



**Mijengo Investments Limited v Kemunto (Miscellaneous Application E008 of 2024) [2024] KEELRC 1140 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1140 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
MISCELLANEOUS APPLICATION E008 OF 2024**

**HS WASILWA, J  
APRIL 30, 2024**

**BETWEEN**

**MIJENGO INVESTMENTS LIMITED ..... APPELLANT**

**AND**

**REAH KEMUNTO ..... RESPONDENT**

**RULING**

1. By an Amended Notice of motion dated 19<sup>th</sup> February, 2024 filed under certificate of urgency, pursuant to sections, IA, 1B, 63(e) of the [Civil Procedure Act](#) and Order 42 Rule 6 & 2 of the Civil Procedure Rules, 2010, the Applicant, sought the following Orders; -
  1. Spent.
  2. That pending the hearing and determination of this application this Honourable Court be pleased to order for stay of execution of the whole of the judgement and decree in Nakuru MCELRC 215 of 2022 Reah Kemunto v Mijengo Investments Limited restraining the respondents whether by themselves, servants and/or agents from executing the judgement and/or decree delivered on 29<sup>th</sup> November 2023 by Honourable Emmanuel Soita.
  3. That pending the hearing and determination of the intended appeal, this Honourable Court be pleased to order for stay of execution of the whole of the judgement and decree in Nakuru MCELRC 215 of 2022 Reah Kemunto v Mijengo Investments Limited restraining the respondents whether by themselves, servants and/or agents from executing the judgement and/or decree delivered on 29<sup>th</sup> November 2023 by Honourable Emmanuel Soita.
  4. That pending the hearing and determination of this application this Honourable Court be pleased to order for stay of execution of the whole of the judgement and decree In Nakuru MCELRC 215 of 2022 Reah Kemunto v Mijengo Investments Limited restraining Gillette



Traders Auctioneers Official Court Brokers from executing the judgement and/or decree delivered on 29<sup>th</sup> November 2023 by Honourable Emmanuel Soita.

5. That pending the hearing and determination of the intended appeal this Honourable Court be pleased to order for stay of execution of the whole of the judgement and decree in Nakuru MCELRC 215 of 2022 Reah Kemunto v Mijengo Investments Limited restraining Gillette Traders Auctioneers Official Court Brokers from executing the judgement and/or decree delivered on 29<sup>th</sup> November 2023 by Honourable Emmanuel Soita.
  6. That this Honourable court be pleased to grant the applicant leave to appeal out of time against the judgement delivered by Honourable Emmanuel Soita on 29<sup>th</sup> November 2023 in Nakuru MCELRC 215 of 2022 Reah Kemunto Vs Mijengo Investments Limited.
  7. THAT costs of this application be in the intended appeal.
2. The Application herein is premised on the grounds on the face of the Application and the supporting affidavit of Joseph Kuria, the managing director of the Applicant, deposed upon on 19<sup>th</sup> February, 2024.
  3. The affiant stated that the Applicant is aggrieved by the decision of the Court in Nakuru MCELRC 215 of 2022 Reah Kemunto v Mijengo Investments Limited delivered on 29<sup>th</sup> November 2023 by Honourable Emmanuel Soita.
  4. It is stated that from the warrants of attachments, the Respondent claims a decretal sum of Kshs 232,114.81 and costs of Kshs 54,605.70. However, that no taxation proceedings have been concluded as there is no certificate of costs for the award of costs to be claimed in the warrants.
  5. It is averred that when judgement was delivered on 29<sup>th</sup> November 2023, it was not typed and therefore that by a letter dated 29<sup>th</sup> November 2023, they requested for a certified copy of the same and paid court fee. However, that Despite reminder and follow ups with the court registry none was supplied delaying further the lodging of the appeal and the application for stay of execution.
  6. The affiant states that the extension of time is an equitable remedy reserved for a deserving Applicant that has demonstrated a good and sufficient cause for not filing the appeal in time.
  7. On that note, that the Applicant herein is seeking for extension of time to file the Appeal out of time as the delay was occasioned by the delay in typing of proceedings and judgement.
  8. He stated that the subject matter herein is substantial and should the execution proceed, the applicant stands to suffer substantial loss and prejudice because the capability of the Respondent to refund the decretal sum, in the event the Appeal succeeds, is unknown.
  9. Conversely, that the Applicant herein is a company and a going concern and able to pay the Respondent if the Appeal fails. He added that the proclaimed properties are its tools of trade which if the stay order is not granted and execution proceeds the operations of the company will be crippled.
  10. It is contended that the present appeal raises triable issues with high chances of success and that failure to stay the execution proceedings therein, the appeal stands to be rendered nugatory if the Respondent executes against the Applicant.
  11. The affiant stated that the Applicant has arguable issues on basis that the trial Court totally disregarded a contract executed between the employer and employee that was as a result of negotiation for terms of employment and proceeded to award damages for unfair termination.



12. He stated that the present application for stay has been brought timeously without any unreasonable delay because judgement was rendered on 29<sup>th</sup> November 2023 and immediately thereafter on the same day a notice of appeal dated the 29<sup>th</sup> November 2023 was lodged and a request for certified copies of judgement and proceedings was send to the Court. However, that the proceedings had not been provided as at the time of filling the present application.
13. The deponent states that the Respondent has issued strict instructions to Gillette Traders Auctioneers Official Court Brokers to attach and execute against the Applicant who have in turn issued a notice of attachment dated 8<sup>th</sup> February 2024 to execute in 7 days which expires on 15<sup>th</sup> of February 2024.
14. He contends that the findings of the trial court were not commensurate to the evidence which was tendered for the court's evaluation. Moreover, that the award on terminal dues was excessive and an erroneous calculation of the dues that ought to be awarded to the Respondent, as the Court did not take into account the cheque issued to the Respondent and the letter signed by the Respondent.
15. The deponent maintains that the respondent will not suffer any prejudice if the application for stay of execution orders is granted and also that it is in the interests of justice that this application be allowed and the status quo be maintained.
16. He added that the thrust of the Applicant's appeal is that the trial court erred in law and in fact by awarding a manifestly high award of 232,114.81/= plus costs and interests which was incommensurate.
17. The Application herein is opposed by the Respondent who filed a replying affidavit sworn on 21<sup>st</sup> February, 2024 and states that the application is inept, incompetent, bad in law and devoid of any merit whatsoever, an afterthought and amounts to an abuse of the court process.
18. She stated that she instituted the trial court case against the Applicant seeking compensation for unfair termination vide redundancy which she considered unlawful, unfair and unprocedural. Also that she sought to be paid underpayments, compensation under Section 49 (c), notice pay, overtime, public holidays, unpaid leave, severance as at 9<sup>th</sup> December, 2022 after working for a period of five (5) years.
19. That after filing, the suit proceeded for hearing and the case closed on 22<sup>nd</sup> November, 2023 and a judgment delivered in her favour on the 18<sup>th</sup> December, 2023 in presence of both parties and the Court then granted stay of execution for thirty (30) days which was sufficient to lodge an Appeal by the Applicant herein. Hence, that the Application filed herein is meant to delay her from enjoying fruits of her judgement.
20. She avers that the allegations that the costs were assessed ex-parte and without the involvement of the Applicant is misconceived, misplaced, a blatant lie, fallacious, untrue and/or unfounded.
21. The Respondent stated the Applicant did not take any steps to satisfy the decree, forcing her to instruct auctioneers to commence execution proceedings, that prompted the Applicant to file the current application.
22. She stated that the letter requesting for certified copy of Judgment and typed proceedings including Notice of Appeal are all dated 19<sup>th</sup> December, 2023.
23. She maintained that a determination was made judiciously and fairly by the Honourable Court and that due process was adhered to, hence she should not be denied the fruits of her judgement. Moreover, that this is a Court of Equity that cannot grant an award on one hand and deny enjoyment of the award on the other hand by stay.



24. The Respondent also stated that the Applicant has not demonstrated how it stands to suffer irreparable loss if the court fails to grant it a stay of execution. In fact, that the Applicant is a blue chip company and paying the award granted will not affect its financial base and/or business.
25. The Respondent avers that the Draft Appeal as filed has no merit and thus no chances of succeeding because the issues to be canvassed have already been fully deliberated during trial and a decision made by the trial Court. On that basis, it was stated that the application is premature, misconceived and bereft of any merit and the Application does not warrant the grant of stay of orders since the conditions for grant of such orders have not been met.
26. She stated that she will be grossly prejudiced if this application is allowed as it is merely an afterthought and aimed at delaying the enjoyment of the decretal sum. Also that the Applicant has not shown how it will suffer substantial loss if it is denied stay.
27. However that in the unlikely event that this Honourable Court is inclined to allow the present Application in exercise of its discretion, taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing her interest as a successful litigant, then the Applicant be ordered to pay half of the decretal amount plus costs to her and the rest to be deposited in a joint interest earning account held in the names of advocates for the parties.
28. The Application herein was canvassed by written submissions with the Applicant filing on 4<sup>th</sup> March, 2024 and the Respondent filed on 19<sup>th</sup> March, 2024.

### **Applicant's Submissions**

29. The Applicant submitted on the following issues for determination; whether the Applicant has demonstrated that the orders of stay of execution pending appeal are merited, whether the Applicant has demonstrated that the order for grant of leave to file an appeal out of time is merited and who bears the costs of the present application.
30. On the first issue, it was submitted that the principles guiding the grant of a stay of execution pending appeal are well settled under Order 42 rule 6(2) of the Civil Procedure Rules. On that note, it was argued that there exists a danger of the Respondent attaching and disposing off the Applicant's property, which wholly constitute its tools of trade, if the orders of stay of execution pending the hearing and determination of the application and the appeal are not granted.
31. It was argued that the Applicant is in the business of milling timber and if the machinery is sold then the company operations may be paralyzed. He reiterated that the Applicant is a going concern which depends on its daily sales and therefore failure to grant the orders sought and the Respondent consequently executes against the Applicant shall necessitate it to close its doors and therefore cease operations to their detriment.
32. The Applicant submitted also that the award is substantial that if execution is allowed to proceed, it stands to suffer substantial loss and prejudice especially because the ability of the respondent to refund the decretal amount is unknown.
33. On the grounds of Appeal, the Applicant submitted that it raises triable issues with high chances of Success and that failure to stay the execution proceedings therein, the appeal stands to be rendered nugatory. In any event that the Respondent has not filed any affidavit of means to confirm her financial status thus there is a risk of failure to compensate the Applicant should the appeal succeed. In this, the Applicant relied on the case of G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Bishar & Another [2018] eKLR where the court considered the respondent's ability to repay



the decretal sum in case the appeal succeeded as there was no affidavit evidence by the Respondent on record on the means.

34. The Applicant submitted that this Court has powers to decide whether or not to grant a stay of execution as was stated in *Butt V Rent Restriction Tribunal* 1982 KLR 417 where the Court of Appeal held that;

“ 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. 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.”

35. Similarly, that in the case of *Samvir Trustee Limited Vs Guardian Bank Limited (Ur)*, the Court aptly stated:-

“ The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court In a particular manner, But the yardstick is for the court to balance or weigh the scales of Justice by ensuring that an appeal Is not rendered nugatory while at the same time ensuring that a successful party /s not impeded from the enjoyment of the fruits of his judgement.”

36. On security for costs, it was submitted that an order for security for costs is not automatic. The applicant highlights that, one of the principles that courts consider, is the ability of the Appellant to pay the costs in the event that he is not successful. On that note, he argued that the Applicant is a saw milling company which operates as a going concern and is therefore willing and able to settle any of the amounts in costs awarded by the court upon completion of the appeal. On the other hand, that the respondent has not demonstrated to the court that the Applicant may fail to pay costs if its appeal is not successful due to bankruptcy, poverty or any other reason nor demonstrated any bad faith or reason for the Applicant's failure to pay costs. In this, they relied on the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others*, CA No. 38 of 2013 [2014] eKLR, where the Supreme Court emphasized that: -

“ In an application for further security for costs, 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 a costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”



37. The applicant maintains that an order for security for costs are usually granted against parties who do not reside within the court's jurisdiction. This was held in *Shah vs Shah* [1982] KLR 95 it was held that: -

“The general rule is that security is normally required from Plaintiff's resident outside the jurisdiction but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given”.

38. Therefore, that it is imperative in consideration of an application for security of costs, for the court to balance the competing rights of the parties, that is the right to access to justice and the right to security for costs. Hence that in this case, it is in the interest of justice that the orders sought are granted and that failure will amount to denying the Applicant the opportunity to exhaust its legal remedies.

39. On leave sought, it was submitted that the delay in filing the appeal for 1 day was inadvertent and not inordinate. He attributes the delay to time taken by the Court in supplying the certified judgement and proceedings.

40. Moreover, that an order for extension of time is an equitable remedy reserved for a deserving Applicant and that the applicant has demonstrated a good and sufficient cause for not filing the appeal in time.

41. Additionally, the Applicant maintains that the decision whether or not to grant leave to appeal out of time is an exercise of discretion just like any other exercise of discretion by the court as provided for under section 79G of the *Civil Procedure Act* as read with Order 50 Rule 5 of the Civil Procedure Rules and reiterated by the Court of Appeal in *Edith Gichungu Koine Vs Stephen Nijagi Thoithi* [2014] eKLR that whenever an application for extension of time is before a court, the court ought to take into account several factors as follows:

“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 decree of prejudice to Respondent if the application is granted and whether the matter raises issues of public importance amongst others.”

42. This view was also held by the Court of Appeal in *Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others* [2015] eKLR, where it held that: -

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint.”

43. Further, that Article 48 of *the Constitution* guarantees every person access to justice, while Article 50(1) of *the Constitution*, guarantees every person the right to have any dispute that can be resolved by the application of law decided in affair and ‘public hearing before a court or, if appropriate, another independent and impartial tribunal or body. He added that the ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows, therefore that no person who approaches the court seeking an opportunity to ventilate their grievances should be locked out.

44. Similarly, the Applicant urged this Court extend time for filling the Appeal as the delay is not inordinate in the circumstances.

45. On costs of the Application, it was submitted that it is trite law that costs are discretionary. However, the norm is that costs follow the event unless unique circumstances are demonstrated to the court as



was held in Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihuru Dairy Farmers Co-operative Society Ltd, where this court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case,”

### **Respondent’s Submissions.**

46. The Respondent submitted from the onset that Order 42 Rule 6 sub-rule 2 of the Civil Procedure Rules, 2010 outlines some of the guiding principles for the court to grant stay of execution pending appeal. Similarly, that the Court in Civil Appeal No. 135 of 2014 Alhyder Trading Company Limited -Vs-Lucy Jepngetich Mibei [2016] eKLR opined that;-

“I must state at this juncture that the decision whether or not to grant stay of execution pending hearing of an appeal is at the discretion of the court. The conditions set out under Order 42 Rule 6 of the Civil Procedure Rules are only meant to be guidelines to assist the court in the exercise of its discretion.”

47. Similarly, that Madan JA (as he then was) in Civil Application No Nai. 6 of 1979 Butt –Vs-Rent Restriction Tribunal, in allowing an application for stay of execution, cited the passage of Brett LJ in Wilson –Vs Church No.2 12 ChD 1879 454 where the learned judge held that;-

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory”

48. On whether substantial loss has been demonstrated, the Respondent cited the first condition required of an applicant seeking an order of stay of execution is to satisfy the court that substantial loss would occur if the order of stay is not granted. This was the position held by Platt Ag JA in Civil Application No. Nairobi 97 of 1986 Ken a Shell Limited –Vs-Benjamin Karuga Kibiru & Another [1986] eKLR held that,

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”

49. Similarly, that the Court of Appeal sitting in Nairobi in Civil Application No Nai 95 Of 1987 Rhoda Mukuma –Vs John Abuoga [1988] eKLR reiterated its earlier decision in the case of Kenya Shell Limited (supra) when it held that;-

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being —



- (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and

SUBPARA (b) the applicant has given security.

The discretion under rule 5(2) (b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore, it is necessary to preserve the status quo.”

50. Further that Mutungi J, in Civil Appeal No. 772 of 2005 Equity Bank Limited –Vs-Taiga Adams Company Limited [2006] eKLR opined that;

“In the application before me, the applicant has not shown or established the substantial loss that would ensue if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent, that is, execution is carried out in the event the appeal succeeds, the Respondent would not be in a position to pay reimburse as he/she/it is a person of no means. Here, no such allegation is made, much less established, by the appellant/applicant.”

51. Accordingly, that the Applicant herein has not demonstrated to this Honourable Court how it stands to suffer irreparable loss if the court fails to grant it a stay of execution, In fact, that the Applicant is a blue chip company and paying the Respondent's lawful and rightful dues will not affect its financial base and/or business bearing in mind that the Respondent is already condemned unemployed in this strenuous economic times.

52. On delay, the Respondent cited the Court of Appeal case of M'ndaka Mbiuki –Vs-James Mbaabu Mugwiria [2016] eKLR where it was held that,

“the grounds is normally easy to determine and is usually straightforward. Although there is exact measure as what mounts unreasonable delay inordinate delay when it occurs. It must be such delay that goes beyond acceptable limit given the nature of the act to be performed.”

53. On that basis, it was argued that the application has been brought without unreasonable delay. But that the filing of the application was aimed at denying the Respondent her fruits of the judgment.

54. On security, it was submitted that an Applicant seeking an order of stay of execution is to provide such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

55. The Respondent argued that in the unlikely event that this Honourable Court is inclined to allow the present Application in exercise of its discretion, taking all relevant factors into account and in order not to render the intended appeal illusory, He urged this Court to order the Applicant to pay half of the decretal amount plus costs to her and the rest to be deposited in a joint interest earning account held in the joint names of the advocates for the parties herein.

56. On prayer for leave, the Respondent submitted that the prayer being sought is granted pursuant to discretionary power given to the court which should be exercised judiciously. That only this court can grant extension of time to file the intended appeal out of time. However, that the move to file the Appeal is a delay mechanism aimed at denying the Respondent enjoyment of the fruits of judgement and therefore that leave should be denied in this case.



57. On costs, it was argued that the Applicant has not proven its case to the required standard and has not met the threshold of proof thus should be condemned to bear the cost of this application.
58. I have examined the averments of the parties herein. The applicant contends that he intends to appeal the judgement of the lower court and seek orders for extension of time to file an appeal and also stay pending the said appeal.
59. The reason advanced by the Applicants as to why the appeal was not filed within reasonable time is that the delay was caused by the failure to have proceedings in time.
60. I take note that the judgement in the lower court was delivered on 29<sup>th</sup> November, 2023. The applicants filed a Notice of Appeal in the matter on the same day. The fact of filing their Notice of Appeal in as appeal in itself and all that the applicant needs to do is proceed to file the record and proceed with the appeal.
61. The application to file an appeal out of time is therefore superfluous. That said and done what remains is the condition of stay which I set and direct that the entire decretal sum be deposited in court within 30 days. In default execution to issue. Costs to abide the outcome of the appeal.

**RULING DELIVERED VIRTUALLY THIS DAY OF 30<sup>TH</sup> APRIL, 2024.**

**HELLEN WASILWA**

**JUDGE**

In the presence of:-

Nyaga for Respondent - Present

Kirihi for Claimant - Absent

