Odhiambo v University of Nairobi Enterprises & Services Board (Cause E497 of 2021) [2024] KEELRC 1026 (KLR) (15 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 1026 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E497 OF 2021

NZIOKI WA MAKAU, J

APRIL 15, 2024

BETWEEN

BURT AGGREY ODHIAMBO ..... CLAIMANT

AND

UNIVERSITY OF NAIROBI ENTERPRISES & SERVICES BOARD ..... RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 16th November 2023 seeking for Orders that pending the hearing and determination of the Application herein and/or further orders, as well as of Civil Appeal No. E746 of 2023 - University of Nairobi Enterprises and Services Limited v Burt Aggrey Odhiambo, an order be made *ex parte* at the first instance to stay execution of the Judgment and Decree issued by this Honourable Court on 18th April 2023 in favour of the Claimant for a sum of Kshs. 1,210,822.85/-. Further, that costs of this Motion be provided for.

2. The Application was premised on the grounds set out therein and supported by the Affidavit of Mr. Seith O. Abeka, the Respondent's Managing Director/CEO. Mr. Abeka averred that the sum of Kshs. 1,210,822.85/-, entered in favour of the Claimant, was for gratuity, notice, leave dues, salary for June from the date of judgment till payment in full as well as costs of the suit. That following the said Judgment and Decree, the Respondent lodged at the Court of Appeal Civil Appeal No. E746 of 2023, wherein it seeks to set aside the said decision in entirety. He further averred that as the Orders by this Court of 18th April 2023 shall be completely vacated if the Respondent's appeal succeeds, stay of execution of the said Judgment and Decree is necessary in order to preserve the substratum of the Appeal. That execution may entail attachment of the Respondent's assets, which shall be detrimental to the operations of the Respondent, who is a State Corporation, maintained out of public funds. It was Mr. Abeka's averment that the orders the Respondent seeks are justified because if payment of the substantial decretal sum is made to the Claimant, who is a man of unknown means and the appeal

succeeds, the said sum shall not be readily recovered from him, if at all. That on the other hand, the Respondent shall readily abide the orders by the Court of Appeal and that the interest of justice and balance of convenience militate in favour of granting the orders sought herein.

3. In response, the Claimant/Respondent swore a Replying Affidavit on 4th March 2023 averring that Prayer 3 of the Respondent's Motion Application has been made on an assumption that the Judgment of the Court issued on 18th April 2023 made an Order and Decree for specific payment of the said sum as particularised by the Applicant as follows: "for a sum of Kshs. 1,210,822.85/- being gratuity, notice, leave dues and salary for June from the date of judgment till payment in full". That however, as at the said date of 18th April 2023, the Court had not made any order as regards the actual payment of defined gratuity sum, notice, leave, salary, costs and interest and in fact ruled at para. 29 of the Judgment as follows:

> The tabulation of dues to be made and a report made to court in the next 14 days after which the final figures will be entered in the judgement since the Respondent has to calculate the gratuity due in order to complete and finalize the termination commenced by the Respondent.

4. The Claimant further averred that on 19th April 2023, the Applicant filed a Notice of Appeal against the said Judgment and made it clear on the face of the Notice of its dissatisfaction with the Judgment of 18th April 2023. That subsequent to filing the said Notice, the Applicant proceeded to participate in further proceedings of the Court by filing its computations as regards gratuity, notice pay and outstanding salary, with the Claimant's Counsel also forwarding their computations. That the Court considered the parties' submissions and delivered a Ruling on 23rd May 2023 wherein it for the first time awarded quantum being gratuity at Kshs. 1,029,547.85, notice pay of Kshs. 123,596/-, leave due at Kshs. 45,319/- and salary for June at Kshs. 12,360/- including costs and interest sum. The Claimant argued that in essence, the Ruling of 23rd May 2023 delivered final Judgment as regards heads of quantum (Gratuity, Notice, Leave, salary, Costs and Interests) and the actual quantum (Kshs. 1,210,822.85 as at November 2023) with the inclusion of components of the Judgment that remained undetermined. That however, the Applicant opted not to submit at all a notice of appeal concerning the heads of quantum and the actual quantum, which are now subject of the instant Application. It was the Claimant's averment that there being no notice of appeal thereof, the Court of Appeal has not been properly moved to consider the questions about the heads of quantum including the actual quantum thereof, which exclusively formed part of the Ruling of the Court dated 23rd May 2023. That there being no competent Appeal before the Court of Appeal, adjudication of the instant Application is therefore not tenable. In addition, the Claimant/Respondent asserted that a period of approximately seven (7) months had passed between the Applicant filing a Notice of Appeal on 19th April 2023 and filing of the present Application on 16th November 2023. That the Respondent is thus guilty of laches and undesirable of being granted any discretion in their favour.

5. According to the Claimant, the sums adjudged by the Court in its Ruling of 23rd May 2023 were exclusively terminal dues that ought to have been paid to him on the date of termination of his employment and that there was no compensatory sum at all adjudged by the Court in exercise of its discretion. He believes that pursuant to the Orders of the Court of 18th April 2023, the Court invited the Applicant herein to proceed and tabulate the terminal dues payable to the Claimant. That thereafter, the Applicant made and submitted to Court a tabulation wherein it admitted that the Claimant was indeed to be paid gratuity, salary in lieu of notice, salary for the days worked. He averred that when the Court adopted the computations in its Ruling of 24th May 2023, the Court only made a determination on the quantum of gratuity and nothing more. That it is an abuse of the court

process for the Applicant to confirm their liability to settle terminal dues, which was due and payable upon exit, and on the same vein feign that they would suffer substantial loss if the sum is paid to the Claimant. The Claimant further averred that the Applicant has not demonstrated the substantial loss it is likely to suffer if it proceeds to effect payment of his terminal dues and that in any case, he owns an immovable asset being property L.R No. 124593 that is fully developed without any encumbrances and is currently valued at Kshs. 18Million. In essence, that he is capable of refunding the entire decretal sums if paid to him and the intended Appeal shall not be rendered nugatory. The Claimant thus urged the Court to disallow the instant Application in the interest of justice and curtail any attempt at being subjected to an unfair labour practices.

6. The Respondent/Applicant filed a Further Affidavit sworn by Mr. Seith O. Abeka on 26th March 2024 averring that contrary to the Claimant's assertion on Prayer 3 of the instant Motion, the Respondent had not made any assumption. Mr. Abeka asserted that by the Judgment dated 18th April 2023, the Court ordered that a tabulation of dues be made and a report made to Court "after which the final figures will be entered in the judgment". That pursuant to the Judgment of 18th April 2023, the tabulation of the Court made on 23rd May 2023 was deemed as having been entered into the said Judgment and a Decree thereon issued on 9th June 2023. That in short, the Court's tabulation of 23rd May 2023 is not independent of the Judgment of 18th April 2023. Mr. Abeka argued that therefore if the said Judgment is upheld on appeal, the Ruling of 23rd May 2023 will as a direct consequence also be upheld and similarly if the Judgment is set aside, the said Ruling will be set aside. He also noted that there is no separate decree arising from the Ruling of 23rd May 2023 and that the Decree issued on 9th June 2023 incorporates the final figures pursuant to the Court's tabulation made on 23rd May 2023.

7. Mr. Abeka further argued that the Valuation Report submitted by the Claimant in respect to the parcel of land comprised in L.R No. 124593 does not at all discharge the evidential burden of proof of means. That the Claimant has not produced a current official search in respect to the property to prove that indeed the property is currently registered in his name and that there are no encumbrances over the said property. That ultimately, there is nothing on record to show that the Claimant is possessed of sufficient means to refund the decretal sum were the appeal to succeed. Mr. Abeka averred that the Claimant filed his Bill of Costs dated 30th May 2023 seeking payment of costs but since execution could not proceed prior to taxation of costs, the Respondent did not file the stay Motion upon the delivery of the Judgment on 18th April 2023. That however, the Respondent expeditiously filed the stay Motion immediately a date was allocated for delivery of the ruling in respect to the Claimant's Bill of Costs, which ruling was scheduled to be delivered on 8th December 2023 but was delivered on 22nd January 2024.

8. Respondent/ Applicant's Submissions

. The Respondent/Applicant submitted that it filed the present Motion under the *Civil Procedure Rules* since the *ELRC Rules* do not have an explicit provision in respect of stay pending appeal. That in doing so, it relied on the decision of this Honourable Court in *Bollore Transport & Logistics Ltd v Kidaha* (Appeal E060 of 2022) [2022] KEELRC 1613 (KLR) (28 July 2022) (Ruling) that it would be unconscionable for a Court to strike out an application for stay pending appeal since the words stay pending appeal do not appear in the *ELRC Rules*. It was the Applicant's submission that to grant or refuse an application for stay of execution pending appeal is discretionary in that the Court has to balance the interests of the Claimant and those of the Respondent when granting stay.

9. Regarding the condition of substantial loss, the Applicant cited the case of *Winfred Nyawira Maina v Peterson Onyiego Gichana* [2015] eKLR wherein the Court held that the substantial loss under Order 42, rule 6 of the *Civil Procedure Rules*, especially where money decree is involved, lie in the inability

of the respondent to pay back the decretal sum should the appeal succeed, and that the claimant's failure to refund the decretal sum paid by the respondent would indeed render the appeal nugatory thereby subjecting the respondent to an undue hardship of loss of public funds. The Applicant in the instant Motion asserted that the duty to prove ability to refund the decretal sum in the likely event the decree is set aside is vested upon the Claimant and not the Respondent/Applicant, as manifestly provided in section 112 of the *Evidence Act*. That the Court of Appeal held in the case of *International Laboratory for Research on Animal Diseases v Kinyua* [1990] eKLR that once a reasonable and justifiable "apprehension" is raised by an applicant, the onus was on the respondent to rebut by evidence the claim that the intended appeal, if successful, would be rendered nugatory on account of his (respondent's) alleged impecunity. The Applicant thus requested the Court to find that the Claimant has failed to prove that he is in a position to reimburse the decretal amount if the appeal succeeds and in that regard, that he may suffer substantial loss. That the Court should also find that the Respondent/Applicant herein has sufficiently proved the substantial loss and the nugatory aspects.

10. Concerning the condition of security, the Respondent/Applicant submitted that Order 42, rule 8 of the *Civil Procedure Rules 2010* provides that,

> No such security as is mentioned in rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity (Emphasis by Applicant).

11. It argued that since it is a subsidiary of a public university and is able to settle the decretal sum in the event that the appeal is not successful, the Court should be guided by the aforesaid provision and grant an order of stay without ordering the Respondent/Applicant to provide security. In support of this position, the Applicant relied on the case of *Teachers Service Commission v Benson Kuria Mwangi* [2020] eKLR wherein the ELRC held that the applicant being a public institution, it was not required to deposit security by virtue of Order 42 Rule 8 of the *Civil Procedure Rules*. Further in the case of *Paul Kipsang Kosgei v National Industrial Training Authority & another; Cabinet Secretary, Ministry of Labour & Social Services (Interested Party)* [2021] eKLR, the ELRC held that the 1st Respondent was not required to deposit security for the appeal on the sole ground that it is a public institution with sufficient funds to meet any liability from the decision of the Court and any liability that may arise from the decision of the Appellate Court should its appeal fail.

12. It was the Applicant's submission that it shall press for an expedited hearing and determination of the Appeal as it is in the public interest that the public coffers money be protected until the suit is heard and determined, as similarly held by the Court in *Ethics & Anti-Corruption v Peter Mangiti & 17 others* [2016] eKLR. That it is thus necessary to stay execution of the Judgment and Decree made by this Court on 18th April 2023 in order to preserve the substratum of the Appeal filed by the Respondent. The Applicant argued that to commit substantial public funds by effecting payment while it is most probable that the award will be set aside in entirety or substantially varied will not be in accord with Article 232(1)(b) of the *Constitution* of Kenya, which demands prudent use of public resources per *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR a decision of the Supreme Court.

13. Claimant/Respondent's Submissions

. The Claimant/Respondent noted that the Applicant failed to file and serve their Supplementary Affidavit and Written Submissions by 14th March 2024, the date set pursuant to the directives made by this Court on 7th March 2024. He opposes the Affidavit and Submissions purportedly filed by the

Applicant for the reason that he would stand prejudiced if the same is admitted yet he did not get the opportunity to respond to the same. He therefore applies and prays that any purported filing by the Applicant after the Claimant had delivered his final written submissions be expunged from the Record in the interest of justice. The Claimant submitted that there is no competent notice of appeal filed by the Applicant. He maintained that the net effect is that the Heads of quantum and the actual quantum adjudged by this Court as payable to the Claimant vide the Ruling of 23rd May 2023, is not and cannot form subject of appeal to the Court of Appeal. That the Judgment of the Court was not completed on 18th April 2023 and the Notice of Appeal dated 19th April 2023 cannot by any stretch of imagination be taken to apply to the Court's subsequent Ruling of 23rd May 2023, whose contents were not known as at the date of submission of the said Notice. In support of this proposition, the Claimant relied on the case of *Communication Workers Union of Kenya v Telkom Kenya Limited* [2020] eKLR in which the Court affirmed that recording the computation was a further action for conclusive role of the Court in the matter and that the computation was a necessary step for completeness and finality of the trial Court's role in the case. He further cited the case of *Makini Schools Limited v Joseph Shalinga & 4 others* – ELRCA E072/2023 (Ruling) in which Aboudha J. held as follows:

> " The decision of the Court that was delivered on 26th August, 2022 was not final. The labour officer was tasked to compute the quantum of redundancy payable to the respondents. Whereas the applicant had prior to the direction of the court computed the redundancy, these did not become the final determination of the issue. The computation by the labour officer upon direction of the court was to be the final pronouncement on the matter. There was a possibility that the labour officer could have come with a different figure from what the applicant had computed. This could have been a ground of appeal. It was therefore prudent for the applicant to await the final orders of the Court before mounting an appeal..."

14. Further, it was the Claimant's submission that this Court should thus find that the Applicant having failed to mount an appeal on the subsequent Ruling of the Court, there cannot be a basis for consideration of the prayer for stay since what is sought to be stayed cannot be ventilated in the Court of Appeal. That this is buttressed in the provisions of Rule 75(2) of the *Court of Appeal Rules*, which provides that,

> Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to Appeal (Emphasis by Claimant/ Respondent).

15. The Claimant argued that it is the presence of a competent intention to appeal or appeal before the Court of Appeal that grants the court jurisdiction or basis for consideration of an application brought before it under Order 42 of the *Civil Procedure Rules*. In this regard, he relied on the case of *Grace Muthoni Mbogo v Amboseli Court Limited* [2020] eKLR wherein this Court dismissed the application for stay pending appeal after observing that there was no competent notice of the intention to appeal and subsequently no appeal. That also in the case of *Andrew Nganga Ndungu v Godfrey Karari & another* [2006] eKLR, the High Court stated that it could not grant any orders pursuant to an incompetent appeal and concluded that the application for stay of execution must therefore fail. The Claimant/Respondent thus urged the Court to dismiss the Application herein in *limine*.

16. Without prejudice to the foregoing submissions, the Claimant/Respondent submitted that the Applicant has not given any reasonable or cogent explanation as to why it took seven (7) months to file the instant Application, which period according to the Claimant was unreasonable delay. He relied on the case of *Republic v Medical Practitioners & Dentists Board & another*; (Miscellaneous Civil Application 59 & 63 of 2019 (Consolidated)) [2021] KEHC 298 (KLR) (Judicial Review) wherein

the Court held that delay, even if for one day must be accounted and that the ground on unreasonable delay largely stands or falls depending whether the delay has been explained. The said Court opined that even an inordinate delay can be explained to the satisfaction of the court. The Claimant urged this Court to find that a delay of seven (7) months is indeed inordinate and has not sufficiently and reasonable been explained in the instant Application.

17. It was the Claimant's submission that the three (3) critical conditions the Applicant was required to satisfy are contained in Order 42, Rule 6 of the *Civil Procedure Rules* and that rule 6(2) bars this Court from ordering stay of execution pending appeal unless: the application is brought without inordinate delay; the applicant demonstrates that he will suffer substantial loss unless stay is ordered; and the Applicant is willing to give security as the court may order. The Claimant submitted that the use of the word 'and' in the quoted law implies that a party desirous of having a stay of execution granted in their favour must demonstrate the three conditions and not either of them. In essence, the Applicant must file the application timeously, demonstrate the aspect of substantial loss and the willingness to grant security.

18. As regards the condition of substantial loss, the Claimant/Respondent submitted that the question of substantial loss as a cornerstone in issues of stay of execution was made clear by the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR. That in essence, the Applicant has a legal burden to demonstrate the substantial loss it is likely to suffer if the stay is not granted while the manner of establishment of such loss was also spelt out by the Court in the case of *Jessikay Enterprises Ltd v George Kahoto Muiruri* [2022] eKLR as follows:

> "...The Applicant was duty bound to demonstrate how substantial loss would arise in this instance, by showing, either that the Respondent would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicants.
>
> These are matters to be established through affidavit evidence and it is not available to the Applicant to allude to such loss through submissions, as done here..."

19. Concerning the first sub-condition of substantial loss on whether payments made in satisfaction of the decree would occasion difficulty to the applicant, the Claimant fronted that in the suit, payments of the sums as adjudged would not occasion any difficulty on the part of the Applicant herein. That it is incumbent on the Applicant to demonstrate, by way of documentary and empirical evidence, the actual difficulty or damage it would incur if the said sum is paid to the Claimant/Respondent. In denying the Respondent/Applicant's assertion that paying the sums adjudged by this Court would be an imprudent and irresponsible utilization of public funds, the Claimant submitted that it is not in dispute that he was a *bona fide* employee of the Respondent and is entitled to terminal dues as adjudged by Court. He contended that the Respondent had not availed any evidence of it being a state corporation and any evidence that it relies on tax revenue to fund itself. The Claimant argued that Courts hardly grant stay of execution when it comes to decrees for payment of strictly accrued terminal benefits per the case of *Stanley Mombo Amuti v National Water Conservation & Pipeline Corporation* [2015] eKLR. That in any case, payment of terminal dues cannot amount to wastage of public funds in any measure and the Applicant has essentially failed to prove by way of evidence that it stands to suffer irreparable loss if the sums are paid. That being a public entity as they claim, the Respondent is capable of settling this sum without occasioning any difficulty or strain on its finances.

20. For the second sub-condition of substantial loss, which is whether the Claimant is a 'man of straw', the Claimant submitted that the sum sought to be paid being approximately Kshs. 1,210,000/-, the asset he disclosed to this Court as belonging to him sufficiently covers the amount. That even though

the Applicant has failed to discharge its legal burden, the Claimant herein has nevertheless effectively discharged the evidentiary burden placed upon him to prove his ability to refund the sum should the Applicant be successful on appeal and should hence not be denied to enjoy the fruits of the judgment. He argued that the Applicant had in fact not brought any evidence to displace his demonstration of actual ownership of an immovable asset currently valued at Kshs. 18Million hence his ability to refund the sum should the Respondent be successful on appeal. The Claimant relied on the case of *Rose Sang Tarus v Barclays Bank of Kenya Limited* [2021] eKLR in which this Honourable Court found that the respondent had demonstrated she owns property of substantial value and thus had the capacity to refund the decretal sum should the pending appeal succeed, and consequently held that the applicant had not demonstrated the degree of loss or detriment it would suffer should stay be denied.

21. It was the Claimant/Respondent's submission that it would not be necessary for this Court to consider the limb as regards security when the Applicant has not satisfied the cornerstone requirement of proving substantial loss. He relied on the decision of the Court in *Johnai Okutoi & another v Najib Jiwa & 2 others* [2017] eKLR that the plaintiff had not offered any security for its worth and since the applicant has not satisfied the first and second conditions for stay, the application had no merit and stood dismissed with costs. That in the case of *Kwekwe Mwakela v Krystalline Salt Ltd* [20151 eKLR, the Court found that the applicant had not brought the motion after inordinate delay and had deposited the decretal sum as security but went on to hold that since the applicant had failed to prove the claimant's inability to repay the judgment debt, the motion failed as the applicant failed to prove that she will suffer substantial loss if stay is not granted. The Claimant/Respondent urged this Court to be guided by the said authority and similarly find that the Applicant herein has not placed before this Court any reasonable grounds to demonstrate substantial loss it would likely suffer if the stay is not granted. That the Applicant having overall not met the standards as by law stipulated and required for grant of stay pending appeal, the instant Application should be dismissed with costs to the Claimant herein.

22. In order to succeed in an application for stay, one must meet certain criteria. It is provided that no order for stay of execution shall be made unless the Court making it is satisfied that:-

    (a) substantial loss may result to the party applying for stay of execution unless the order is made;

    (b) the application has been made without unreasonable delay; and

    (c) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

23. In the case of *R W W v E K W* [2019] eKLR the court indicated the purpose of a stay of execution order pending appeal to be as follows:

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
>
> Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

24. In this case the Respondent/Applicant took a long time to make the application for stay. It was made despite the Respondent participating in the determination of the matter in relation to the final dues payable. The notice of appeal purportedly filed was not a notice of appeal as the decision was partly handed down first and finalized when the parties reverted with the final dues payable. As such, the *bona fides* of the Respondent/Applicant are doubtful. Secondly, the Respondent/Applicant has not made any provision for security as required in law. There is no merit in the allegation that substantial loss would ensue if no stay is granted. Third and not least, the Claimant/Respondent has demonstrated that he is capable of refunding the sum should the Respondent/Applicant succeed on appeal. Given the parameters the Court has to consider and weighing the response of the Claimant/Respondent to the motion for stay, I find that there is no basis to grant stay pending appeal. Application by the Respondent/Applicant is accordingly dismissed with costs to the Claimant/Respondent.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL 2024

NZIOKI WA MAKAU

JUDGE