



REPUBLIC OF KENYA



KENYA LAW
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**Riley Falcon Security Limited v Makinya (Miscellaneous Application
E090 of 2023) [2024] KEELRC 910 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 910 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS APPLICATION E090 OF 2023**

**CN BAARI, J
APRIL 25, 2024**

BETWEEN

RILEY FALCON SECURITY LIMITED APPLICANT

AND

LUKE MAERI MAKINYA RESPONDENT

RULING

1. By a Notice of Motion dated 30th November, 2023, brought pursuant to Sections 1A, 1B, 3A and 79G of the Civil Procedure Act, Oder 42 Rules 6(1), (2) and Order 51 Rule 1 of the Civil Procedure Rules, the Applicant, seeks the following reliefs:
 - i. Spent.
 - ii. Spent.
 - iii. That leave be granted to the Applicant to file an appeal from the judgment of Hon. S. Cheruiyot dated and delivered on 21st September, 2023 out of time.
 - iv. That the court be pleased to grant an order for stay of execution and/or enforcement of the judgment and decree dated 21st September, 2023 in Kisumu CM ELRC Cause No. 85 of 2019 pending the hearing and determination of the Appeal.
 - v. That the draft Memorandum of appeal annexed herein be deemed as dully filed upon payment of the requisite filing fees.
 - vi. That costs of this application be provided for.
2. The application is supported by the grounds on the face thereof and the affidavit of Sharon A. Omollo, sworn on 30th November, 2023. The crux of the motion is that the trial court delivered a judgment allowing the Respondent's claim against the Applicant, and awarded him a total sum



of Kshs. 3,032,045.20/-, which the Applicant is dissatisfied with, and for which it prefers an appeal against.

3. The Applicant states that the period stipulated by law for filing an appeal to the High Court is 30 days, and which period has since lapsed. It states further that the judgment was to be delivered on 5th July, 2023, but which was not delivered as scheduled, and that it only learnt that the same was delivered vide a letter dated 24th November, 2023, sent to them by the Respondent's Advocate, and which judgment was rendered without notice to the Applicant.
4. The Applicant avers that the Respondent has commenced the process of extracting the decree and is likely to commence execution of the said decree/judgment any time, and which will render the intended appeal nugatory if an order for stay of execution is not granted.
5. It is the Applicant's assertion that failure to lodge the appeal in time was not deliberate as has been explained above, and that it is in the interest of justice that the orders sought be granted.
6. The Respondent opposed the motion vide a replying affidavit sworn on 10th January, 2024, wherein, he states that all parties were aware that Judgment would be delivered on the date on which it was scheduled to be delivered, and that it is inconceivable that while having the conduct of the matter and knowing that the same was pending Judgment, the Applicant would only learn of the delivery of the judgment close to three months after its delivery and well after the expiry of the appeal period.
7. He avers that the Applicant, in its intended appeal, has not demonstrated the chances of success of the intended appeal and how it shall be rendered nugatory in the event that the application for stay of execution is not granted as prayed.
8. The Respondent further asserts that the Applicant has not met the threshold required in law to merit the orders sought, considering that it has failed to demonstrate the substantial loss in detail as required in law that shall be suffered by the Applicant in the event that the application is not allowed as prayed.
9. The motion was canvassed by way of written submissions and both parties filed submissions, and which have been dully considered.

Determination

10. I have carefully appraised the application, the grounds in support, the replying affidavit in opposition and the submissions filed both parties.
11. Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules](#), provides for stay of execution as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) 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
- (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.”

12. The Court’s exercise of discretion in staying execution of a Judgment, is guided by the grounds set out in the case of *Stephen Wanjobi v Central Glass Industries Ltd* Nbi HCCC No. 6726 of 1991 where the Court emphasized that:

“For the Court to grant stay of execution there must be:

- (a). Sufficient cause.
- (b). Substantial loss.
- (c). No unreasonable delay and security offered for due performance of the decree.”

13. The Applicant, being the burden bearer, was under duty to demonstrate to Court that the intended appeal is arguable. A glance at the judgment rendered on 21st September, 2023, and the award made therein, is on the face of it, demonstration that the intended appeal is arguable, and further shows that the Applicant stands to suffer irreparably should the prayers sought not be granted.

14. The Respondent has also not shown that notice of the judgment was issued to the Applicant the delivery of the said judgment having been rescheduled on more than two occasions.

15. Justice Odek JA (as he then was) in *Edith Gichungu Koine v Stephen Niagi Thoitbi* [2014] eKLR had this to say on extension of time to lodge an appeal;

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision 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.”

16. The judgment herein, was initially fixed for delivery on 5th July, 2023. It was not delivered on that day, but was rescheduled to the next day, 6th July, 2023, and subsequently 12th July, 2023, which again did not happen and parties were told that the judgment would be delivered on notice. Nothing shows that the notice was issued when the judgment was finally delivered on 21st September, 2023

17. I conclude by holding that the motion is merited, and is allowed as follows: -

- a. That leave be and is hereby granted to the Applicant to file an appeal from the Judgment of Hon. S. Cheruiyot dated and delivered on 21st September, 2023, out of time, and to do so within 7 days of this order.
- b. That an order for stay of execution and/or enforcement of the Judgment and decree dated 21st September, 2023 in Kisumu CM ELRC Cause No. 85 of 2019, be and is hereby granted pending the hearing and determination of the Appeal.



- c. That the draft Memorandum of appeal annexed herein, be and is hereby deemed as dully filed upon payment of the requisite filing fees.
- d. Costs shall abide the appeal.

18. Orders accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF APRIL, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:-

Ms. Omollo Achieng present for the Applicant

N/A for the Respondent

Erwin Ongor – C/A

