



**Nairobi West Hospital v Krishnamurthy (Cause E573 of 2021)
[2024] KEELRC 2257 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2257 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E573 OF 2021
JK GAKERI, J
SEPTEMBER 19, 2024**

BETWEEN

THE NAIROBI WEST HOSPITAL APPLICANT

AND

NARAYANAN KRISHNAMURTHY RESPONDENT

RULING

1. Before the Court for determination is the Respondent's Notice of Motion dated 9th August, 2023 filed under Certificate of Urgency seeking Orders That:-
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. Pending the hearing and determination of this application and the intended appeal, the Honourable Court be pleased to stay the implementation of the ruling dated 27th July, 2023 allowing the implementation of the arbitral award published on 15th December, 2022 together with all consequential orders thereof.
 6. The Honourable Court be pleased to grant any other relief it deems fit.
 7. Costs of this application be in the cause.
2. The Notice of Motion is expressed under Section 16 of the *Employment and Labour Relations Court Act, Judicature Act* and Rule 3(1) and (2) of the High Court (Practice and Procedure) Rules and is premised on the grounds set forth on its face and the Supporting Affidavit sworn by Linda Rutto on 9th August, 2023 who deposes that she is the Manager Legal and Compliance of the Applicant which



offers affordable, accessible and quality health care and in an endeavour to enhance its services engaged the Respondent on competitive and attractive terms but who was declared redundant in August 2020 and the arbitrator awarded Kshs.141,561.16 and damages of Kshs.9,955,356/= and the Respondent had commenced execution for the accumulated sum of Kshs.39,019,055.00.

3. That while the objection was upheld, the application to send aside the award was declined on 15th March, 2023 and the applicant intends to appeal and have justifiable grounds.
4. That denying the objection dated 28th March, 2023 denied the applicant an opportunity to challenge the award.
5. That the Respondent had through its counsel demanded payment of the amount awarded by the arbitrator and the application for stay is timeous.

Response

6. By a Replying Affidavit sworn by the Respondent on 22nd August, 2023, the affiant depones that he joined the applicant on 1st July, 2020 and served diligently for 4 months until 21st October, 2020 when he was unlawfully declared redundant and the dispute was referred to arbitration and an award made on 15th December, 2022 but the Applicant is yet to settle the amount awarded despite demands even after recognition of the award on 15th March, 2023.
7. That appeals from the High Court to the Court of Appeal under Section 35 of the [Arbitration Act](#) require leave of this Court and it had not been sought.
8. The Respondent deposes that the instant application is mischievous to delay the Respondent's enjoyment of fruits of the arbitral award.
9. In a Supplementary Affidavit sworn on 15th September, 2023, Linda Rutto deposes that the objection could not be determined unless the Court had been provided with the date and time of receipt of the arbitral award.
10. The affiant's averments are a contest of a ruling delivered by the Court as opposed to factual matters and no new factual issues for purposes of the application for stay of execution of the award.

Applicant's submissions

11. On the right to appeal, counsel cites the sentiment of the Supreme Court in *Nyutu Agrovet Ltd V Airtel Networks Kenya Ltd* (2019) eKLR on the circumstances in which a decision of the High Court to set aside an arbitral award may be applicable.
12. Counsel urges that the decisions in [Synergy Industrial Credit Ltd V Cape Holdings Ltd Civil Appeal No. 81 of 2016](#), *Anne Mumbi Hinga V Victoria Njoki Gathara Civil Appeal No. 8 of 2009* (2009) eKLR and *Micro-House Technologies Ltd V Co-operative College of Kenya Civil Appeal No. 228 of 2014* (2017) eKLR cited by the Respondent are intended to clog the applicant's right to appeal to the Court of Appeal to urge that Nyutu's case is the prevailing authority. That all the Applicant needs to show is that the case falls within the terms of the circumscribed right of appeal under the Nyutu Agrovet case.
13. Counsel further makes effort to justify why the Applicant's case falls within the Nyutu Agrovet's case and proceeds to argue whether the applicant has an arguable appeal.
14. As to whether the applicant is likely to suffer substantial loss, counsel submits that since the applicant is not a citizen of Kenya, relies on the Visa granted by the Government, has no other employment and



could leave the Court's jurisdiction as soon as he receives the cash and his means to refund the same is unknown, the applicant stands to suffer substantial loss if stay orders are not granted.

15. Counsel further submits that the applicant has already provided security in the form of a professional undertaking by the advocate.
16. Finally, counsel urges that the instant application was instituted timeously and without delay as the ruling was delivered on 28th July, 2023 and the application was filed on 9th August, 2023 and arguably the applicant had demonstrated entitlement to stay of execution as prayed.
17. The decisions in *Jessikay Enterprises Ltd V George Kaboto Muirui Civil Appeal No. E127 of 2021*, *Nicholas Stephen Okaka V Alfred Wwaga Wesonga Civil Appeal No. E003 of 2022*, *Jamii Bora Bank V Samuel Wambugu Ndirangu Civil Appeal No. E030 of 2021* among others are cited to reinforce counsel's submissions.

Respondent's submissions

18. As to whether the instant application meets the threshold for grant of stay of execution, counsel for the Respondent submits that the applicant had not shown any substantial loss citing the decisions in *Charles Mwangi Gitundu V Charles Wanjohi Wathuku (2021) eKLR* and *Michael Ntouthi Mitheu V Abraham Kivondo Musau (2021) eKLR*.
19. On delay, counsel relies on the decision in *Jaber Mohsen Ali & another V Pricillah Boit & another (2014) eKLR* to urge that unreasonable delay depends on the circumstances of the case and even a single day could be unreasonable.
20. On security, counsel submits that the Respondent/Applicant made no provision yet the same is mandatory as held in *Miriam Wambui Gitau V Boniface Mwangi Kihia (2018) eKLR*.
21. Reliance was also made on the decision in *Equity Bank Ltd V Taiga Adams Company Ltd (2006) eKLR* for the proposition that all the requirements for the grant of stay must be met before it is granted.
22. Finally, counsel submitted on arguability of the appeal and cited various decisions to urge that no right of appeal lay and the instant application is a waste of judicial time and prays for its dismissal with costs.

Analysis

23. The singular issue for determination is whether the applicant's Notice of Motion is merited.
24. This ruling turns on whether the applicant has provided sufficient material so as to meet the threshold for the grant of a stay of execution pending the hearing and determination of an intended appeal.
25. The principles that govern an application for stay of execution are well settled.
26. Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 prescribes the threshold 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.



27. Noteworthy, Order 42 Rule 6(2) identifies the requirements conjunctively as opposed to disjunctively to underline the fact that all must be met for the Court to exercise its discretion favourably as held in *Equity Bank Ltd V Taiga Adams Company Ltd* (supra) cited by the Respondent’s counsel.
28. It is trite law that whether or not to grant a stay of execution pending appeal entails the exercise of judicial discretion as underlined in legions of decisions such as *Butt V Rent Restriction Tribunal* (1982) KLR 417, *Global Tours and Travel Ltd V HCWC* No. 43 of 2000 UR and *RWW V EKW* (2019) eKLR.
29. As regards substantial loss, the sentiments of the Court in *James Wangalwa & another V Agnes Naliaka Cheseto* (2012) eKLR are worth recapitulating as follows;

“No doubt in law the fact that the process of execution has been put in more or likely to be put in motion by itself does not amount to substantial loss. Even where execution has been levied and completed that is to say the attached properties have been sold as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The applicant must establish other factor 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 . . . 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”.
30. Relatedly, in *Equity Bank Ltd V Taiga Adams Company Ltd* (supra), the Court expressed the view that;

“The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds the Respondent would not be in a position to pay – reimburse as he is a person of no means. Here no such allegation is established by the appellant”.
31. In its Replying Affidavit, the Respondent depones that it is medical facility offering affordable and accessible quality health care, that the Respondent is not a citizen of Kenya, relies on a Visa granted by the Government of Kenya, and had not secured alternative employment since last year, and if paid, he could easily leave the Court’s jurisdiction and chances of refunding the sum would be diminished if the application succeeded at the Court of Appeal.
32. Similarly, the applicant argues that the Claimant has no known assets for purposes of execution of the decree ensuing.
33. The Respondent, on the other hand admits that he was employed by the applicant from 1st July, 2020 as the Group Chief Executive Officer and Managing Director but only for 4 months.
34. He has not adduced any evidence to show that in the event the intended appeal succeeds, he would be in a position to refund the sum or would not leave the country.
35. The fact that the Claimant/Respondent could easily leave the court’s jurisdiction after execution somehow strengthens the applicant’s case.
36. The totality of the foregoing is that the applicant has demonstrated that it stands to suffer substantial loss if the intended appeal succeeds.
37. Judicial authority is unshakeable that substantial loss is the cornerstone of consideration in the exercise of discretion on whether or not to grant an order of stay of execution.



38. See *Kenya Shell Ltd V Kibiru & another* (1986) KLR 410 and the sentiments of Medi J. in *Jessikay Enterprises Ltd V George Kahoto Muiruri* (Supra).
39. As regards the timing of the Notice of Motion, the sentiments of the Court in *Jaber Mohsen Ali & another V Priscillah Boit & another* (Supra) are spot on that:-

“The question that arise is whether the application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case . . .”
40. Even though one (1) day could amount to unreasonable delay as held in *Jaber Mohsen Ali & another V Priscillah Boit & another* (supra), as contended by the Claimant’s counsel, in the instant case, the applicant acted timeously as submitted in that it lodged the instant application on 9th August, 2022 after the ruling on 27th July, 2022, less than 14 days thereafter.
41. The Court is satisfied that the application was made without unreasonable delay as ordained by the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.
42. Concerning provision of security, the Applicant’s Supporting Affidavit makes no reference to its willingness or readiness to provide security.
43. Strangely, the deponent appears to be executing the appeal which is of no moment in the instant application as it is not a requirement of Order 42 Rule 6(2) of the Civil Procedure Rules.
44. It is trite law that the applicant for stay is the one required to volunteer the security it wishes to provide as held in *Mutahi Kiranga V Margaret Waweru & another* (2015) eKLR. It is price for the stay and a manifestation of good faith.
45. See *Carter & Sons Ltd V Deposit Protection Fund Board & 2 others* Civil Appeal No. 291 of 1997 and *Equity Bank Ltd V Taiga Adams Company Ltd* (Supra).
46. The applicant’s failure to offer to furnish security for due performance signifies good faith and its absence may be construed an indication that the applicant is not ready to forego anything, the judgment against it notwithstanding and impending execution.
47. However, during the many mentions the Court schedule for counsels and their clients to agree on the terms of the security, it became clear that the applicant was ready and willing to provide security but the parties could not agree on the amount to be deposited as security.
48. In the circumstances, the Court is satisfied that the applicant is willing to provide security and the requirements for a stay of execution pending appeal are fulfilled and a stay is merited.
49. Finally, as to whether the applicant has the right to Appeal or has an arguable appeal, it is not for this Court to make a determination.
50. Contrary to the Applicant’s counsel’s submission that appeals in arbitral cases require leave of this Court, that’s not the case as the *Arbitration Act* does not make it a requirement.
51. Moreover, Section 17 of the Employment and Labour Relation Act, 2011 is explicit that Appeals from the Court shall be to the Court of Appeal against any judgment, order or decree issued by the Court in accordance with Article 164(3) of *the Constitution*.
52. In the upshot, the Applicant’s Notice of Motion dated 9th August, 2023 is merited and is granted in the following terms;



- a. Stay of execution is granted pending the hearing and determination of the intended appeal provided the Respondent deposits as security the sum of Kshs.30,000,000/= in an interest earning bank account under the joint names of the advocates for the parties or provide a bank guarantee for a similar amount within 45 days.
- b. If the applicant fails to satisfy (a) above, the Respondent will be at liberty to proceed with execution of the decree as provided by law.
- c. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH 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

