



REPUBLIC OF KENYA



KENYA LAW
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**Kuira v Karanja & 2 others (Cause 79 of 2018)
[2023] KEELRC 485 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 485 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 79 OF 2018
HS WASILWA, J
FEBRUARY 23, 2023**

BETWEEN

GEOFFREY NGARE KUIRA CLAIMANT

AND

MARTHA WANGUI KARANJA 1ST RESPONDENT

JOSEPH WAGUR KARANJA 2ND RESPONDENT

BUSARA FOREST VIEW ACADEMY 3RD RESPONDENT

RULING

1. Before me for determination is the respondents/applicants' notice of motion dated December 14, 2022, filed under certificate of urgency pursuant to section 63(e) of the *Civil Procedure Act*, order 22 rule 22, order 42 rule 6 & order 51 rule 1 of the *Civil Procedure Rules* and all other provisions of law seeking for the following orders;
 1. Spent.
 2. Spent.
 3. Pending the hearing and determination of the intended appeal, the honourable court be pleased to stay execution of the Judgement delivered on September 22, 2022 and or any other orders issued therein and or incidental therefrom.
 4. That the costs of this application be awarded to the applicants.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of Martha Wangui Karanja, the 1st applicant herein.
3. In the affidavit the applicants stated that judgement in this matter was delivered in favour of the claimant/respondent for the payment of Kshs 871,472 being damages for the unfair termination.



4. That the applicants are aggrieved by the said judgement and have preferred an appeal to the Court of Appeal serialized as Nakuru Civil Appeal No E132 OF 2022.
5. It is averred that the respondents are apprehensive that the claimant/ respondent will execute the decretal sum unless stay orders are granted.
6. They contend that the appeal will be rendered nugatory unless the stay orders sought in this application are granted.
7. The affiant stated that the applicants are all willing to abide by any reasonable conditions set by the honourable court as a pre-requisite to the grant of the orders sought herein.
8. It is stated that the application has been filed without undue delay.
9. The application is opposed by the respondent who filed a replying affidavit sworn on January 17, 2023. In the affidavit the affiant stated that the application before court is not merited because the applicants have not demonstrated how the intended appeal will be rendered nugatory if the orders are not granted.
10. It is stated that the applicants have not stated the loss they will suffer if the orders are denied. Further that if any loss will be occasioned, the same can be compensated by damages.
11. He averred that the applicant have not disclosed the kind of security they will deposit to guide the court in making its decision whether to allow the application or not. In totality, the affiant avers that the applicants have not met all the conditions required for the grant of the orders sought and should be disallowed.
12. Directions were taken for the application to be disposed of by way of written submissions with the applicants filing on the January 25, 2023 and the respondent filed his on the January 26, 2023.

Applicants' Submissions.

13. The applicants submitted on two issues; whether the application should issue and who should bear costs of this application.
14. On the first issue, it was submitted that order 42 rule 6 of the *Civil Procedure Rules* provides for stay of execution pending Appeal. The threshold required before such orders are granted was aptly put in the case of *HGE Vs SM* [2020] eKLR where the court held that ;

“An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.”
15. On substantial loss, it was submitted that the duty of the Court at this stage is to ensure the substratum of the appeal is preserved. To support this argument, they relied on the case of *Antoine Ndiaye V Africa Virtual University* [2015] eKLR where the Court held that;

“substantial loss in the sense of order 42 rule 6 has been described; see the following rendition in a work of Ogola J in *Tropical Commodity Suppliers Ltd (Supra)* that:- “...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept.



it refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”

And also in the case of Bungoma Hc Misc Application No 42 of 2011 *James Wangalwa & Another vs Agnes Naliaka Cheseto* 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. This is what substantial loss would entail...”

16. On that basis, the applicants submitted that they have already lodged an appeal and if stay of execution is not allowed, the claimant will execute against them and the appeal will be rendered a mere judicial exercise. It was further argued that the sum in issue is a colossal one which the claimant may not be in a position to refund in the event the Appeal succeeds. To support this argument they relied on the case of *RWW Vs EKW* [2019] eKLR where the court held that;

“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.”

17. On whether the application was made timeously, it was submitted that as soon as judgement was delivered, the applicants filed this application as such the same was filed without unreasonable delay.

18. On security, it was submitted that the applicants are willing to deposit any security ordered by the Court for due performance of the decree. In this they relied on the case of *Arun C Sharma V Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 others* [2014] eKLR where the court held that;

“The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment-debtor... civil process is quite different because, in a civil process, the judgment is like a debt hence the applicants become and are judgment-debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the *Civil Procedure Rules* acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume, the security must be one which can serve that purpose.”

19. Lastly on costs, the applicants submitted that costs follow event and prayed to be awarded costs of the application herein.

Respondent’s Submissions.

20. The respondent submitted that this court has feted discretion to grant stay of execution orders. He argued that the discretion to grant these orders are determined by the fulfillment of three main conditions set out under order 42 rule 6(2) of the *Civil Procedure Rules* . To support this argument,



the respondent cited the case of *Trust Bank Limited V Ajay Shah & 3 others* [2012] eklr, where the court held that ;

“It is clear from the foregoing that the sub-rule is couched in mandatory terms by the use of the words “shall not.” Accordingly, for a stay to be granted an applicant must satisfy three requirements, namely, that the application has been made timeously, that the applicant will suffer substantial loss if the stay is not granted and must give security for the due performance of the decree or order sought to be stayed.”

21. They reinforced their argument above, by relying on the case of *Peter Ndungu Ngae & 2 others V John Mugane Karomo* [2015] eklr where the court held that;

“In its totality the applicant has satisfied only one condition as set out in order 42 rule 6(2), that, the application was filed without delay. He has failed to satisfy this court of the other two. Even after considering the principles of justice and fairness to both parties, the court finds no merit in the application.”

22. On whether the application was filed on time, the respondent submitted that judgement in this matter was delivered on the September 22, 2022 while this application was filed on December 14, 2022 , about Three (3) months without any explanation given for the delay.

23. On substantial loss, the respondent cited the case of *Kenya Shell Limited V Benjamin Kabiru & Another* [1986] eklr where 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.”

24. The respondent then submitted that the details and particulars of the loss to be suffered must be given as was held in *Peter Ndungu Ngae & 2 others V John Mugane Karomo*[2015] eklr where the court held that;

“To prove substantial loss the applicant is under a duty to do more than merely stating that he will suffer loss, details and particulars must be given and the court will therefrom determine whether such loss will ensue and if it so does, that the applicant is likely to suffer substantial injury pending the hearing of the appeal. Where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay of execution.”

25. The respondent reiterated that substantial loss is the cornerstone of the jurisdiction to grant a stay of execution order pending Appeal. In this he cited the case of *Kenya Shell Limited V Benjamin Karuga Kibiru & Another* [1986] eklr.

26. Based on the foregoing, the respondent submitted that the applicants have not demonstrated any loss it will suffer in the event the orders sought are not granted.

27. On security for due performance of the decree, the respondent submitted that the applicants have not offered any security for performance of the decree as provided for under the Rules. In this they relied



on the case of *Stephen M Ikunyua N Imanthiu V Elijah Mwingi & Another* [2006] eKLR where the court held that;

“for discretion to be exercised in favour of the appellant, the court is enjoined to do so upon a security being given by the appellant or the court would otherwise create other terms as it deems fit for granting the stay of execution.”

28. He also relied on the case of *John Mwangi Ndiritu V Joseph Ndiritu Wamathai* [2016] eKLR where the court held that;

“Apart from proof of substantial loss the applicant is enjoined to provide security. The applicant has not offered any security at all. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the applicant as a price for stay.”

29. In conclusion, the respondent submitted that the applicant has not satisfied any of the conditions for stay of execution pending appeal to issue, as such the application should be dismissed with costs.

30. I have examined the averments and submissions of the parties herein. The applicants seek stay on the ground that they have filed an appeal against the judgment of this court dated September 22, 2022.

31. The applicants have demonstrated that they have indeed filed the appeal being CA No E132/2022.

32. order 42 rule 6(2) of the *Civil Procedure Rules* enjoins the applicant to satisfy 3 conditions before stay can be granted being:-

33. In the circumstances of this case, I find the application was filed late being over 2 months from the day the judgment was delivered on 22/9/2022 to December 14, 2022.

34. On issue of whether the applicant will suffer substantial loss if the order sought is not granted, the only reason the applicants have cited is that the appeal file may be rendered nugatory if it is determined in their favour.

35. The respondent did not however indicate that he is able to refund the decretal sum if the appeal succeeds.

36. For the reason that an appeal has been filed and so that it is not rendered nugatory in case it is determined in favour of the applicant, I will grant stay of execution on condition that the entire decretal sum is deposited in an interest earning account held in joint names of counsels on record within 60 days in default execution may proceed.

37. Costs to abide the outcome of the appeal.

RULING DELIVERED VIRTUALLY THIS 23RD DAY OF FEBRUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mbiyu for Plaintiff/respondent – present

Miss Karugu for Mirugi Kariuki for respondent/applicants – present

Court Assistant – Fred

