



**Okari t/a Janettes Cateres v Karanja (Appeal E0260 of 2024)
[2024] KEELRC 2592 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2592 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E0260 OF 2024
JW KELI, J
OCTOBER 24, 2024**

BETWEEN
JANETT MORAA OKARI T/A JANETTES CATERES APPELLANT
AND
MARTHA MUTHONI KARANJA RESPONDENT

RULING

(On the Notice of Motion Application dated 6th September 2024 by the Appellant/Applicant)

1. The ruling was on application by way of a Notice of Motion application by the Appellant (herein “Applicant”) dated 6th September 2024 and filed on 7th September 2024 and brought under the provisions of Article 159 of *the Constitution* Sections 1A, 1B, 3A & 79G of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, and Order 40, 42 Rule 6(2), and Order 51 Rule 1 of the Civil Procedure Rules, 2010, seeking the following orders: -
 - a. Spent.
 - b. Spent
 - c. Spent
 - d. Spent
 - e. That pending the hearing and determination of the application interpartes the Honorable Court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by Hon. C.K. Cheptoo on 30th August 2024(sic*error noted of date in application. Judgment was delivered on the 30th July 2024)
 - f. That pending the hearing and determination of the intended appeal, the Honourable Court be pleased to grant an order of stay for execution of the Orders dated 7th September 2024.



- g. That pending the hearing and determination of the intended appeal, the respondent and its employees, agents and/or servants be restrained through an order of injunction from selling or from interfering with the applicant's goods which are subject of a proclamation dated 4th September 2024 issued by the Respondent's appointed auctioneer Nairobi Connection Services Auctioneers.
- h. That the costs of this application be provided for.
2. The Notice of Motion was premised on the grounds on the face of the Application and the grounds in the Supporting Affidavit of Janett Moraa Okari sworn on 6th September 2024. The gist of the application was that a judgment was entered in favour of the Respondent on the 30th of July 2024 by the lower court against the Applicant (JMO-1 was a copy of the judgment). That the applicant was aggrieved with the judgment which awarded the respondent Kshs. 1,008,107 for unlawful termination. The Applicant contended that on the 31st July 2024 she instructed her then advocates M/S Otwal & Manwa Associates Advocates to lodge an appeal. On the 4th of September 2024, she learnt that the respondent had already instructed the auctioneer who had since proclaimed her assets (JMO-2 was the proclamation notice dated 4th September 2024). That the former advocate contrary to her instructions, failed to file the appeal. She had the said advocate consent with the current advocates on the change of advocates and further had requested for the lower court proceedings (JMO3 a & b were copies of the Consent and letter requesting for proceedings). The Decree was issued on the 7th of August 2024 (JMO4 was a copy of the Decree). That the Proclamation Notice of 7 days was to expire on 10th September 2024 posing danger to her proclaimed assets being sold in a public auction. That she would suffer substantial loss if the attachment is effected as her intended appeal would be rendered nugatory. That the respondent was not likely to suffer any prejudice if the stay was granted. That she had an arguable appeal raising questions of law and fact as per the draft memorandum of appeal (ATK-5). That she was remorseful towards the inadvertent mistake of the previous advocate and prays for leave to file an appeal. The applicant stated she would abide by the conditions of the court for grant of orders sought.

Response

3. The Application was opposed through the advocate for the Respondent, Willis Wetaba Nanjendo, vide his replying affidavit of 30th September 2024.
4. The respondent states that the application is incompetent for not being brought under the court rules for an extension of time. The judgment was delivered in the presence of the applicants' counsel and it was not truthful that a party only moves court upon proclamation to get a stay and seek an extension of time to file an appeal out of time.
5. The Respondent contends that the appeal had no chance of success as the judgment was pursuant to evidence on record, especially the regulation of wages governing hotels and caterers as pertains the definition of who a casual employee is.
6. The respondent stated that the applicant failed to satisfy security. The Respondent contended applicant's financial capacity to satisfy the judgment was in question as no evidence had been availed towards the financial health of both the individual and the business as run by the individual. There was no single proposal by the applicant on security.
7. That the application was filed after the expiry of 30-day stay granted by the trial court and the applicant was to blame and responsible for the auctioneer's costs.



8. That the applicant had not particularized the loss they would suffer in the event the stay of execution was not granted.
9. The Respondent as a compromise proposed that the applicant to pay the auctioneer fees, release 50% of the decretal amount to the claimant and deposit the remaining 50% to an interest-earning bank account within 7 days of the court order.
10. That the applicant ought to take care of the auctioneer charges. That the application was made to delay her access to the fruits of her judgment.

Decision

11. The application for extension of time to file appeal was brought under section 79G of the [Civil Procedure Act](#) to wit:-

“79G. Time for filing appeals from subordinate courts Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

12. The respondent contended that the application was incompetent for not being brought under the Court Rules. The Court finds that the [Civil Procedure Act](#) is an Act of Parliament that cannot be ousted by the Court Rules. The court finds that the Civil Procedure Rules apply in the Court’s execution proceedings. The court declined the invitation to find the application incompetent based on procedural rules.
13. The impugned Judgment was delivered by the lower court on the 30th of July 2024 and the instant application was filed on the 7th of September 2024. The applicant blamed the former advocate for not appealing on time allegedly after instructions. The court may not punish the applicant for the mistake of the advocate. It is the opinion of the court that there is a good and sufficient cause for not filing the appeal on time and further there was no inordinate delay in filing this application. The court allows the application for an extension of time to file the intended appeal.
14. Order 42 Rule 6 of the Civil Procedure Rules, 2010, specifies the circumstances under which the Court may order a stay of execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following: -
 - a) Substantial loss may result to the applicant unless the order was made;
 - b) The application was made without unreasonable delay; and
 - c) 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.”
15. From the above provision of the law, it is clear that the Court must be satisfied that there is “sufficient cause” to grant a Stay. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.



16. The Court of Appeal in *Rhoda Mukuma v John Abuoga*[1988] eKLR, held that “It was laid down in *Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979*, (following *Wilson v Church* (No 2) (1879) 12 Ch 454 at p 488) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.

“Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being –

- (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo.”.(Emphasis added).

17. The applicant annexed as ATK-5 filed Memorandum of Appeal. The Respondent’s response was that the appeal had no chance of success as the judgment was based on evidence before the lower court on regulation of wages and casual engagement. The Court of Appeal in *Cabinet Secretary Ministry of Health v Aura & 13 others (Civil Application E583 of 2023)* [2024] KECA 2 (KLR) (19 January 2024) (Ruling) held that: “An arguable appeal is not one that must succeed and an applicant need not proffer a multiplicity of arguable points. One is sufficient. For a point to be arguable it needs merely to raise a bona fide point of law or fact sufficient to call for an answer from the respondent and is worthy of the court’s consideration.

33. Moreover, whereas such arguable points should ideally and conveniently be expressed in the form of a draft memorandum of appeal, there is no rule that it must be so. One can raise such grounds on the face of the motion and even in the supporting affidavit, as happened in this case. We reiterate what was said recently in *Ontweka & 3 others vs. Onderi* (supra)“While it would have been desirable for the applicant to annex a draft proposed memorandum of appeal to its application, we are of the view that the omission to do so is not fatal, and is curable in so far as the applicant has sufficiently set out its grievances on the face of the application. That is the case in this application. The applicant set out what it considers to be arguable points that it intends to raise during the appeal and addressed at length on the same. This is sufficient to demonstrate its grievances against the orders that it seeks to be reversed.”(Emphasis added) I uphold the foregoing decision to hold that the filed memorandum of appeal grounds discloses an arguable appeal. The appeal need not have a high chance of success but ought to disclose arguable grounds.

18. The impugned Judgment was delivered on the 30th July 2024 and hence the court finds no unreasonable delay in filing the instant application.

19. The last issue pursuant to Order 42 Rule 6 of the Civil Procedure Rules, was the question of compliance by the Applicant with such security as the Court orders for the due performance of such Decree or Order as may ultimately be binding on her. The applicant had not deposited security in court and the Respondent raised fears of her business financial position. This is a serious issue for the court to deal with in deciding on whether to grant a stay or not. The Respondent’s right to enjoy her fruits of the judgment has to be protected by securing the decretal amount with sufficient security. The Respondent gave proposal for payment by the Applicant of the due auctioneer charges, payment of 50% of the decretal amount to the Respondent and 50% be deposited in joint interest-earning account.



There was no acceptance of the proposal. The execution process had begun and the Court noted the auctioneer charges were due, the proclamation notice having been issued. The court is of the opinion that a deposit of 50% of the decretal amount in joint interest-earning account between the parties' advocates within 30 days is sufficient security and it is so Ordered. The Applicant is further ordered to meet the auctioneer charges following the proclamation notice.

20. In the upshot the application is allowed as follows:-

- a. That applicant is granted leave to appeal out of time against the judgment delivered by Hon. C.K. Cheptoo on 30th July 2024.
- b. That pending the hearing and determination of the intended appeal, the Honourable Court grants an order of stay for execution of the Orders dated 7th September 2024 and of the judgment of Hon. C.K. Cheptoo delivered on 30th July 2024.
- c. That the Applicant is Ordered to deposit as security, 50% of the decretal amount in a joint interest-earning account between the advocates for the Decree Holder and the applicant within 30 days of this Order failing which execution to resume.
- d. The applicant to pay the auctioneer charges.
- e. Costs of the application to the Respondent.

21. It is so Ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI VIRTUALLY THIS 24TH DAY OF OCTOBER, 2024.

JEMIMAH KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Caleb

Applicant: - Ms. Wandugi

Respondent: Mr. Wetaba

