



Brinks Security Services Limited v Mudaki & another (Miscellaneous Case E131 of 2024) [2024] KEELRC 2340 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2340 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E131 OF 2024
JK GAKERI, J
SEPTEMBER 30, 2024

BETWEEN

BRINKS SECURITY SERVICES LIMITED APPLICANT

AND

PATRICK A. MUDAKI 1ST RESPONDENT

WILLIAM ELIJAH KIMONDO NDERITU 2ND RESPONDENT

RULING

1. This is the Respondent's Notice of Motion dated 20th April, 2024 filed under Certificate of Urgency seeking orders That:-
 1. Spent.
 2. Spent.
 3. This Honourable Court to grant the Applicant leave to file an appeal out of time against the Judgment in Milimani Commercial Magistrates Court Chief Magistrate Employment and Labour Relations Cause No. E229 of 2019 Patrick Mudaki & another V Brinks Security Services Ltd delivered on 23rd January, 2024.
 4. There be stay of execution of Judgement of the Milimani Commercial Magistrates Court delivered in Cause No. E229 of 2019 on 23rd January, 2024 pending the hearing and determination of the intended appeal.
 5. The costs of and incidental to this application be in the cause.
2. The Notice of Motion is expressed under the provisions of the Civil Procedure Act and Order 40 and 42 of the *Civil Procedure Rules* and is based on the grounds enumerated on its face and the Supporting Affidavit of Victor Ondundo sworn on 20th April, 2024 who deposes that the Applicant's former



counsel failed to obtain certified copies of typed judgment and could not be obtained within 30 days for the filing of the appeal and the physical copy was released from the Magistrate's Chambers after the lapse of 30 days.

3. That neither a copy of the judgment nor the typed proceedings were availed until 12th April, 2024 when counsel perused the handwritten judgment.
4. That the Respondent obtained a Decree issued on 18th April, 2024 for purposes of execution and request for warrants have been made and execution proceedings are imminent.
5. The affiant deposes that the delay in filing the appeal is not inordinate and the appeal is arguable with chances of success.
6. That the claim was time barred and the Court had no jurisdiction to hear and determine it and the Applicant will suffer irreparable loss on account of attachment if the Respondent is not restrained and the applicant is desirous of exercising its right of appeal and this application was filed without inordinate delay.

Response

7. In his Replying Affidavit, Mr. Patrick Mudaki deposes that the instant application is an abuse of the Court process and should be struck out in limine as no reasons for stay have been advanced as substantial loss has not been demonstrated if execution was actualized.
8. That the applicant was accorded 45 days of stay of execution by the trial court and demand for payment of decretal sum was unresponded to and the Memorandum of appeal could be filed within the 30 days and none had been filed more than 3 months later.
9. That no offer for security has been made and evidence of movement of the court file has not been provided.
10. The affiant deposes that the instant application has not been filed in good faith and was a delaying tactic and should be dismissed.

Applicant's submissions

11. As to whether the Applicant has met the threshold for allowing the application, reliance is made on the decision in *Macharia & 2 others V Malewa Farmers Co-operative Society Ltd & 2 others* (2024) KECA 59 (KLR) on the factors that the Court should consider as articulated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 others* to urge that in *Macharia & 2 others (Supra)*, the Court allowed the application on the premise that the explanation for the delay was sufficient and the Respondent adduced no evidence to show that it would suffer prejudice if the application was allowed.
12. Reliance was also made on *Sokoro Savings and Credit Co-operative Society Ltd V Mwamburi* (2023) KECA 381 (KLR) to urge that the reason relied upon by the Applicant is sufficient and the application to file the appeal out of time should be granted as counsel could not avail a handwritten copy of the Court's judgment.
13. Counsel urged the Court to exercise its discretion judiciously by allowing the application.



Respondent's submissions

14. As to whether the Court should enlarge time to file an appeal out of time, counsel adopted the contents of the Replying Affidavit.
15. As to whether the Order of stay should be issued, counsel submits that Order 42 Rule 6 of the *Civil Procedure Rules* is clear on the requirements for a stay of execution pending appeal namely; substantial loss, without unreasonable delay and security.
16. Reliance was made on the sentiments of the Court in *James Wangalwa & another V Agnes Naliaka Cheseto* (2012) eKLR and *Gianfranco Manenthi & another V Africa Merchant Assurance Company Ltd* (2019) eKLR to urge that substantial loss has not been demonstrated and no security had been offered.
17. The decisions in *University of Nairobi V Mary M. Cornelius* (2021) eKLR and *University of Nairobi V Patrick Mwangi Njunjiri* (2022) eKLR were also cited to urge that the Applicant had not met the requirements for stay of execution.

Analysis and determination

18. It is common ground that on 23rd January, 2024, the Senior Principal Magistrate, Hon. Paul K. Rotich delivered a judgment in favour of the Claimant but neither a copy of the judgment nor typed copies of proceedings were availed in Court.
19. However, a copy of a letter dated 5th February, 2024 and received by the Milimani Commercial Court on 7th February, 2024 requesting for certified copies of proceedings and judgment in CMEL Cause No. 229 of 2019 Patrick Mudaki and Elijah Nderitu V Brinks Security Services Ltd is attached and the requisite charges were paid on 7th February, 2024.
20. No other verifiable evidence on attempts to secure the proceedings or judgment was provided.
21. Notably, although the Respondent discounts the Applicant's efforts to secure copies of proceedings and the judgment, on the ground that no evidence of movement of the court file was furnished, he did not contend or suggest that the judgment or the typed proceedings were availed or accessible.
22. It is common knowledge that avilment of typed proceedings has been slow thereby delaying the filing of appeals and efforts to enhance the attendant processes are on-going.
23. Having paid for certified copies of proceedings and judgment on 7th February, 2024 after formally requesting for the same, the Applicant's counsel could only await their avilment yet they had not by 24th April, 2024 when the instant application was filed.
24. It is surmisable that the Applicant may have been waiting for the documents prior to the filing of the application and appeal.
25. The retort by the Respondent that the Memorandum of Appeal could have been filed within the 30 days is unsustainable as it is based on the judgment whether in draft or as the final copy since it is challenge to the judgment itself.
26. It requires no emphasis that a Memorandum of Appeal is based on and draws from the reasoning and findings and determination of the trial court and it would be an idle to attempt to draft a Memorandum of Appeal without having the benefit of perusing and internalising the judgment sought to be appealed against.



27. In determining the issue of extension of time to file an appeal, the Court is guided by the sentiments of Mativo JA in *Njoroge Kimani* Civil Application Nairobi E049 of 2022 (2022) KECA 1188 (KLR) as follows;

“An applicant for extension of time must show good and substantial reason for the delay, and prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both the above that the court will use its discretion to grant the application.

This discretionary power, however, is judicial in nature and must be confined to the rules of reason and justice” as held in *Nicholas Kiptoo Korir Salat V Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR.

28. The learned judge further stated;

“In granting leave, the court has to balance the competing interests of the applicant and those of the Respondent, a position well stated in *M/S Portreitz Maternity V James Karanga Kobia* Civil Appeal No. 63 of 1997 . . .

The main reason offered by the applicant is that the delay in obtaining certified copies of the proceedings and the judgment. The question here narrows to whether the delay is excusable. Excusable delays are delays that are unforeseeable and beyond the control of the party. Non-excusable delays are delays that are foreseeable or within the party’s control. Obviously, the distinction between these two is significant in that it determines whether a party is liable for the delay.

In deciding whether sufficient cause has been shown, among the facts usually relevant are the degree of lateness, the explanation therefore and the prospects of success. This list is not exhaustive and each case will depend on its peculiar facts and circumstances . . .

In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application irrespective of the applicant’s prospects of success. Condonation cannot be had for the mere asking . . .

Equally, important is that an application for condonation must be made without delay and/or as soon as an applicant becomes aware of the need to do so.

. . . I have evaluated the reason offered for the delay. I find and hold that the delay in obtaining certified proceedings and judgment cannot be faulted on the applicant. I find and hold that the delay is excusable and that it has been satisfactorily explained. I also find that the application meets the tests for the court to exercise its discretion in the applicant’s favour . . .”

29. The foregoing sentiments apply on all fours to the circumstances of the instant application as the applicant is not blameworthy for the delay in obtaining certified proceedings and judgment.

30. See also *Del Monte Kenya Ltd V Patrick Njuguna Kariuki* (2015) eKLR and *National Union of Mineworkers V Council for Mineral Technology* (1998) ZALAC 22, *Sokoro Savings and Credit-Co-operative Society Ltd V Mwamburi* Civil Applicati on E032 of 2022 (2023) KECA 381 (KLR),



Muchungi Kiragu V James Muchungi Kiragu & another (1998) eKLR and *Ngei V Kibe & another* Civil Application E359 of 2021 (2021) KECA 243 (KLR) among others.

31. As regards arguability of the appeal, the applicant is contesting the Court's findings and awards in light of the evidence availed or not availed.
32. It is also contesting the awards on the premise that they were statute barred and the award of salary in lieu of notice as it was a summary dismissal.
33. It also queries the award of costs and interest.
34. In the court's view, these are arguable grounds of appeal.
35. For the foregoing reasons, it is the finding of the Court that the prayer for extension of time to file the intended appeal is merited.
36. Concerning stay of execution pending the hearing and determination of the intended appeal, the applicant avers that it stands to suffer irreparable loss and damage if execution materialises and the appeal will be rendered nugatory.
37. Order 42 Rule 6(2) of the *Civil Procedure Rules* describe the essentials for the grant of a stay of execution pending appeal as follows;
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.
38. The purpose of a stay of execution order pending appeal was aptly captured in *RWW V EKW* (2019) eKLR as follows;

“The purpose of an application for stay of execution pending 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 called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
39. See also *Kenya Shell Ltd V Kibiru & another* (1986) KLR 410.
40. Clearly, an application for stay pending the hearing and determination of an appeal must satisfy the three conditions set out in Order 42 Rule 6(2) namely;
 - a. substantial loss may result to the applicant
 - b. application has been made without unreasonable delay, and
 - c. that such security as the court orders for the due performance of such decree or order has been given. See *Antoine Ndiaye V Africa Virtual University* (2015) eKLR.



41. The requirement of substantial loss was explained in *James Wangalwa & another V Agnes Naliaka Cheseto (Supra)* as follows;

“ . . . The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal . . .

The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”.

42. In *Kenya Shell Ltd V Kibiru & another (Supra)*, Platt Ag JA stated;

“ . . . Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented . . .”

43. Finally, in *Century Oil Trading Company Ltd V Kenya Shell Ltd* HCMA No. 1561 of 2007, Kimaru J. was of the view that;

“ . . . Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the Respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the Respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The Court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that appeal is not rendered nugatory and the interest of the Respondent who is seeking to enjoy the fruits of his judgment.”

44. In the instant case, the applicant avers that it is going to suffer irreparable loss and damage including loss of property through attachment in execution proceedings if the stay is not granted and the appeal will be rendered nugatory.

45. The Respondent on the other hand contend that the instant application is restricting enjoyment of fruits of his judgment but is silent on their ability to refund the decretal amount if the appeal is successful.

46. As regards the timing of the instant application, it is evident that the application was filed after 3 months of the judgment sought to be appealed against which in the Court’s view is not inordinate.

47. Concerning security, the applicant regrettably has not expressed its readiness to provide security as may be directed by the court.

48. An offer to provide security by an applicant for stay of execution is a signification of good faith as it is the price the Applicant pays for the stay of execution.

49. However, the Court is not bound by the security offered by the Applicant as it has jurisdiction to make such orders as may be necessary in the interest of justice.

50. In his submissions, the Respondent submitted that although the Applicant had the financial muscle to provide security, it avoided the issue altogether as adverted to above.

51. Needless to underscore, provision of security is one of the essentials for the grant of stay of execution and the security must be for due performance of the decree and binds the provider.



52. In *Gianfranco Manethi & another V Africa Merchant Assurance Co. Ltd* (Supra) the Court observed that:-

“ . . . The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*. It is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgement in case the appeal fails.”

53. In the end, as Okwany J. observed in *Nyatera Nyakundi* (Civil Appeal E033 of 2022 (2023) KEHC 3086 (KLR);

“The position taken by courts when faced with similar applications, is that they ought to weigh the likely consequences of granting or not granting the stay and lean towards a determination which is unlikely to lead an undesirable or absurd outcome. That is to say that the court should place the parties before it on equal footing so as to ensure that any transitional motions before the court do not render nugatory the ultimate end of justice.”

54. Flowing from the forging and balancing the interests of the applicant and the Respondent, the scale of justice is in favour of granting the two prayers by the applicant in the following terms;

- a. There shall be a stay of execution of the decree/judgment in Nairobi CMEL Cause No. 229 of 2019 but on condition that:-
 - i. The applicant shall within forty five (45) days deposit the entire decretal amount in an interest earning account in a reputable Commercial Bank, to be held in the joint names of the counsels for the parties.
 - ii. The applicant shall within sixty (60) days file the intended appeal and take steps to have it placed before the Court for further directions on disposal.
 - iii. In the event of failure to comply with the conditions in (a) (i) and (ii) herein above, the Stay Orders issued herein shall automatically lapse and the Respondents shall be at liberty to proceed with the execution process.
- b. The costs of this application shall abide the outcome of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

JUDGE

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 Civil 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.

DR. JACOB GAKERI

JUDGE

