



**Ateku v Western Seed Company Limited (Cause E008 of 2023)
[2024] KEELRC 13304 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13304 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
CAUSE E008 OF 2023
MA ONYANGO, J
NOVEMBER 28, 2024**

BETWEEN

PHILIP NGOLO ATEKU CLAIMANT

AND

WESTERN SEED COMPANY LIMITED RESPONDENT

RULING

1. Vide an application by way of notice of motion dated 3rd April, 2024 the Applicant seeks the following orders:
 - a. That the Application be certified as urgent and service be dispensed with in the first instance.
 - b. That leave be granted for Teti and Company Advocates to come on record for the Respondent in place of Katama Ngeywa and Co. Advocates
 - c. That pending hearing and determination of the instant application inter parties there be an order of stay of execution of the Ruling delivered on 28th September, 2023 and subsequent decree and/or orders and/or proceedings.
 - d. That this Honourable court be pleased to stay execution of the Ruling delivered on 28th September, 2023 and subsequent decree and/or orders and/or proceedings pending the hearing and determination of the intended appeal.
 - e. That the Honourable court be pleased to grant the Applicant leave to Appeal out of time against the Ruling delivered herein on 28th September, 2023 and subsequent order.
 - f. That the costs of the application be provided for.
2. The application is based on the following grounds:



1. That M/S Teti and Company Advocates signed a consent with Katama Ngeywa and Company Advocates to enable Teti and Company Advocates to come on record for the applicant hence forth.
2. That a ruling was delivered in this matter on 28th September, 2023 in which the Claimant's claim was allowed and the applicant ordered to pay the Claimant a total of Kshs. 419, 834, and gratuity for any year worked and costs.
3. The Claimant has already proclaimed the applicant's movable properties for Kshs. 858,860 plus cost of 230,670 making a total of Kshs.1,089.530 and shall attach the same any day starting 4/4/2024.
4. That the 30 days required for appeal have lapsed yet the applicant is aggrieved with the said Ruling and would like to appeal against the entire ruling.
5. The failure to file the Memorandum of Appeal within the prescribed time was not intentional but was due to non-communication of the ruling of the court by the former firm of advocates which was on record for the Applicant.
6. The Applicant only came to learn of the Ruling delivered by the Honourable Court on 5th November, 2023 when time for filing a Notice of Appeal had already expired and immediately instructed the new firm of Advocates, Teti & Co. Advocates to come on record for them.
7. That upon filing a consent to come on record together with the notice of change of advocates, the court file was misplaced and only resurfaced on 19/1/2024 when the Claimant's Bill of Costs came up for taxation.
8. That between 19/1/2024 and 19/3/2024, is the time taken by the applicant's new advocates to study the court file, photocopy pleadings and file the instant application.
9. That section 7 of the Appellate Jurisdictions Act provides that the High Court may extend the time for giving notice of intention to appeal from a ruling of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.
10. The Applicant has an arguable and meritorious Appeal with a good likelihood of success as evidenced on the attached draft memorandum of appeal.
11. The Applicant is bound to suffer irreparable prejudice, loss and damage unless this Honourable Court grants the Orders sought herein.
12. It is in the interest of justice that the prayers sought herein are granted.
3. The application is further supported by the affidavit of the Doreen Namaemba, the Human Resource Officer of the Applicant in which she reiterates the grounds on the face of the application.
4. The application is opposed by the replying affidavit of the Claimant Philip Ngolo sworn on 10th April, 2024. In the replying affidavit the Claimant deposes that the application is an afterthought and was only filed after he proclaimed in execution of the decree herein. That there is no explanation of the delay in filing appeal, that the application is malafide, and is being used to delay his enjoyment of the fruits of his judgment.
5. The application was disposed of by way of written submissions.



Determination

6. The issues for determination are whether the Applicant has given satisfactory explanation for delay in filing appeal and whether the orders sought should be granted.
7. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -
 - “ 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
 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 1st 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.
8. Thus under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:
 1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
9. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when 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 CPR. This is so because execution is a lawful process. 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.



10. The applicant has stated in the affidavit in support of the application that it will suffer irreparable prejudice, loss and damage unless the orders sought are granted.
11. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicant is required to show the manner in which execution will irreparably affect him or will alter the status quo to his detriment therefore rendering the appeal nugatory. This being a money decree, the Applicant cannot plead substantial loss unless he can demonstrate that he would be unable to recover the decretal sum should his appeal succeed. In the instant application the Applicant has failed to demonstrate how it will suffer substantial loss.
12. Secondly, the applicant has not explained the inordinate delay in filing notice of appeal. In the supporting affidavit it is deposed that the delay was caused by non-communication by the Applicant's erstwhile advocates. That by the time the Applicant learned about the judgment on 5th November, 2023 the 30 days window for appeal had lapsed. That was only 8 days after the time for filing appeal had lapsed.
13. The Applicant pleaded that it engaged a new counsel who was unable to trace the court file which was missing until 19th January, 2024 when the file came up for taxation.
14. This does not explain why the application was filed on 3rd April, 2024, more than 2 months after the file was traced.
15. Further, there is no evidence of the fact that the court file was not available up to 19th January, 2024. There is no evidence that the Applicant or its counsel wrote to court to ask for the file.
16. There is further no request for typed proceedings and decree for purposes of appeal.
17. I am inclined to agree with the Claimant that the Applicant became interested in this matter only after proclamation. There is no indication at all about the intention to appeal before the date of proclamation.
18. On his part the Claimant has explained that the Respondent's current advocates on record Teti & Company Advocates participated in the taxation of Bill of Costs on 16th November, 2023 and was informed of the ruling of the taxing master on 8th March, 2024. These facts are not contested.
19. I am not satisfied by the Applicants explanation for the delay in filing the appeal or applying for leave to appeal out of time. The result is that I find no merit in the application and dismiss it with costs.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF NOVEMBER 2024.

M. ONYANGO

JUDGE

