed proceedings. The costs taxed off are related to the Judgement and Decree of 9th March 2023, for which the Applicant has filed a Notice of Appeal. The taxation proceedings emanate from the judgement to be appealed and they cannot be separated and a failure to grant a stay of the Decree on costs and pending appeal as pleaded by the Applicant can occasion substantial loss to him.
49. There was no inordinate delay in filing the instant Notice of appeal which was lodged on 22nd March 2023 and the Judgement and Decree to be appealed against was delivered on the 9th March 2023, which was 13 days after judgment which is within the 14 days provided under Rule 77(2) of the [Court Appeal Rules, 2022](#).
50. As to security of costs, the Applicant states that he has already paid the Costs on the taxed costs and is willing to comply with the condition on security pending appeal.
51. The Judgement dismissed the Claimant's claim and granted costs to the Respondent which were taxed. The intended Appeal is against the judgment and the Decree granting the taxed costs.
52. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the [Civil Procedure Act](#), I find and hold that the Applicant has merited the requirements for the grant of stay of execution pending the intended Appeal.
53. Accordingly, the Applicant's application dated 24th January 2024 is Hereby allowed, and a grant of stay of execution of the Judgment and Decree pending appeal in the Court of Appeal issued on the following conditions: -
 - a. The Applicant/ Appellant shall deposit the entire decretal sum of Kshs. 312, 630/- in Court, within 15 days of this ruling; or if already paid, produce and serve the Respondent with the proof of the payment into the Judiciary account within the said period.
 - b. No Order as to Costs.

54. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF MARCH 2024.

J.W. KELI

JUDGE

IN THE PRESENCE OF: -

Court Assistant: Lucy Macheso

Applicant: - Wekesa

Respondent: Ms. Wanyama

