



Namileli v Runo t/a Page & Page Ventures (Miscellaneous Application E033 of 2024) [2024] KEELRC 13410 (KLR) (6 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13410 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E033 OF 2024
AN MWAURE, J
DECEMBER 6, 2024**

BETWEEN

SYALIKHO NAMILELI APPLICANT

AND

AUSTINE KAMUNYO RUNO T/A PAGE & PAGE VENTURES .. RESPONDENT

RULING

1. The Respondent filed a Chamber Summons dated 17th July 2024 under a certificate of urgency seeking orders that-
 1. Spent
 2. Spent
 3. A stay of execution in Nakuru MCELRC No. 148 of 2021 be granted pending the hearing and determination of this application
 4. The court be pleased to grant leave to the applicant judgment debtor to appeal out of time against the Judgment made by Hon Mr. P.A Ndege on the 13th of July 2023 in Nakuru MCELRC No. 148 OF 2021
 5. The said leave do operate as a stay of all proceedings
 6. The costs of this application be provided for
 7. Any other orders that meets the ends of justice

Applicant's case

2. The Applicant avers that judgment was delivered in Nakuru MCELRC No. 148 of 2021 on 13th July 2023 before Hon. P. A. Ndege.



3. The Applicant avers that he applied for typed proceedings and judgment for purposes of appealing against the said judgment.
4. The Applicant avers that he has not managed to get the typed proceedings since requesting them on 23rd August 2023.
5. The Applicant avers that he filed an application for stay of execution pending appeal and a ruling was delivered on 28th May 2024 dismissing the application.
6. The Applicant avers that time has lapsed in lodging the appeal and is seeking time to file the appeal out of time.
7. The Applicant attached a draft of the memorandum of appeal to the said application.

Respondent's case

8. In opposition to the application, the respondent filed a replying affidavit dated 19th July 2024.
9. The Respondent avers that the application is misconceived, incompetent and bad in law.
10. The Respondent avers that the applicant did not lodge an appeal against the judgment of Hon. P. A. Ndege in Nakuru MCELRC No. 148 of 2021.
11. The Respondent avers that the delay in filing the appeal is inexcusable and inordinate.
12. The Respondent avers that the applicant has not given sufficient grounds explaining the delay in filing his appeal.
13. The Respondent further avers that the applicant has not demonstrated how he will suffer substantial loss should the court decline granting the stay orders sought.
14. The Respondent avers that money decrees are not rendered nugatory and there are many decided authorities in support.
15. The Respondent avers that the court should balance his right to a lawful judgment against the applicant's right to appeal.
16. The Respondent avers that the applicant cannot have it both ways and must comply with the court's ruling.
17. The Respondent avers that the memorandum of appeal does not raise any triable issues.
18. The Respondent avers that the application lacks merit and should be dismissed.

Respondent's submissions

19. The Respondent submitted that the principles applicable for leave to file appeal out of time are outlined in the case of Nicholas Kiptoo Arap Salat V IBEC and 7 others [2014] eKLR.:
 - a. The court has to consider the length of the delay
 - b. The reason for the delay
 - c. The chances of the appeal succeeding if the application is granted.
 - d. The degree of prejudice to the respondent if the application is granted.



20. The Respondent submitted that the applicant's counsel wrote a letter dated 23rd August 2023 requesting a copy of the judgment and typed proceedings. However, the Respondent failed to lodge an appeal. The Respondent also submitted that the applicant failed to explain why the appeal had not been filed a year later after judgment was delivered by the trial court.
21. The Respondent submitted that the Applicant is not entitled to extension of time as it has not provided sufficient explanation for the delay and thus does not deserve the court's discretion. In *Olivia Wamuhu Kinyanjui V Margaret Njeri Ndirangu* (2015) eKLR the court held that the applicant had not sufficiently explained the delay in filing the appeal.
22. The Respondent submitted that the Applicant's intended appeal does not raise any triable issues as the appeal cannot be said to be arguable citing the case of *Githau V Kagiri & Anor (Civil Appeal No. 314 of 2023)* (2024) KHC 6320 (KLR).
23. The Respondent submitted that the Applicant may not be able to pay the decretal sum in Nakuru MCELRC No. 148 of 2021 if the appeal is dismissed. The Applicant has not provided any evidence to show that he is financially capable of settling the decretal sum.
24. The Respondent submitted that the draft memorandum of appeal does not raise triable issues and the applicant has not demonstrated how he stands to suffer irreparable loss in the event the court declines to grant the stay orders.
25. Order 42 Rule 6 of the Civil Procedure Rules provides as follows:
 - No order for stay of execution shall be made under subrule (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.”
26. In *Butt V Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal held that gave guidance on how a court should exercise discretion in an application for stay of execution and held that:-
 - a. “The power of the court to grant or release an application for stay of execution is a discretionary power
 - b. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.
 - c. The court in exercising its powers under XLI Rule 4(2)(b) of the Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as awarded will cause the order for stay of execution to lapse.”
27. The Respondent submitted that the applicant has not properly moved this Honourable Court in seeking a stay of execution orders as the legal provisions under the application do not support granting orders for stay.
28. The Respondent relied on the case of *Vishram Ravji Halai V Thornton & Turpin* (1990) KLR 365 the court held that the applicant had not met the threshold for a stay of execution pending appeal.



29. The Respondent submitted that the applicant has not met the requirements for extension of time to appeal and also failed to meet the threshold for grant of stay orders. The Respondent relied on the case of *Githau V Kagiri & Anor*(supra) where the court held as follows:

“Having found that the applicant has not satisfied the requirements of extension of time to appeal and that he has failed to meet the threshold for grant of stay pending appeal, I reach the conclusion that this applicant must fail. Accordingly, it is my considered view that the application dated 29th June 2023 lacks merit and is hereby dismissed with costs.”

30. The Respondent urged this Honourable Court to dismiss the application with costs.

31. The Applicant did not file any submissions.

Analysis and determination

32. The issues for determination to be considered by this Honourable Court are whether an order of stay of execution should be granted and whether the applicant should be granted leave to appeal out of time.

33. Stay of execution is provided under Order 42 Rule 6(2) of the Civil Procedure Rules as earlier stated in the body of this ruling.

34. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the court stated as follows:

“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.”

35. In this instant case, the Applicant has not given sufficient evidence of how it will suffer substantial loss if the stay of execution is not granted.

36. The court has looked at the application which was filed one year later after judgment was delivered on 13th July 2023 and therefore the application filed was delayed and the reasons given are not sufficient.

37. The Applicant has not offered any form of security and therefore the Applicant is not willing and ready to comply to give security.

38. In view of the foregoing, the Applicant has failed to satisfy the conditions of stay of execution as set out under Order 42 Rule 6(2) of the Civil Procedure Rules.

39. On the issue of appealing out of time has been settled in *Nicholas Kiptoo Arap Salat V IBEC and 7 others*(supra).

40. In this instant case, the trial court in Nakuru MCELRC No. 148 of 2021 delivered on 13th July 2023 and the Applicant applied to be furnished with a copy of the judgment and typed proceedings on 23rd August 2023 which is one year and 10 days later. The court was not furnished with any other proof of follow up of the proceedings by the applicant from that date.



41. The Applicant did not follow the proper procedure as once judgment has been delivered and a party is dissatisfied with the judgment one is required to file a Memorandum of appeal within 30 days and the Applicant did not do so. There is no Memorandum of appeal filed except the draft Memorandum of appeal dated 17th July 2024 with a court stamp of 12th July 2024. It is possible and likely the appeal was filed as an afterthought once the auctioneers proclaimed the Applicant's goods by the Proclamation notice dated 19th July 2024. The court would be aiding an indolent litigant by staying execution of the Decree-holder's judgment.

The Decree-holder is entitled to the fruits of his judgment. This judgment was delivered on 13th July 2023 and if the judgment-debtor was keen to appeal he had 30 days to do so.

42. The draft memorandum of appeal filed way out of time does not raise credible issues and this Honourable Court is not persuaded by the same issues raised by the Appellant.

In view of the foregoing this Honourable Court is not persuaded that the Appellant's application is merited.

43. This Honourable Court therefore dismisses the Appellant's application dated 17th July 2024.

44. Let each party meet their costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAKURU THIS 6TH DAY OF DECEMBER, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

