



**Kenya Petroleum Oil Workers Union v Oryx Service Station and Pebo Filling Station
(Cause E072 of 2021) [2024] KEELRC 13579 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13579 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E072 OF 2021
JK GAKERI, J
DECEMBER 18, 2024**

**BETWEEN
KENYA PETROLEUM OIL WORKERS UNION CLAIMANT
AND
ORYX SERVICE STATION AND PEBO FILLING STATION RESPONDENT**

RULING

1. This is the Respondent's Notice of Motion dated 15th July, 2024 filed under Certificate of Urgency seeking Orders that: -
 1. Spent.
 2. Spent.
 3. The Honourable Court be pleased to order stay of execution of the judgment and decree of the Court given on 11th April, 2024 pending hearing and determination of the intended appeal to the Court of Appeal.
 4. Spent.
 5. The costs of this application.
2. The Notice of Motion is expressed under Order 42 Rule 6 and Order 51 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act* and is based on the grounds set forth on its face and the Supporting Affidavit sworn by Hellen Kwamboka Onchong'a on 15th July, 2024 who depones that appellant being dissatisfied by the Court's judgment delivered on 11th April, 2024, had already fled a Notice of Appeal and applied for certified copies of the judgment and proceedings in readiness for the appeal, which is arguable, and will be rendered nugatory if the orders sought are not granted.



4. The affiant depones that the Respondent is a non-entity and the actual party may not recover the amount paid to the Claimant.
5. The affiant further depones that the Claimant is not a person of means capable of refunding the money in the event the appeal is successful and the correct party was not sued and attempts to execute against the correct party is irregular and unlawful and the right party stand to suffer substantial loss.
6. That the applicant is willing to abide by conditions for security for due performance as directed by the court.

Replying Affidavit

7. By a Replying affidavit sworn on 23rd September, 2024, in opposition to the Notice of Motion, Mr. George Okoth Omolo, the Secretary General of the Claimant deposes that the applicant's application has not attained the threshold for a stay of execution as it had not demonstrated the loss the applicant stood to suffer, as loss occasioned by execution does not amount to substantial loss as execution is a lawful process.
8. That the respondent had not applied for nor perfected any decree and a certificate of costs was not executable and the applicant's apprehension is unfounded and has thus not established a basis for the grant of the Orders sought.
9. Reliance is made on the mandatory requirements of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules to urge that the applicant had not deposited the decretal sum as directed or demonstrated attempts to do so.
10. That the Respondent was in a position to refund the sum if the appeal was successful as it had assets and investments all over the country.
11. The Respondent argues that the question of the wrong party was not raised and justice demands that the Respondent be allowed to enjoy the fruits of its judgment.
12. The Respondent prays for the vacation of the temporary Order of stay in force as the applicant had failed to deposit the decretal sum as directed by the court.

Applicant's Submissions

13. As to whether the applicant has established grounds for stay of execution, the applicant submits that the application was brought without unreasonable delay, is likely to suffer substantial loss as the amount may be irrecoverable and was ready and willing to provide security as directed by the Court.
14. Reliance was made on the sentiments of the Court in *Buff V Rent Restriction Tribunal* [1982] KLR 417 on the need to preserve the subject matter and urge that execution will irreparably affect the essence of the appeal.
15. Reliance was also made on the decision in *Masisi Meita V Damaris Wanjiku Njeri* [2015] eKLR.

Analysis and Determination

16. It is common ground that the judgment sought to be appealed against was delivered on 4th April, 2024 and the instant application was filed on 16th July, 2024 more than 3 months later, though a Notice of Appeal was filed on 16th April, 2024.



17. When the matter came up on 16th July, 2024, the Court did not certify the same urgent but directed service and granted a temporary stay of execution pending inter partes hearing, provided the applicant deposited the decretal sum in court within 30 days from the date of the order.
18. Puzzlingly, the Respondent/Applicants ignored the Court order and now seeks a stay of execution pending the hearing and determination of an intended appeal.
19. The singular issue for determination is whether the applicant's Notice of Motion is merited.
20. The law that governs the grant of Orders for stay of execution pending appeal is Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provides that;
 1.
 2. No 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 Orders as may ultimately be binding on him has been given by the applicant.
21. In the words of Okwany J in *Nyatera V Nyakundi* [2023] KEHC 3086 (KLR)

The above provision requires an Applicant seeking Orders for stay of execution to establish that he/she has a sufficient cause for seeking the orders, that he stands to suffer substantial loss if the orders are not granted and lastly that he is willing to furnish security for due performance of the decree. In addition to the above conditions an application for stay of execution pending appeal must be made without unreasonable delay...”
22. As regards the filing of the instant application, it is clear that the judgment was delivered on 11th April, 2024 and the instant application was made on 16th July, 2024 slightly over 3 months later, which in the Court's view, was not unreasonable delay.
23. Be that as it may, it behoves the Court to ascertain whether the other essential conditions have been satisfied.
24. As regards substantial loss, in *Kenya Shell Ltd V Kibiru* [1986] KLR 410 the Court held that: -

It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.
26. It is not sufficient by merely stating that the sum of Kshs.20,380.00 is a lot of money and the applicant would suffer loss if the amount is paid, what sort of loss would this be? In an application of this nature the applicant should show the damages it would suffer, if the Order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand granting the stay would be denying a successful litigant of the fruits of his judgment”.



27. Equally, in *James Wangalwa & Another V Agnes Naliaka Cheseto* [2012] eKLR, the Court observed that: -

... 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 corner stone of both jurisdictions...”

28. In the instant case, the applicant’s apprehension is that since the respondent is not the actual party to the suit the real party may not be in a position refund the decretal sum if the appeal succeeds.

29. Although the respondent’s General Secretary deposes that the respondent is in a position to refund the amount in the event the appeal is successful, he has not demonstrated the grievants ability to do so as they are the recipients of the decretal sum and the primary obligation to refund the money would be on them not the respondent.

30. In the circumstances the Court is satisfied that the applicant has demonstrate that it is likely to suffer substantial loss if a stay of execution pending appeal is not granted and the appeal succeeds.

31. As regards security, the law requires the applicant to provide security for the due performance of the decree.

32. In determining this issue, the Court is guided by the rendition of the Court in *Mwaura Karuga t/a Limit Enterprises V Kenya Bus Services Ltd & 4 Others* [2015] eKLR where it was held that:

The security must be one which shall achieve the due performance of the decree which might ultimately be binding on the applicant. The rule does not therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here for they refer to the entire decree as will be payable at the time the appeal is lost.

33. That is the presumption of law here. Therefore, the ultimate decree envisaged under Order 42 Rule 6(2) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted – which is seldom. The security to be given is measured on that yardstick.

34. In this case, Hellen Kwamboka Onchong’a, a director of the respondent deposes that the applicant is ready and willing to comply with the conditions for security for costs for due performance as the Court may direct which is a demonstration of good faith in its readiness to provide security.

35. The Court is persuaded that the requirement security is satisfied.

36. In the circumstances, the Court is satisfied that the applicant’s Notice of Motion dated 15th July, 2024 meets the threshold for the grant of stay of execution pending appeal and the same is granted on condition that the applicant deposits the decretal sum in a joint interest earning account in a reputable bank in the names of the advocates on record within 45 days and in default, the stay Order shall lapse and the respondent will be at liberty to execute.

37. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 18TH DAY OF DECEMBER, 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

