



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Koech v Kipkales & another (Cause 640 of 2017)
[2023] KEELRC 426 (KLR) (20 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 426 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 640 OF 2017
JK GAKERI, J
FEBRUARY 20, 2023**

BETWEEN

JUDY CHEPNGENO KOECH CLAIMANT

AND

AMOS CHETALAM KALE KIPKALES 1ST RESPONDENT

**STEPHEN KIPKORIR BUNDOTICH T/A KALE MAINA & BUNDOTICH
ADVOCATES 2ND RESPONDENT**

RULING

1. Before me for determination is a Notice of Motion dated September 2, 2022 by the Respondent/Applicants under Certificate of Urgency seeking orders that;
 1. The Honourable Court be pleased to grant the applicants leave to file an appeal from the judgement of July 27, 2022 out of time.
 2. The Honourable Court be pleased to order stay of execution of the judgement entered on July 27, 2022 pending the hearing and determination of the Applicants intended appeal against the said judgement.
 3. The Applicants be at liberty to apply for further orders and/or directions as the Honourable Court may deem just to grant.
 4. The costs of this Application be provided for.
2. The Application is expressed under Section 7 of the *Appellate Jurisdiction Act*, Order 42 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act*, (Cap 21) Laws of Kenya and is based on the grounds set out on its fact and supported by the Affidavit of Stephen



- Kipkorir Bundotich sworn on September 2, 2022 who deposes that he is aggrieved by the judgement of the trial court, and seeks to appeal against the same.
3. That the full version of the judgement was availed on August 24, 2022 after a request by letter dated July 28, 2022 and the intended appeal raises several issues for determination as detailed in the Draft Memorandum of Appeal attached.
 4. That the Applicants are apprehensive that the Respondent may commence execution process at any time as they had obtained a Decree dated August 17, 2022 and the Applicants stand to suffer substantial loss and irreparable damage if execution of the judgement is not stayed.
 5. That the Applicants are willing to furnish security interest as the court may direct in due performance of the judgement of July 27, 2022.
 6. That the amount involved is substantial and execution would have great repercussions and occasion irreparable damage and the applicants may not recover the money from the Respondent if the intended appeal succeeds.
 7. That the application has been made without undue delay and it would be in the interest of justice that execution be stayed pending the hearing and determination of the intended appeal.
 8. In the Replying Affidavit by Judy Chepngeno Koech, sworn on September 20, 2022 (indicated as 2021), the Claimant/Respondent depose that application herein is frivolous, vexatious and abuse of court process and should be struck out or dismissed.
 9. The affiant states that the applicants have not demonstrated with precision the prejudice they stood to suffer if the orders sought were not granted and the affiant's right to the fruits of her judgement would be delayed to her detriment.
 10. The affiant further states that as a precondition for the grant of stay, the Respondents/Applicants should provide security for costs by depositing the decretal amount in a joint interest earning account held in the names of both Advocates on record as admitted.
 11. That a perusal of the Draft Memorandum of Appeal and Respondents/Applicants are challenging pay in lieu of notice and housing allowance only.
 12. Finally, the affiant deposes that the instant application was unmerited and should be dismissed with costs.
 13. In a Supplementary Affidavit dated October 13, 2022, the affiant states that the Applicants have since the judgement paid the Respondent a substantial part of the award amounting to Kshs 280,000/= vide cheque No 006xxx of September 26, 2022 and a certificate of service had been issued.
 14. That the Respondent means were unknown to the Applicants and had not demonstrated ability to repay the sum if the intended appeal was successful.
 15. That the Applicant would suffer substantial loss due to the possible inability of the Claimant/Respondent to pay back the contested sums and willing to offer security pending determination of the intended appeal.

Respondents/Applicants submissions

16. Counsel for the Applicants identified three issues for determination, namely; whether leave to file appeal out of time should be granted, whether stay of execution of judgment delivered on July 27, 2022 should be granted and who should bear the costs.



17. As regards the 1st issue, reliance was made on the contents of the Supporting Affidavit as well as the decision in [*Kinyunjuri Muguta V Wotuku Muguta*](#) (2018) eKLR on the unfettered discretion of the High Court to extend the time for filing an appeal before it.
18. The court was unambiguous that factors such as length of delay, reason for the delay, chances of success of the appeal and the degree of prejudice to the Respondent are relevant considerations.
19. As regards the order of stay of execution of the judgement, reliance was made on Order 42 Rule 6 of the [*Civil Procedure Rules, 2010*](#) to highlight the requirements for grant of stay, namely; substantial loss could result, no unreasonable delay and security will be provided. The decision in [*HGE V SM*](#) (2020) eKLR was cited to buttress the submission.
20. It was urged that the applicants had fulfilled the criteria under Order 42 Rule 6(2) of the [*Civil Procedure Rules, 2010*](#).
21. Reliance was also made on the decision in [*James Wangalwa & another V Agnes Naliaka Cheseto*](#) (2012) eKLR to underline the essence of substantial loss. The Applicants urged that their assets and accounts were at risk of being attached and the Respondent/Claimant might not be in a position to refund the decretal amount.
22. It was further submitted that the burden of proof lay upon the Respondent to demonstrate ability to refund the decretal amount if the appeal was successful. The decision in [*National Industrial Credit Bank Ltd V Aquinas Francis Wasike & another*](#) (2006) eKLR was relied upon as was the decision in [*Victor Ogola V Mary Waithe Kibiu*](#) (2021) eKLR.
23. That the intended Appeal raises arguable grounds of law and fact and the application was filed on September 5, 2022 without undue delay.
24. That the Respondent/Applicant was willing to comply with any orders of the court pending the hearing and determination of the intended appeal.
25. Finally, the Court of Appeal decision in [*Butt V Rent Restriction Tribunal*](#) (1979) eKLR was cited to reinforce the submission that the High Court had discretion to grant a stay of execution.
26. On costs, reliance was placed on the provisions of Section 27 of the [*Civil Procedure Act*](#) as well as the decision in [*Cecilia Karuru Ngayu V Barclays Bank of Kenya Ltd & another*](#) (2016) eKLR to urge that costs follow the event, ordinarily.

Claimant/Respondent's Submissions

27. Counsel for the Claimant/Respondent isolated two issues for determination, namely; whether the Respondent had satisfied the principles for the grant of stay pending appeal and costs.
28. On the 1st issue, counsel rehashed the contents of Order 42 Rule 6(2) of the [*Civil Procedure Rules, 2010*](#) as echoed by Kamau J in [*GN Muema P/A Mt Kenya Maternity & Nursing Home V Miriam Maalim Bishar & another*](#) (2018) eKLR to urge that the Respondent had not met the threshold for the grant of stay of execution pending appeal.
29. It was urged that since the applicants were only challenging salary in lieu of notice and house allowance, the appeal lacked merit.
30. Counsel submitted that the Respondent would suffer loss if the stay was granted as the intended appeal could take up to 24 months to hear and determine and the decretal amount should be deposited in a joint interest earning account in the name of the Advocates on record as a precondition for stay.



31. Finally, the Respondent submitted that she was not principally opposed to the application provided the court balanced her rights to enjoy the fruits of the judgement against the Applicants right to appeal the decision.

Determination

32. The singular issue for determination is whether the Notice of Motion Application before the court is merited in terms of the extension of time to file appeal before the Court of Appeal and stay of execution of judgement pending the hearing and determination of the intended appeal.
33. It is common ground that the judgement sought to be appealed against was delivered on July 27, 2022 and the Notice of Motion Application before the court was filed on September 5, 2022.
34. Equally not in dispute is the fact that the Claimant/Respondent obtained the decree dated August 17, 2022 and forwarded the same to the Claimant/Respondent's counsel by letter dated August 23, 2022, received on the same day.
35. Puzzlingly, although the Applicant's applied for a copy of the judgement vide letter dated July 28, 2022, it was deponed that the full version of the judgement was not availed until August 24, 2022.
36. The Applicants were represented in court on July 27, 2022 when the judgement was delivered and requested for a copy of the judgment. From the evidence before the court, the Applicants made no follow-up from July 28, 2022 when the letter was dispatched until August 24, 2022.
37. As regards the request for leave to file an appeal out of time, the trial court is being invited to extend time within which an appeal should be filed in the Court of Appeal on the basis of a Draft Memorandum of Appeal which is challenging the decision of the court. The Draft Memorandum of Appeal is yet to be filed, nor has a Notice of Appeal been filed.
38. In sum, there is no appeal before any court but an intended appeal.
39. Reliance was made on the provisions of Section 7 of the [Appellate Jurisdiction Act, 2012](#). Section 7 provides that;
- "The High Court may extend the time for giving notice of intention to appeal from a judgement 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 time for giving such notice or making such appeal may have already expired."
40. On the face of it, it would appear that being a court of co-ordinate jurisdiction, the Employment and Labour Relations Court has jurisdiction to extend time within which an appeal ought to be filed before the Court of Appeal.
41. Surprisingly, the [Court of Appeal Rules, 2010](#) confer similar powers to the court and which are more elaborate than the provisions of Section 7 of the [Appellate Jurisdiction Act, 2012](#).
42. Rule 4 of the [Court of Appeal Rules](#) deals with extension of time to appeal while Rule 5(2) (b) on the other hand empowers the court "in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just."
43. It is unclear to the court why the Applicants are seeking extension of time to lodge an appeal in the trial court while the court expected to hear the appeal has similar powers and is better placed to *inter alia* assess the propriety of the Draft Memorandum of Appeal and determine whether the threshold of



- Order 42 Rule 6(2) of the [Civil Procedure Rules](#) had been met in its view as opposed to another court making the decision for the appellate court whose decisions bind this court.
44. Is the Court of Appeal bound by such a determination? The court is not persuaded it is.
 45. What would be the implications if the intended appeal was never filed as it does not exist?
 46. These are pertinent issues the applicant did not address in urging the court to grant the orders sought pending the hearing and determination of a non-existent appeal.
 47. Needless to emphasized, the principles governing extension of time to file an appeal are well settled.
 48. In [Leo Sila Mutiso V Wangari Mwangi](#) [1999] 2 EA 231, the Court of Appeal stated;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionally . . .”
 49. Further, in [Karny Zabarya & another V Shalom Levi](#) C Appl No 80 of 2018, Koome JA (as he then was) stated *inter alia*

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has the decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party’s opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal; and whether, prima facie the intended appeal has chances of success or is a mere frivolity . . .”
 50. Similar sentiments were expressed in [Imperial Bank Ltd \(in receivership\) & another V Alnasir Popat & 18 others](#) (2018) eKLR.
 51. A cursory examination of the factors to be considered by a court in determining whether to extend time to file an appeal suggest that the court with jurisdiction to hear and determine the appeal should exercise the discretion.
 52. Similarly, in [Abdul Azizi Ngoma V Mungai Mathayo](#) (1976) KLR 61 at 62, the Court of Appeal held;

“We would like to state once again that this court’s discretion to extend time under rule 4 only comes into existence after sufficient reason for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered.”
 53. Finally, the factors to be taken into consideration by the court in determining whether or not to extend time, were re-emphasized by the Supreme Court in [Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & others](#) (2014) eKLR.
 54. As regards the stay of execution, the operative principles are contained in Order 42 Rule 6(2) of the [Civil Procedure Rules, 2010](#) as explained and applied in legions of decisions. That the court must be satisfied that;
 - i. Substantial loss may result to the applicant if the order is not granted.



- ii. The application has been made without unreasonable delay.
- iii. Security has been given as directed by the court.

55. The applicant urges that it stands to suffer substantial loss if the application is not granted as the Respondent had no known means and had not demonstrated ability to repay the decretal amount should the intended appeal succeed.

56. That the application was timeously made after the full version of the judgement delivered on July 27, 2022 was furnished on August 24, 2022 although the request was date July 28, 2022.

57. The applicant provided no evidence as to when the letter was received at the Registry and when the charges were paid to explain the one (1) month delay.

58. Finally, the applicants stated that they were willing to furnish such security interest as the court orders for the due performance of the judgement of July 27, 2022 as may ultimately be binding on them.

59. In *Butt V Rent Restriction Tribunal* (supra), the Court of Appeal held as follows;

“It is the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being tendered nugatory, per Prett LJ *Wilson V Church* (No 2) 12 CH D (1879) 545 at 459. In the same case, Cotton LJ said at page 459.

“I will state my opinion that when a party is appealing exercising his undoubted right of appeal, this court ought to see that the appeal, if necessary is not nugatory . . . The court will grant a stay where special circumstances of the case so require, per Lope LJ in the *Attorney General V Emerson & others* (1889) 244 BD 56 at 59.”

60. In the instance application, there is no appeal before this court or any other court whose success will be rendered nugatory.

61. Similarly, the applicant has not demonstrated any special circumstances for the grant of an order of stay.

62. Finally, of the seven decisions relied upon by the applicant in urging their case, five (5) are related to applications made before the High Court against decisions of subordinate courts and were of little assistance to the court.

63. Relatedly, in *National Industrial Credit Bank Ltd V Aquinas Francis Wasike and another* (supra), the application for stay of execution was made at the Court of Appeal as was the case in *Butt V Rent Restriction Tribunal* (supra), the application for stay was made before the Court of Appeal after the High Court declined to grant the orders sought.

64. In other words, none of the authorities relied upon was analogous to the fact of the instant case.

65. For the foregoing reasons, it is the finding of the court that it is inopportune to grant the orders sought.

66. In the end, the Notice of Motion Application dated September 2, 2022 is unmerited and accordingly dismissed.

67. Parties to bear own costs.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF
FEBRUARY 2023**

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

