



REPUBLIC OF KENYA



**KENYA LAW**  
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**Saina v Kaimosi Tea Estate Limited (Cause 30 of 2021)  
[2023] KEELRC 400 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 400 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 30 OF 2021  
JW KELI, J  
FEBRUARY 16, 2023**

**BETWEEN**

**JOSEPH KIPYEGON SAINA ..... CLAIMANT**

**AND**

**KAIMOSI TEA ESTATE LIMITED ..... RESPONDENT**

**RULING**

1. The respondent, following judgment of the court delivered on the October 27, 2022 filed the instant notice of motion application dated 1 November 8, 2022 under certificate of urgency seeking the following orders:-
  - a. That the application herein be certified urgent, service thereof be dispensed with in the first instance.
  - b. That the honourable court be pleased to stay execution of the judgment dated October 27, 2022 pending the hearing and determination of this application.
  - c. That the honourable court be pleased to stay execution of the judgment dated October 27, 2022 pending the hearing and determination of the intended appeal.
  - d. That the costs of this application be provided for.
2. The prayers Nos 1 and 2 are spent the court having granted temporary stay order on the November 22, 2022 to wit:- ‘order of stay of execution of judgment of court delivered on October 27, 2022 is hereby granted pending hearing and determination of the application.’”
3. The application is grounded on the following reasons:
  - a. That the respondent/applicant being aggrieved by the decision of the Honourable Justice JW Keli delivered on October 27, 2022 intends to appeal against part of the said decision.



- b. That the respondent/applicant has filed a notice of appeal dated December 9, 2022.
  - c. That the respondent/applicant has also requested for certified copies of typed proceedings to facilitate filing of the record of appeal.
  - d. That the respondent/applicant's intended Appeal is arguable and with a high probability of success.
  - e. That the claimant/respondent has already filed a Bill of costs for taxation which is set for hearing on November 22, 2022.
  - f. That the Applicant stands to suffer irreparable harm and damage if the order for stay of execution is not granted as the claimant/respondent may proceed to execute against the applicant.
  - g. That if stay of execution is not granted, the respondent/applicant's intended appeal will be rendered nugatory and a pure academic exercise as they may never recover the decretal sum from the claimant/respondent as she has no known source of income or financial stability.
  - h. That the claimant/respondent shall not suffer any prejudice if the Application is allowed.
  - i. That the Claimant/Respondent is ready and willing to deposit security in due performance of the decree.
  - j. That this Application has been made without unreasonable delay.
  - k. That it is in the interest of justice and equity that the prayers sought herein are granted.
4. The Application is opposed vide Replying affidavit of Joseph Kipyegon Saina sworn on the December 2, 2022.
  5. The court directed that the application be canvassed by way of written submissions. The Applicant's written submissions drawn by Wachira Wanjiru & Company Advocates were dated December 13, 2022 and received in court on the December 14, 2022. The Respondent's/Claimant written submissions drawn by M/S Mwakio Kirwa & Company Advocates were dated December 2, 2022.

## **Determination**

### **Issues for determination**

6. The Applicant in their written submissions identified the following as the issues for determination in the application:-
  - a. Whether the respondent/ applicant has a case to warrant grant of stay orders.
  - b. Costs of the application.
7. The Respondent in their written submissions identified the following as the issues for determination in the Application:-
  - a. Whether the application dated November 18, 2022 for stay of execution is merited.
  - b. Whether the application should be allowed or not
  - c. Who should pay costs of the application.



8. The Application is brought under sections 3 and section 17(1) of the *Employment and Labour Relations Court Act*, rule 5(2)(b) of the *Court of Appeal Rules 2022* and Rule 17(1)(8) *Employment and Labour Relations Court(Procedure) Rules 2016*.

9. Section 3 of the *Employment and Labour Relations Court Act* reads:-

"Principal Objective

- (1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.
- (2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).
- (3) The parties and their representatives, as the case may be, shall assist the court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the court."

10. Section 17 of the *Employment and Labour Relations Court Act* reads.

"Appeals (1) Appeals from the Court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the Court in accordance with article 164(3) of the *Constitution*."

11. Rule 17(1)(8) *Employment and Labour Relations Court(Procedure) Rules, 2016*

"17. (1) An interlocutory application shall be made by notice of motion and shall be heard in open court.

- (8) A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the affidavit shall be served on the other party."

12. The court finds that the substantive provisions of the law with regard to the orders sought under the application for stay of execution pending appeal to be Order 42 rule (6) of the *Civil Procedure Rules* to wit:-

"Stay in case of appeal [Order 42, rule 6.]

- (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 order set aside.



- (2) 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.”

13. The court applying the provisions of article 159(2)(d) of the Constitution that justice shall be administered without undue regard to procedural technicalities proceeds to consider the instant application on merit. The court then proceeds to consider whether there is sufficient cause to stay the execution and further whether the application meets the criteria under order 42 rule 6(2) of the Civil Procedure Rules to wit:-

- (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.”

14. On the 1<sup>st</sup> limb of substantial loss and application being brought without unreasonable delay The Applicant pleaded under paragraph 12 of the Supporting affidavit of Sospeter Angira sworn on the November 18, 2022 that the respondent /claimant had no known source of income or financial stability thus recovery of the decretal sum may be prove futile if orders of stay are not granted.

15. To buttress this submission on substantial loss the applicant relied on the decision of the Court of Appeal where while dealing with a similar situation in the case of Nairobi Civil Application No 238 of 2005 National Industrial Credit Bank Limited v Aquinas Francis Wasike & another (UR) as cited in High Court in Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa [2016] eKLR the Court of Appeal stated:-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

The applicant further relied on decision with similar holding in International Laboratory for Research on Animal Diseases v Kinyua [1990] KLR 403 to buttress its submissions.

16. The applicant submits that the respondent/claimant in her response they did not demonstrate or provide evidence of means to refund the decretal amount if the appeal succeeds thus the applicant had discharged their burden on balance of probabilities on inability of the respondent to refund the decretal amount for lack of income.

17. The respondent/claimant in their replying affidavit of January 16, 2023 under paragraph 14 pleaded:-

“That the allegation that I am unlikely to refund the decretal sum in the event appeal succeeds is not true. I am informed by my advocate on record that where the allegation is that



the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove the respondent will not be able to refund to the respondent'/applicant any sum paid in satisfaction of the decree”

18. The Respondent relied on several decisions on substantial loss which the court looked into. In *Vishram Ravji Halai v Thornton & Turpin* Civil Application No Nai 15 of 1990 (KLR) Where the Court of Appeal held that whereas the Court of Appeal is unfettered, the High Court’s jurisdiction to do so under order 42 rule 6 of the Civil Procedure Rules was fettered by three conditions namely establishment of a sufficient cause , satisfaction of substantial loss and furnish security. In *James Wangalwa & another v Agnes Naliak Chesoto* High Court Misc. Application No 42 of 2012 where Justice Gikonyo held that the applicant in such application must establish other factors which show the execution will create state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. In *Machira t/a Machira & Co Advocates v East African standard (No 2)*(2002) KLR 63 where it was held:-

“In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars.. where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant stay.”

19. The Respondent further submits that in a similar case the court in declining to issue order of stay and setting aside judgment being In *Equity Bank Limited v Taiga Adams Company Limited* 2006 e KLR the court held:

“In the application before me, the applicant has not shown or established the substantial loss that would ensue if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay- reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellant/applicant.”

And in *Kenya Shell Limited v Kibiru* [1986] KLR 410 where the court held that substantial loss in its various forms is the cornerstone of jurisdiction of granting stay.

20. The Respondent further cited decision in *Mohammed Salim T/A Choice Butchery v Nasserpurial Memon Jamat* (2013)e KLR where the court upheld the decision in *M/S Portreiz Maternity v James Karanga Kabia* Civil Appeal No 63 of 1997 and stated that,

“That the right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of judgment delivered in his favour. There must be a just cause of depriving the plaintiff of that right.”

21. Lastly the Respondent submits that at stake is a money decree and relied on the decision in *Kenya Hotel Properties Limited v Willesden Properties* Civil Application No Nai 322 of 2006 where the court held that a money decree would not be rendered nugatory if the appeal was successful so long as the court ascertains the respondent is not a man of straw but is a person who on the success of the appeal would be able to repay the decretal amount.



## Decision of the court on the substantial loss and application brought without unreasonable delay

22. The court on this issue finds that the applicant pleaded specifically that the claimant had no known source of income or financial ability and would not be able to pay the decretal sum if the stay is not granted.
23. The respondent in her affidavit in response to the allegation paragraph 14 pleaded:-
- "That the allegation that I am unlikely to refund the decretal sum in the event appeal succeeds is not true. I am informed by my advocate on record that where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove the respondent will not be able to refund to the respondent'/applicant any sum paid in satisfaction of the decree"
24. The court appreciated the authorities cited by all the parties to be in agreement that the main basis of stay of money decree was the incapacity of the respondent to pay back the decretal money in event that the appeal was successful otherwise the appeal would be rendered an academic exercise/nugatory. The court finds in the instance case the burden shifted to the respondent upon the applicant pleading with specificity that the respondent had no known source of income. The court finds that the respondent was evasive as per their pleading in paragraphs 14 of her replying affidavit (*supra*). It was only him who was in a position to inform the court of his financial status. The court finds and determines that the applicant proved on balance of probabilities that the respondent had no financial ability to refund the decretal sum in the event the appeal was successful. The court upholds with approval the decisions cited by the parties in Nairobi Civil Application No 238 of 2005 *National Industrial Credit Bank Limited v Aquinas Francis Wasike & another* (UR) as cited in High Court in *Stanley Karanja Wainaina & another v Ridon Anyangu Mutubwa* [2016] eKLR stated:-
- ‘This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.’(emphasis given). In *Equity Bank Limited v Taiga Adams Company Limited* 2006 e KLR the court held: ‘ In the application before me, the applicant has not shown or established the substantial loss that would ensue if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay-reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellant/applicant.’ In *Machira t/a Machira & Co Advocates v East African standard no 2* (2002) KLR 63 where it was held:- ‘in this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars.. where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant stay.’
25. Applying the foregoing jurisprudence the court determines that the applicant has proved on balance of probabilities they will suffer substantial loss if execution of the decree of the court is not granted as the respondent has no known source of income or financial ability to refund the decretal money in event the appeal is successful. The court further finds that the judgment of the court having been



delivered on the October 27, 2022 there was no unreasonable delay in bringing the instant application filed in court on the November 21, 2022.

26. On the 2<sup>nd</sup> limb of order 42 rule 6 of the Civil Procedure Rules requiring security of performance as a condition for grant of stay. The Applicant vide the supporting affidavit of Sospeter Angira dated November 18, 2022 under paragraph 13 stated that the applicant was ready and willing to provide security as may be determined by court to ensure due performance of the decree.
27. The respondent submits that the applicant is obliged to furnish security and relies on the decision In Giafranco Mannthi & Another v Africa Merchant Assurance Company Ltd [2019] eKLR to that effect. (The court was not able to trace the authority online and the respondent had not availed a copy with the submissions). The applicant relied on the case of Exclusive Mines Limited & another v Ministry of Mining & 2 others (2015) eKLR where the court held that the applicant seeking stay pending appeal should as a sign of good faith, offer, propose any such security for the performance of the decree which the appeal has been preferred. The court upholds the said authority as good law to apply in the instant case. The court finds and determines that the Applicant meets the threshold of 2<sup>nd</sup> limb under Order 42 rule 6 of the Civil Procedure Rules by stating it was ready to furnish security for the performance of the decree as the court may order.

#### **Whether the applicant had arguable case**

28. The court found the submissions by the Applicant on the whether the applicant has arguable case on appeal to be irrelevant in the application for stay of execution before the trial court as the same amounts to re-opening the hearing. The court will say no more other than to state that whether or not the appeal is arguable is not a relevant issue in the instant application .

#### **Conclusion and Disposition**

29. The Court of Appeal has settled the principles for stay of execution in the case cited by Justice Ongudi in MFI Document Solutions Ltd v Paretto Printing Works Limited (2021)eKLR of Butt v Rent Restriction Tribunal [1982] KLR 417 where the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held that:-

- “ 1. the power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle is granting or reusing a stay is : If there is no other overwhelming hindrance , a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge ‘s discretion. (sic)( trial court judgement).
3. A judge should not refuse a stay if there is a good grounds for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
4. The court in exercising its powers under order 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 of costs as ordered with cause the order for stay of execution to lapse”.



30. The decree/judgement sought to be challenged in the instant application is a monetary decree. The Applicant has proved on balance of probabilities that they are likely to suffer substantial loss if the stay is not granted. The court finds there is sufficient cause to grant the stay of execution. The discretion of the court in applications for stay pending appeal should be exercised in such a way as not to prevent an appeal. The court upholds the principle of granting or refusing a stay as enunciated by Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 to wit :

If there is no other overwhelming hindrance , a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s judgment.”

31. In final disposition of the application by way of Notice of motion dated November 18, 2022, I find merit in the said application and grant An order of stay of execution of the judgment and/or decree of the court dated October 27, 2022 in Bungoma ELRC Claim No 30 of 2021 *Joseph Kipyegon Saina v Kaimosi Tea Estates Limited* pending the filing, hearing and determination of the intended appeal to the Court of Appeal on condition that the entire decretal amount of Kenya shillings eighty two thousand, six hundred and twenty eight and eighty five cents (KES 82,628.85) is deposited in court within 30 days of this ruling failing which the order of stay shall stand automatically vacated.

32. Costs of the application to the respondent/claimant.

33. It is so ordered.

**WRITTEN, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 16<sup>TH</sup> FEBRUARY, 2023.**

**JW KELI,**

**JUDGE.**

**In the presence of:-**

Court Assistant – Brenda Wesonga

Applicant:- Wachira (Ms)

Respondent:- Kirwa (Mr)

