



Mideya v Kaimosi Tea Estate Limited (Employment and Labour Relations Cause 29 of 2021) [2023] KEELRC 402 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 402 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 29 OF 2021**

JW KELI, J

FEBRUARY 16, 2023

BETWEEN

SHARON MIDEYA CLAIMANT

AND

KAIMOSI TEA ESTATE LIMITED RESPONDENT

RULING

1. The Respondent, following Judgment of the Court delivered on the November 24, 2022 filed in court Notice of Motion Application dated December 16, 2022 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 in Bungoma ELRC Cause No. 29 of 2021 – Sharon Mideya -vs- Kaimosi Tea Estate Limited dated 24th November 2022 pending the inter partes hearing and determination of this Application.
 - c. That the Honourable court be pleased to stay execution of the judgment in Bungoma ELRC Cause No. 29 of 2021 – Sharon Mideya -vs- Kaimosi Tea Estate Limited dated 24th November 2022 pending the hearing and determination of the Appeal
 - d. That the court costs of this Application be provided for.
2. The prayers Nos 1 and 2 are spent the court vide Justice Radido at Kisumu on the December 20, 2022 having granted the said orders to effect that, ‘pending other directions in Bungoma Court, court grants interim stay of execution on condition that applicant deposits decretal sum of Kshs. 221, 147/= in court on or before December 31, 2022.
3. The Application is grounded on the following reasons:



- a. That the Respondent/Applicant being aggrieved by the decision of the Honourable Justice J. W Keli delivered on 24.11.2022 intends to appeal against part of the said decision.
 - b. That the Respondent/Applicant has filed a Notice of Appeal dated 6th December, 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 Applicant stand 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.
 - f. 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.
 - g. That the Claimant/Respondent shall not suffer any prejudice if the Application is allowed.
 - h. That the Claimant/Respondent is ready and willing to deposit security in due performance of the decree.
 - i. That this Application has been made without unreasonable delay.
 - j. 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 Sharon Mideya sworn on the 16th January 2023 and received in court on even date.
 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 19th January 2023 and received in court on the January 20, 2023. The Respondent's/Claimant written submissions drawn by M/S Mwakio Kirwa & Company Advocates were dated 23rd January 2023 and received in court on the 26th January 2023.

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 16th December 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 95 and section 3A of the Civil Procedure Act , rule 41 of the Court of Appeal Rules 2010 and Order 50 Rule 6 of the Civil Procedure Rules. Section 95 of The Civil Procedure Act reads:- ‘Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.’ The Court finds that the cited provision is irrelevant to the instant application.
9. The court finds that the relevant provisions of the law with regard to the orders sought under the application is order 42 (6) 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.’’
10. The court applying the provisions of article 159(2)(d) of 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.’’
11. On the 1st limb of substantial loss and application being brought without unreasonable delay The Applicant pleaded under paragraph 10 and 11 of the Supporting affidavit of Joshua Kathini sworn on the 16th December 2022 that the respondent /claimant had no known source of income or financial stability, as established during the trial at examination in chief and documents on court record thus recovery of the decretal sum from the claimant may be prove futile rendering the appeal if successful nugatory.
12. 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 Vs Aquinas Francis Wasike & Another (UR) as cited



in High Court in *Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa* (2016)e KLR 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.

13. The Applicant submits that the respondent/claimant in her response 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 the inability of the respondent to refund the decretal amount for lack of income.
14. The Respondent/Claimant in their replying affidavit of 16th January 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’’
15. The Respondent relied on several decisions on substantial loss which the court looked into. 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.’
16. 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) eKLR 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) 410 where the court held that substantial loss in its various forms is the cornerstone of jurisdiction of granting stay.
17. 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.’



18. 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

19. The court on this issue finds that the applicant pleaded specifically that the claimant would not be able to pay the decretal amount if they succeed on appeal.
20. 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”
21. 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. The court finds in the instance case the burden shifted to the respondent upon the applicant pleading with specificity that the respondent had no source of income. The court finds that the claimant was evasive as per their pleading in paragraphs 14 of replying affidavit (supra). The court finds and determines that the applicant proved on balance of probabilities that the respondent had no financial capacity to refund the decretal amount 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 Vs Aquinas Francis Wasike & Another (UR)* as cited in High Court in *Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa* (2016)e KLR 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.’

22. 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 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 24th November 2022 there was no unreasonable delay in bringing the instant application filed in court on the 16th December 2022.

23. On the 2nd limb of Order 42 Rule 6 of the Civil Procedure Rules requiring security of performance as a condition for grant of stay. The Applicant submits that pursuant to the interim order of 22nd December 2022 they deposited the entire decretal amount of KES 221,147.00/-. The Respondent submits that the decretal money was not deposited in court. On perusal of the court file the court found there was a deposit receipt issued by Bungoma Law Courts on the 29th December 2022 to the Applicant with respect to this cause for the sum of KES 221,147/-.
24. The court then finds and determines that the Applicant complied with the 2nd limb under order 42 rule 6 of the Civil Procedure Rules.

Conclusion and disposition

25. 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 -vs 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”.

26. 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 and that the decretal money of KES. 221147/- was deposited in court on the 29th December 2022 in compliance with the interim order of stay. The court is satisfied that the applicant has proved sufficient cause for the court to grant stay of execution of the decree of the court. 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 -vs 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.”



27. In final disposition of the Application by way of Notice of Motion dated December 16, 2022, I hereby grant an order of stay of execution of the Judgment and/or Decree of the court dated November 24, 2022 in Bungoma ELRC Claim No.29 Of 2021 Sharon Mideya V Kaimosi Tea Estates Limited pending the filing, hearing and determination of the intended appeal to the Court of Appeal.
28. Costs of the application to the Respondent/Claimant.
29. It is so ordered.

WRITTEN, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 16TH FEBRUARY 2023.

**J. W. KELI,
JUDGE.**

In the presence of:-

Court Assistant – Brenda Wesonga

Applicant:- Wachira (Ms)

Respondent:- Kirwa (Mr.)

Court Order: Notice to issue.

