



Rupa Mills Limited v Choge (Employment and Labour Relations Appeal E002 of 2024) [2024] KEELRC 2265 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2265 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E002 OF 2024
MA ONYANGO, J
SEPTEMBER 20, 2024**

BETWEEN

RUPA MILLS LIMITED APPLICANT

AND

HILLARY KAVERENGE CHOGE RESPONDENT

RULING

1. Before the court for determination is the application dated 12th March 2024 brought under Sections 3 and 3A of the [Civil Procedure Act](#), Order 42 rule 6 and Order 51 rule 1 of the [Civil Procedure Rules](#). It seeks for orders that:
 - i. This application be certified as urgent and be fixed for hearing on priority basis.
 - ii. Pending the hearing and determination of this application interparty, the Court be pleased to order a stay of execution and any further proceedings in Eldoret CMCC ELRC Cause No. E105 Of 2022 *Hillary Kaverenge Choge v Rupa Mills*.
 - iii. Pending the hearing and determination of this application interparty, this Honorable court be pleased to grant leave to the Applicant to lodge an Appeal from judgment and decree of the Chief Magistrate in Eldoret Cmcc Elrc Cause No. E105 Of 2022 *Hillary Kaverenge Choge v Rupa Mills* out of time the same having been delivered by the trial court on 23rd November 2023.
 - iv. The Court be pleased to order a stay of execution and any further proceedings in Eldoret Cmcc Elrc Cause No. E105 Of 2022 *Hillary Kaverenge Choge v Rupa Mills* pending the hearing and determination of the intended appeal.
 - v. This Honorable court be pleased to grant leave to the Applicant to lodge an Appeal from judgment and decree of the Chief Magistrate in Eldoret Cmcc Elrc Cause No. E105 Of 2022



Hillary Kaverenge Choge v Rupa Mills out of time the same having been delivered by the trial court on 23rd November 2023.

- vi. Costs be provided for.
2. The application is premised on the grounds set out on the face thereof to wit; that the Applicant is aggrieved by the judgment of the Chief Magistrate in Eldoret ELRC No. E105 of 2022 delivered on 23rd November 2023; that the Applicant's advocate was not aware of the judgment and only came to know of the same on 28th December, 2024 when copies of the same were availed and by then the period for stay had lapsed; that upon receipt of the judgment, the advocates on record consulted for further instructions in liaison with the Applicant and they concluded that the Applicant's Advocates seek leave to lodge an Appeal and that the Applicant is willing to abide by any conditions imposed by the honorable Court; that the failure by the Applicant to file the appeal within time was not deliberate as the Applicant and the Advocates had to engage in consultations which were necessary to give way forward on the case after delivery of judgement; that the Applicant has a good Appeal from the said judgement; that this application is made in good faith and lastly, that it has been lodged expeditiously.
3. The application is supported by the sworn affidavit of Aloo Romanus, counsel for the Applicant on record. The said affidavit reiterates the contents in the grounds set out in the application.
4. The application was canvassed by way of written submissions. Both parties filed their respective submissions.

Determination

5. I have considered the application, the rival affidavits as well as the submissions on record. In my view, the only issues that falls for this court's determination are whether the Applicant has met the requirement for grant of orders of stay of execution pending the hearing and determination of the Appeal and whether the Applicant should be granted leave to file appeal out of time.
6. Order 42 Rule 6 of the *Civil Procedure Rules, 2010* provides for the circumstances when the court may order stay of execution of a decree pending an appeal. Under that rule the Applicant must establish that (a) substantial loss may result to the applicant unless an order of stay is granted, (b) the application has been made without undue delay and (c) security as to costs has been given by the applicant.
7. In the case of *RWW v EKW* [2019] eKLR, the court observed 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.”
8. In this case, the trial court entered judgment in favour of the Respondent. There is likelihood that should the orders of stay not issue, the Respondent may execute against the Applicant and thereby occasioning the Applicant substantial loss. I am therefore persuaded that likelihood of substantial loss has been established.



9. The second issue for determination is whether the application has been filed without unreasonable delay. The judgment which is the subject of the appeal was delivered on 23rd November 2023. The instant application was filed just over three months after judgment was delivered. In the case of *Utalii Transport Company Ltd & 3 Others - v - NIC Bank Ltd & Another* 2014 eKLR the Court has this to say:-

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to 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 for 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. On applying the courts mind on the delay caution is advised for courts not to take the word “inordinate” in its dictionary measuring but in the sense of excessive as compared to normality”.

10. The applicant’s counsel has attributed the delay in filing the instant application to having obtained a copy of the judgment on 28th December 2023 and engaging in consultations with the applicant to agree on a way forward on the case after delivery of judgment. I therefore find that the delay has been explained.

11. With regard to the issue of security for due performance, this court has discretion to issue appropriate orders to meet the ends of justice.

12. Flowing from the above, I find that the Applicant has satisfied this court on the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the *Civil Procedure Rules*.

13. On the prayer for leave to file appeal out of time, I am satisfied that the reasons given for delay in filing appeal in time are justifiable. The replying affidavit does not dispute any of the grounds stated in the application or the affidavit in support thereof.

14. Consequently, I allow the application dated 12th March 2024 with an order that the Applicant deposits the entire decretal sum in a joint interest earning account in the names of counsels for both parties within 30 days. The Appeal on record is deemed to be properly on record subject to the deposit of the decretal sum as directed.

15. The costs of this application shall be borne by the Appellant/Applicant in any event.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 20TH DAY OF SEPTEMBER, 2024

MAUREEN ONYANGO

JUDGE

