Kenya Building and Construction, Timber and Furniture Industries Employees Union v Timsales Limited (Cause E029, E030 & E031 of 2021 (Consolidated)) [2024] KEELRC 2130 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2130 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE E029, E030 & E031 OF 2021 (CONSOLIDATED)

HS WASILWA, J

JULY 31, 2024

BETWEEN

KENYA BUILDING AND CONSTRUCTION, TIMBER AND FURNITURE INDUSTRIES EMPLOYEES UNION ..... CLAIMANT

AND

TIMSALES LIMITED ..... RESPONDENT

RULING

1. This Ruling is in respect of the Respondent/ Applicant's Notice of Motion dated 4th April, 2024, filed under Article 50 (7) of *the Constitution* of Kenya, Sections 12 (3)(i) and 17 of the *Employment and Labour Relations Court Act*, Rule 17 of the Employment and Labour Relations Court Procedure Rules , Order 42 of the Civil Procedure Rules, and all the enabling provisions of the Law, seeking for the following Orders;-

    1. Spent.

    2. This Honourable Court be pleased to stay execution of the judgment issued in this matter on 17/1/2023 together the rulings delivered on 20/06/2023 and or 05/10/2023 and or 31/10/2023 or any other date thereof pending the hearing and determination of this application.

    3. Pending the hearing and determination of the appeal lodged in the Court of Appeal, this Honourable Court be pleased to stay execution of the judgement delivered in this matter on 17/01/2023 together the rulings delivered on 20/06/2023 and or 05/10/2023 and or 31/10/2023 or any other date thereof.

    4. This Honourable Court be pleased to make any such other and or further orders towards the ends of justice.

5. Costs of this Application to abide the outcome of the appeal.

2. The basis of this Application is that on 17/01/2023 the Honourable Court entered judgment in favour of the Clamant as against the Respondent and directed the Respondent to pay the grievants; Notice pay, Leave Pay, Gratuity as per clause 19 of the CBA, days worked, Compensation equivalent to 6 months' salary together with costs and interest from the date of this Judgement. Also that they were to be issued with Certificate of service.

3. That in the judgment, the Honourable court directed the parties to compute the exact number of the grievants with the help of the County Labour Office Nakuru and the figures be submitted to court for adoption as part of the judgment.

4. Dissatisfied with the judgement of the Honourable Court, the Respondent/ Applicant appealed against the entire judgment of the Honourable Court to the Court of Appeal through a Notice of Appeal dated 18th January 2023. Subsequently, they filed their record of appeal on 23/01/2024 and served it upon the Claimant/ Respondent.

5. He avers that they have an arguable appeal before the Court of Appeal with high chances of success and is apprehensive that the appeal shall be defeated and or rendered nugatory unless the Honourable Court stays execution of the decree issued in this cause.

6. He stated that the Respondent in this matter is a going concern and is engaged in business both within Nairobi and Nakuru Counties. Currently, it employs about 1,000 employees at both its Nairobi and Nakuru establishments. Further that it has sufficient assets to liquidate the judgement of this Court in the event the Court of Appeal were to reject its appeal.

7. Conversely, that the grievants' physical addresses and or sources of income are unknown to the Respondent, thus, in the event they proceed to execute the decree and the Court of Appeal allows the Respondent's Appeal, the Respondent will suffer total loss.

8. In the alternative, that the Respondent is amenable to abide by such terms as the Honourable Court may impose in the interest of justice in the circumstances of this case. The Respondent proposes to furnish a bank guarantee to secure the effectual performance of the decree.

9. He states that the Claimant and the grievants will not suffer any harm if the orders sought herein are granted as interest is payable from the date of the judgement of this Court. On the other hand, that the Respondent will suffer total and irreparable loss as demonstrated here above. Besides, that the employment of the 1,000 employees currently working with the Respondent will be jeopardized and industrial peace disturbed if assets of the Respondent are carted in execution of the judgment issued in this matter.

10. Moreover, that the claimant has already made an application to be allowed to execute against the Respondent for the decretal sum before taxation of costs. Therefore, that there is imminent threat of execution.

11. The Application is further supported by an affidavit sworn on 4th April, 2024, by Sriram Rayaprolu, the General manager of the Applicant. The deponent basically reiterated the grounds of the Application and urged this Court to allow the Application as prayed.

12. The Application is opposed by the Claimant/ Respondent herein who filed a replying affidavit sworn on 5th June, 2024, by Owen Magata, the Advocate ceased of the conduct of this matter on behalf of the claimant.

13. In the affidavit, the deponent admitted that once judgement was delivered in this matter, the Respondent lodged an Appeal against the entire judgement to the Court of Appeal. That the Orders sought herein are unwarranted since the claimant/respondent has not commenced execution proceedings. In any event, execution cannot amount to substantial loss since the same is a lawful process.

14. He stated that the Applicant has merely asserted substantial loss but has not demonstrated and/or annexed empirical or documentary evidence in support of the said assertion.

15. He states that whereas it has been alleged that the respondent/applicant is endowed with substantial assets that it can liquidate for the judgment if the Appeal is rejected, no evidence of the said allegation has been placed before the court.

16. He states that whereas the grievant's physical addresses and/or sources of income are allegedly unknown, that does not necessarily justify an impediment that can stop it from enjoying the fruits of their judgment. Further that as much as Applicant is amenable to abide by such terms as the court may impose given the two competing rights herein, the proposed bank guarantee is a risky security given the colossal amount in question, coupled with the history of some banks in this county.

17. The affiant stated that the Applicant's assertions that the claimant will not suffer any harm since the judgement herein will attract interest is not only made in bad taste but also tantamount to shedding crocodile tears to the claimant who has a judgment in its favour.

18. The Respondent also stated that the Application herein has not be filed timeously.

19. He stated further that the Applicant has not placed before court any evidence or otherwise substantiated the alleged loss and/or irreparable harm that it would suffer in the event that the decree herein is satisfied before the said appeal is heard and determined. On the contrary that the application is meant to delay and deny the claimant and by extension, the grievants the fruits of their judgement.

20. He reiterated that there is no imminent threat of execution as alleged, thus the Application is premature and an abuse of Court process.

21. The Application herein was canvassed by written submissions.

Applicant's Submissions

22. The Applicant submitted on only one issue; whether the Application is merited and submitted that the Application herein is based on Order 42 Rule 6 of the Civil Procedure Rules. In this, he cited the case of Halai & Another v Thornton & Turpin (1963) Ltd [1990] eKLR where the court at page 2 commenting on Rule 2 (b) of the Court of Appeal Rules which has facets of Order 42 rule 6 (2) of the Civil Procedure Rules save for sufficient cause held that:

> " Thus, the Superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay."

23. Similarly, that in this case, there is no dispute that the Respondent has a pending appeal before the Court of Appeal and despite filing an Appeal in the Court of Appeal, the Claimant filed an application dated 01/03/2024 seeking to execute the decree of the Honourable Court before taxation of party and party costs. A clear indication that executing is in the offing.

24. With regard to the principles precedent to the grant of stay of execution in this Court as set out under Order 42 rule 6 (2) of the Civil Procedure Rules, the Applicant argued, regarding substantial loss, that the Applicant has already appealed to the Court of Appeal against the entire judgment of this Honourable Court on the finding of legality of termination and the reliefs granted thereof. He argued that the judgment sum in this matter is in excess of Kshs.140 Million, a colossal sum that if the Claimant were to execute against the Respondent, it will render the Respondent's appeal nugatory and totally negate the subject matter of the appeal. In support of this, he relied on the case of Tropical Commodities Suppliers Ltd & Others Vs. International Credit Bank Ltd (Gn liquidation) (2004) 2 E.A. 331 cited with approval in the case of Kenya Power & Lighting Ltd V Andrew Kainga M'munoru [2009] eKLR, where the Court held that:

> "Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal."

25. Secondly, that the Claimant is a union and instituted this suit in a representative capacity for its beneficiaries of who are in excess of Three Hundred (300) whom, the Applicant is not aware of their physical addresses or any known assets. Therefore, that if execution was to be carried out before the Appeal is heard and determined, the Appeal would be rendered academic as it will be impossible and or impractical to trace over Three Hundred (300) grievants with view of recovering the decretal sum paid out to them. In any event, such endeavour will require enormous resources therefore defeating its very essence despite the uncertain outcome.

26. To further buttress its argument on substantial loss, the Applicant relied on the case of New Nairobi United Services Ltd & another v Simon Mburu Kiiru [2021] eKLR at paragraph *30* & 31 the Honourable Court held that:

> "Whilst I would agree that a successful party should not be denied the fruits of his/ her judgment, it is incumbent that the party rebuts the assertion that it would not be in a position to repay the sums paid in the event that the appeal is successful. On this, the Respondent did not rebut the assertion that he cannot refund the money save to state that the Appellants stand to suffer no harm if the monies are paid. In Leu, the Respondent failed to file an affidavit of means to demonstrate his ability to refund any sums that may be paid to him in case the appeal succeeds."

27. Similarly, that the Claimant has not demonstrated its ability and or that of the grievants to repay the judgment sum in the event the Respondent's appeal at the Court of Appeal succeeds.

28. It was also submitted that the Applicant employs about 1,000 employees. If it were executed in satisfaction of the decree issued by the Honourable Court, the employment of the employees currently in service will be severely compromised not withstanding that an appeal that stands high chances of success is pending before the Court of Appeal. Besides, that there will be serious industrial unrest with the employment of over 1,000 employees' affected as the execution, thereof, will lead to total collapse of the Respondent's business despite the fact that there is a pending appeal that stands a high chance of success. On that note, he urged this Court to find that the Applicant has demonstrated that it will suffer substantial loss if the orders for stay pending appeal are not granted.

29. On time taken to file the Application herein, it was submitted that judgment in question was delivered on 17/01/2023. However, the judgment did not contain figures. Accordingly, the Honourable Court directed the parties to compute figures in terms of the reliefs granted by the Honourable Court.

Consequently, the labour office for Nakuru County presented various reports over time in the year 2023, which resulted to the Court delivering three rulings in the matter regarding the computation of figures, the last being the one of 30/10/2023, which triggered the filling of the Appeal on 23/01/2024 and the filling of this Application done on 04/04/2024. Therefore, the application has been presented timeously without undue delay more so considering this case had voluminous documents which required preparation and compiling before the appeal could be presented. In support of this, he relied on the case of Wanja Waweru Vs Jackson Wainaina Muiruri & another [2014], eKLR at paragraph *7* the Court of Appeal held that:

> " There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case."

30. Also in Mwangi S. Kimenyi vs Attorney General & Another [2014] eKLR the Honourable Court held that:

> " There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given of the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the Litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore inexcusable. Caution is, however, advised for courts not to take the word "inordinate" in its dictionary meaning, but to apply it in the sense of excessive as compared to normality."

31. He added that from the time the last ruling was delivered to the time the application under consideration was presented, only a period of five months lapsed and taking the complexity of the matter at hand, a period of five months would not constitute inordinate delay and urged this Court to find that the application was filed within reasonable time.

32. On security, the Applicant proposes to furnish a bank guarantee of Kshs.10,000,000.00 to secure the due performance of the decree. Besides, the Respondent has vast assets in the form of machinery and inventory. These are sufficient to secure the Claimant's interest in the unlikely event the appeal be declined. Moreover, that the requirement for security should not be imposed in a manner that impedes a party intending to appeal against a decision from pursuing the appeal. Rather that the requirement for security should be balanced in such a manner that caters for the interest of the Appellant and the Respondent. To support this, the Applicant relied on the case of Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR , where the court observed that:

> " Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant."

33. In summation, the Applicant urged this Court to find that it has satisfied the three conditions precedent to grant of orders for stay of execution pending appeal, while costs of the Application abide the outcome of the Appeal.

Respondent's Submissions

34. The Respondent also submitted on the merit of the Application and argued that salient grounds that predicate the instant application are, first that a stay of execution ought to be granted so as not to render the intended appeal nugatory and secondly that the applicant will thereby suffer substantial loss

if the orders sought are not granted. In support of this, he relied on the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR the Learned Judges made the following observations with regard to a similar application;

> " But this court must look at the matter from the point of view of rule (2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. itis loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent's circumstances, but the information that was forthcoming did not confirm the applicant's misgivings. 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 what the respondents should be kept out of their money...Accordingly, while certain passages in the judgment and ruling gave offence to the applicants, in fact there is no substance to this application, and | would dismiss it with costs...It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be" In an application of this nature the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status should remain as it were before judgment. What assurance can there be of an succeeding, on the other hand granting the stay would be denying a successful litigant of the fruits of his judqement. The applicant has not given to court sufficient materials to enable it to exercise its discretion in - ranting the order of stay."

35. Similarly, that the Application before court is, inter alia, predicated upon Order 42 Rule 6(1) Civil Procedure Rules and the powers of the court under the said provision are not only discretionary but also judicious.

36. Accordingly, that the Applicant alleges that it shall suffer substantial loss if the orders sought are not granted. However, other than speculation of an industrial unrest and mere assertions that the employment of the respondent's 1000 employees may be compromised, no cogent evidence of substantial loss as been tendered. In any event that there are employees who are already suffering by their actions, thus the assertion of protecting their employees is ironical. In support of this, he relied on the case of Kenya Shell Limited Vs Benjamin Karuga Kibiru & another [1986] eKLR.

37. He also relied on the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR and the case of Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 where it was held that:

> " to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the

court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court"'.

38. Accordingly, that the Applicant has no demonstrated any loss it will suffer if the stay is denied.

39. It was submitted that the application is premature since there is no threat whatsoever regarding execution. Also that the Application was not filed timeously since its now almost one and half years from when the applicant came to court for orders under the said order. That the reasons that has been proffered for the unreasonable delay is that the applicant was compiling an appeal, which reason in their view is inexcusable.

40. The foregoing notwithstanding, he argued that the Applicant in its affidavit avers that it is amenable to abide by such terms as this court might impose. However, that the Applicant has proposed a bank guaranteed of Kshs 10,000,000(Ten Million) whereas the judgment amount is Kshs 148,016,605/ exclusive of interests that continue to accrue and costs that are yet to be ascertained. Thus, the proposal runs afoul the legal edict espoused in Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others [2015] eKLR . Accordingly, he urged this Court to reject the applicant's proposal of a bank guaranteed of Kshs 10,000,000(Ten Million) and in the alternative order for the sum of Kshs 148,016,605 to be deposited in court, this is based on the distrust that the Respondent has regarded the credibility of the banking institutions in this country, a fact that this court has judicial notice of.

41. Penultimately, in the unlikely event that the application is allowed, he prayed for half of the aforesaid amount to be paid to the grievants. In support of this proposal, they relied on the case of Mutua Mulonzya v Fellowship of Christian Councils & Churches in the Great Lakes and Horn of Africa [2021] eKLR wherein the Court observed thus: -

> " 34. As regards the issue of security for the due performance of the impugned decree, the Applicant stated that it is willing to abide by the conditions and terms of security as the Court may deem fit. In Kenya shell limited v Benjamin Karuga & Another [1986] eKLR the Court Appeal held that..."Substantial loss, in its various forms, is the cornerstone of both jurisdictions for granting 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. 35. This Court has an obligation to balance the interest of the parties by granting conditional stay order where substantial loss has been demonstrated. In this case the applicant has not done so. However, since the Respondent has proposed that a half of the decretal sum be paid to him and the other be deposited in an interest earning account to be opened in the joint names of the advocates on record for both parties as a condition for granting the stay order sought, I proceed to do so. However, the stay will lapse automatically if it is verified that there is no appeal filed. In the end I find that the application has failed to meet the legal threshold for granting stay pending appeal."

42. The Respondent also relied on the case of Edna Semiti v Intex Construction Limited [2020] eKLR the Count held thus; -

> " I have examined the averments of the Parties herein. Judgment in this case was delivered on 28/1/2020. This application was filed on 30/6/2020 5 months later...The Applicant also needs to demonstrate the irreparable damage they stand to suffer if the orders sought are not granted. In this case, the Applicants aver that they have filed an Appeal and indeed the

annexed a Notice of Appeal to this Application. With the understanding that they have filed an Appeal, if the Orders of stay are not granted the substratum of the Appeal may be destroyed in the case the Appeal succeeds. In the circumstances, I allow the Application for stay of execution on condition that the Applicant deposits ½ of the decretal sum in an interest earning account held in joint names of Counsels on record within 60 days and releases the remaining to the Claimant within the same period. In default execution to proceed."

43. On costs of the Application, the Respondent urged this court to be guided by the ends of justice and the circumstances of this case and award costs to them, who have a Decree in their favour. In support of this, they relied on the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh & 4 others [2014] eKLR.

44. In conclusion, the Respondent prayed that this Court finds the instant application is bereft of merit and dismiss the same with costs to the Respondent.

45. I have considered the averments and submissions of the parties herein. The applicant seeks stay orders having preferred an appeal against the judgment of this court dated 17/11/2023 and subsequent rulings thereafter.

46. The applicant avers that they are willing to adhere to orders conditional to the stay as this court would direct Order 42 of rule (6) (2) states as follows:

> " (2) 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."

47. In line with this provision of the law, the applicants have approached this court timeously. They have demonstrated that they stand to suffer if the stay orders are not granted and are willing to abide by any condition of stay that this court may direct.

48. In the circumstances, I will allow stay orders on condition that the entire decretal sum be deposited in an interest earning account held in joint names of counsels on record within 90 days in default execution may proceed.

RULING DELIVERED VIRTUALLY THIS 31ST DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Esang holding brief Mongeri for Petitioner – present

Kanoti holding brief Maina for 2nd & 3rd Respondents – present

Court Assistant - Fred