



**Kel Chemicals Limited v Muganda (Miscellaneous Application
E211 of 2023) [2024] KEELRC 1598 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1598 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E211 OF 2023**

**K OCHARO, J
JUNE 24, 2024**

BETWEEN

KEL CHEMICALS LIMITED APPLICANT

AND

ROY NOAH MUGANDA RESPONDENT

RULING

1. The Applicant seeks two prime orders in the Notice of Motion dated 11th October 2023. An order for extension of time for filing of an appeal out of time, and a stay of execution of the decree in ERLC E 034 of 2021, *Roy Noah Muganda Vs- Kel Chemicals Limited* pending the hearing and determination of the intended appeal.
2. The Applicant states that judgment was delivered against it, in the above-stated matter for the unfair termination of the Respondent's employment, in the sum of KSHS. 1,112,666.00, costs and interest.
3. It contended that upon hearing the parties' respective cases, the trial Court slated delivery of judgment in the suit for the 26th of June 2023. On this date, the judgment was not delivered but adjourned to the 28th of June 2023. On this latter date, the judgment wasn't again delivered. The Trial Magistrate directed that the judgment could be delivered on notice.
4. The notice was never issued. However, it dawned on the Applicant's Counsel that the judgment was delivered on 5th July 2023. The judgment was delivered without notice to Counsel for the Applicant or the Applicant. It only came to know that the judgment had been delivered, on the 24th of August 2023, when it received a letter from its then Counsel on record. The Judgment was delivered in its Counsel's absence.
5. It received the notification after the statutory time for filing an appeal had lapsed.
6. The Applicant asserts that its intended appeal isn't frivolous. It has a high chance of success.



7. In execution of the decree in the lower court matter, the Respondent has proclaimed the Applicant's property. The items proclaimed are vital to the Applicant's business operation. If the Respondent is allowed to proceed further with the execution process, its business shall be adversely affected, thus subjecting it to substantial loss.
8. The Applicant further contends that the decretal sum payable to the Respondent is substantial. It may be difficult for the same to be recovered from him should the appeal succeed with the consequence that he is called upon to refund, thus defeating the objective of the appeal. The Respondent is not of the means that he can make the refund.
9. It is willing to furnish any form of security that the Court might deem fit to direct for the due performance of the decree as may ultimately be binding on it. The Applicant is willing to give an undertaking to pay and or offer a bank guarantee as security for the repayment of the decretal sum or deposit the entire decretal amount for the same purpose in a joint interest-earning account in the names of Counsel for the parties.
10. The Applicant states further that by reason of the premises foregoing, if the order sought for a stay of execution is not granted the intended appeal shall be rendered nugatory. Further, the application herein has been filed timeously.
11. The Respondent opposed the application upon the grounds set out in his replying affidavit sworn on the 21st of October 2023. According to him, the instant application is devoid of any merit. It is only intended to delay him from realizing the fruits of his Judgment.
12. He states that on 19th April 2023, the trial Court directed that the suit be scheduled for mention on 24th May 2023 to fix the same for Judgment. The Respondent was directed to file his written submissions within ten [10] days while the Applicant was to file and serve theirs within ten [10] days of service of the Respondent's.
13. On the 24th of May 2023, the trial Court stated that it shall deliver its Judgment on June 2023. By the said date, the Applicant had not filed its written submissions and was directed to file and serve the same by the close of the business that day.
14. The Respondent further states that on 14th June 2023, both Counsels for the parties were present, when the trial Court deferred the delivery of its Judgment to 26th June 2023. On 26th June 2023, both Counsels were present when the matter was given a new date, 28th June 2023. Wednesday, 28th June 2023, was declared a public holiday to celebrate Eid UI Adha.
15. He contends that, therefore, it is deceptive for the Applicant to assert as it has done, that the Judgment was to be delivered on notice when absolutely no order to that effect was issued by the trial Court.
16. The Applicant was aware that the above-stated date was a public holiday and that therefore the Judgment could not have been delivered, however, it didn't follow up thereafter to know when the judgment was to be delivered. This was not only, an exhibition of indolence but also a want of diligence.
17. Despite knowing of the judgment on 25th August 2023, and realizing that the period for filing the appeal had lapsed, the Applicant only moved the Court with the instant application on 12th October 2023 approximately one and half months later. Letters by the Applicant requesting proceedings were done on the 6th of October 2023.
18. He asserts that the Applicant has not demonstrated the substantial loss it will suffer if the orders sought are not granted. Further, the appeal has no chance of success, as attested by the Applicant's annexure TR3A.



19. Lastly, he is not impecunious as the Applicant asserts. He is capable of refunding the decretal sum if called upon to. The Applicant's assertion that he suffers from impecuniosity is just but a bald assertion.

The Applicant's Submissions.

20. Counsel for the Applicant submits that Order 42 Rule 6 of the *Civil Procedure Rules* provides for stay of execution pending appeal, and the conditions that an Applicant must establish as a condition precedent for the grant of the order in his or her favour.
21. The Applicant contends that it stands to suffer substantial loss if the stay order is not granted, allowing the Respondent to proceed with the already commenced execution process against it. Its Properties attached by Auctioneers under instructions of the Respondent are so vital to its business operations. The motor vehicles are used to distribute its products to customers and the generator to power its manufacturing plant.
22. The Applicant's fear and contention that the Respondent shall not be able to refund the sums of the lower court's decree if required to do so upon the success of the intended appeal, has not been sufficiently challenged by the Respondent. He has not tendered any evidence to support his financial capability to refund the sum. To support the submission that the Respondent bore the duty to demonstrate his financial ability, Counsel places reliance on the case of *Elias Kithinji v Silas Kimathi Japhet* [2021] eKLR.
23. Once a Judgment has not been delivered on the appointed date for one reason or another, and a new date is not allocated in the presence of the parties, notification of the fresh date must be effected by the court. To support this submission Counsel cites the case of *Ngoso General Contractors Ltd v Jacob Gichunge* [2005] eKLR, and *Jonathan Karisa v Kenya Power & Lighting Co. Limited* [2018] eKLR where the Court held;
- “To this court, the need for notice of a date for delivery of judgment is an integral part of the right to access justice so that a party who feels aggrieved by a decision exercises its right to appeal within the time stipulated by statute.”
24. The failure on the part of the trial Court to issue a notification for the fresh date for the delivery of the Judgment and subsequent delivery of the judgment in the absence of its then Counsel on record, substantially compromised its right to appeal.
25. In fulfilment of one of those pre-requisite conditions for the grant of a stay order, the Applicant has undertaken expressly, to provide security for the due performance of the decree as may ultimately be binding on it.
26. On the limb for leave to appeal out of time, Counsel submitted that the principles to be considered in exercising the court's discretion on whether or not to grant an order for an extension of time to file an appeal are now settled. The Court has to consider the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the Respondent if the application is granted. To support this point, he cites the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* -Civil Appeal 255/1997.
27. Considering that the Applicant came to know of the Judgment on the 24th August 2023, and filed the instant application on 12th October, 2023, it cannot be said that the application was filed with inordinate delay.



28. The intended appeal is arguable, as can be discerned from the draft memorandum of appeal annexed to the application. An arguable appeal is one that need not succeed but one that warrants the court's interrogation on the one hand and the court's invitation to the opposite party to respond thereto- *Kiu & Another v Khaemba & 3 others* [2021] KECA 318 [KLR].
29. The Respondent will not suffer any prejudice if the Orders sought are granted.

The Respondent's Submissions.

30. Counsel for the Respondent submits that an order for leave to file an appeal out of time may only be granted if the party seeking the same satisfies the Court that it had a good and sufficient cause for not filing the appeal out of time.
31. The factors considerable in an application for extension of time, like the instant application were elaborately set out by the Supreme Court of Kenya in the case of the *County Executive of Kisumu v County Government of Kisumu & Others* [2017] eKLR.
32. There is no plausible reason that has been given by the Applicant why it didn't make any effort to establish the outcome of the judgment between 28th June 2023 and 25th August 2023 when it was notified of the delivery of the Judgment. Further, the Applicant has not explained the delay in lodging the instant application after the notification.
33. On the order sought for stay of execution pending the intended appeal. It is argued that the Applicant hasn't demonstrated that it will suffer substantial loss if the stay order isn't granted. All that it did was place a bare assertion that the equipment attached are vital to its business. There is no evidence put forth establishing a relationship between the items attached and the impact that will follow on the business, if they are allowed to be seized and auctioned.
34. As to what amounts to substantial loss, Counsel urged this Court to be persuaded and adopt the definition in *James Wangalwa & Another v – Agnes Naliaka Cheseto*.
35. Counsel argued that the financial ability of the decree-holder alone cannot be the reason for allowing a stay application. It is enough that the decree-holder is not a dishonourable miscreant without any form of income. To buttress this submission, he places reliance on the case of *Stephen Wanjohi v Central Glass Industries Ltd*, Nairobi HCCC NO. 6726 of 1991.
36. Should this Court be inclined to grant the instant application, then the grant should be conditional, the Applicant should be directed to deposit the entire decretal sum in court as security and pay Auctioneers fees for the proclamation exercise.

Analysis and Determination

37. In this ruling I will first determine whether the Applicant has demonstrated that it deserves the exercise of this Court's discretion in its favour for an order of leave to file an appeal out of time. The law relating to the court's power to grant an extension of time is now trite, thus:
- I. The extension is not a right of a party;
 - II. It is an equitable remedy that is only available to a deserving party at the discretion of the court,
 - III. A party who seeks for the extension of time has the burden of laying a basis to the court,
 - IV. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis depending on the peculiar circumstances of the case,



- V. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court,
- VI. Whether the Respondent will suffer any prejudice if the extension is granted;
- VII. Whether the application has been brought without undue delay; and
- VIII. Whether public interest should be a consideration.

See, *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR.

- 38. It is common cause that the trial Court's Judgment wasn't delivered on the first appointed date, neither was it on the 2nd appointed date. Further, after being slated for delivery for a third time, unfortunately, it was not delivered as the date set turned out to be a public holiday. The Applicant contended that it naturally expected to be notified of a fresh date, by the trial court in the circumstances.
- 39. I have carefully considered the rival affidavits by the parties herein and I get a clear view, that there is a point of convergence, the judgment was delivered in the absence of Counsel for the Applicant without notice. However, from the judgment exhibited herein by the Applicant, it is not clear whether the same was delivered in the presence of Counsel for the Respondent, but the tone of his affidavit suggests, he was. How the Counsel got to know about the fresh date for the delivery of the Judgment was unexplained.
- 40. Where a court desires to deliver a Judgment on a date that parties to the affected matter aren't aware of for one reason or the other, as was in the matter before the trial court, in my view, it is reasonably and mandatorily expected that the court issues sufficient notification to them for the date. Mandatorily, as undoubtedly, rights of appeal are exercisable within set statutory times, and it is expected therefore that courts shouldn't through an act[s] of omission and or commission, compromise any of the parties' ability to exercise the right within the requisite period.
- 41. With great respect, the situation that the Applicant found himself in was heavily contributed by the trial court's omission to notify its counsel that it was to deliver its judgment on the 5th of July 2023. It would be remiss of this Court to allow the Applicant to be in a position of prejudice in the circumstances.
- 42. On this premise, I am persuaded that the justice of this matter requires that the Applicant be allowed to exercise its right of appeal, and not lose it. As a result, the Applicant shall get the leave to appeal out of time, on the condition that it pays thrown-away costs. This condemnation to pay the thrown-away costs flows from the fact that it has not explained the delay of approximately two and half months between the time it dawned on it that the judgment had been delivered and the date of filing the instant application.
- 43. The court's power to grant an order for a stay of execution is a controlled discretion. It is only exercisable in favour of an Applicant if that Applicant establishes the conditions set out in Order 42 of the *Civil Procedure Rules*. He or she must demonstrate that; the application for stay has been filed timeously; if the order is not granted he or she shall suffer a substantial loss; and he or she has offered security for the performance of the decree in case the appeal does not succeed.
- 44. The Applicant contended that the Respondent is a man of no known means and that if the decretal sum is paid to him, it will be difficult to recover the same from him should the intended appeal succeed and he is required to refund the money, thus rendering the success nugatory. Once an Applicant expresses fear as the Applicant herein did, it becomes the duty of the Respondent to demonstrate that he is of sufficient means to refund the decretal sum, if called upon to.



45. To demonstrate the capability, an Applicant is not expected just to state “I have sufficient means, I will refund the decretal sum if called upon to”. He or she shall be required to give sufficient details to express the capability. Undoubtedly, the Respondent herein didn’t give any material from which his financial ability can be gauged. He baldly asserted that he is a man of means.
46. This Court notes that the decretal sum is colossal. This coupled with the foregoing premises drives this Court to conclude that a stay of execution order pending appeal is necessary. As this Court shall shortly hereinafter hold that the grant shall be conditional, the Respondent isn’t likely to suffer any prejudice.
47. The Applicant has in compliance with the provisions of Order 42, undertaken to provide security for the due performance of the decree should it be called upon to. The nature of the security that an Applicant should give pursuant to the provision has to be left to the court for determination. It often depends on the peculiar circumstances of each case. As the parties in the instant matter are in agreement on the form of the security, I will allow the application, but on condition that it does deposit the decretal sum in a joint interest-earning account in the names of Counsel for the parties.
48. In the upshot the Applicant’s application herein is allowed as follows;
 - I. Leave is hereby granted to it to file an appeal out of time against the judgment in Thika MCELRC/E034/2021. The appeal be filed within 14 days of this ruling.
 - II. There shall be a stay of execution of the decree emanating from the Judgment above stated, pending the intended appeal, subject to the Applicant depositing the entire decretal sum in a joint interest-earning account in the names of Counsel for the parties. The deposit be made within 30 days of today.
 - III. The Applicant to pay the Respondent thrown away costs of Kshs. 20,000 within 30 days of today.
 - IV. In the defaulting of any of the conditions in [i], [ii], and [iii] above, execution is to proceed.
 - V. The Applicant to pay the Auctioneer’s charges if any, the charges to be agreed upon and if not, the Deputy Registrar to tax the same.

READ, DELIVERED AND SIGNED THIS 24TH DAY OF JUNE, 2024.

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OCHARO KEBIRA

JUDGE

In the Presence of:-

Ms Kamande for Applicant

Mr. Opundo for the Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE.

