



REPUBLIC OF KENYA



**KENYA LAW**  
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**Radar Limited v Nicholas (Appeal E126 of 2022)  
[2023] KEELRC 339 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 339 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E126 OF 2022  
JK GAKERI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**RADAR LIMITED ..... APPELLANT**

**AND**

**TONUI NICHOLAS ..... RESPONDENT**

**RULING**

1. Before the court for determination is a Notice of Motion application by the applicant/appellant dated July 25, 2022 seeking orders that:-
  1. Spent.
  2. The firm of M/s Chomba and Mbugua Advocates be granted leave to come on record on behalf of the applicant/appellant.
  3. This honourable court be pleased to grant interim stay of further execution of the judgement and decree delivered by the Honourable Senior Resident Magistrate A N Ogonda (Miss) on March 31, 2022 in Milimani Civil Suit no CMEL no E1058 of 2020 awarding the respondent kshs 561,677/= pending the hearing and determination of this application.
  4. This court be pleased to grant the applicant/appellant leave to file his appeal out of time and thus deem the Memorandum of Appeal dated July 25, 2022 as being properly on record and duly filed within time.
  5. This court be pleased to stay further execution of the judgement and decree delivered on March 31, 2022 pending the hearing and determination of the appeal.
  6. Spent.



7. This honourable court be pleased to issue any other order and/or direction it deem fit to grant in the circumstances.
8. The costs of this application abide the outcome of the appeal.
2. The application filed under certificate of urgency is expressed under the Civil Procedure Rules, 2010, the Civil Procedure Act and article 159(2)(a) and (d) of the Constitution of Kenya, 2010 and other enabling provisions of the law and is based on the grounds stated on its face and supported by the affidavit sworn by Albert Moruri dated July 25, 2022 who deposes that he was the human resource manager of the appellant/applicant. That the Judgement delivered by Hon A N Ogonda, senior resident magistrate on March 31, 2022 held the applicant liable 100% and awarded kshs 561,677/= as general damages and being aggrieved by the said judgement filed an appeal out of time and prayed that the court granted leave to file the appeal out of time by deeming the Memorandum of Appeal on record as properly filed and served. That it was in the interest of justice that the orders sought be granted pending the hearing and determination of the application and appeal.
3. The affiant further stated that the respondent had commenced execution by taking out warrants of attachment dated June 21, 2022 and issued a proclamation dated July 18, 2022 and the applicant is likely to suffer irreparable loss, damage, great injustice and prejudice. The court granted interim orders on July 26, 2022 by staying further execution and granted M/s Chomba and Mbugua Advocates leave to come on record on behalf of the appellant/applicant.
4. In his Replying Affidavit sworn by Willis Wetaba Nanjendo, the respondent deposes that application was incompetent and unmerited as the judgement was delivered in the presence of both parties advocates and the respondent accorded the applicant one (1) month allowance and no reason has been given why the appeal was not lodged on time and now seek court's discretion.
5. The commencement of execution was not a ground of appeal and the applicant had not placed any material before the court for discretion to be exercised in its favour and had not addressed the provision of security.
6. That should the application succeed, the applicant be compelled to provided security of the decretal sum of kshs 760,000/= by depositing the same in a joint account opened by the advocates on record within 14 days.
7. That there was no compelling reason to grant the application in light of the judgement, and section 40 of the Employment Act and litigation had come to an end.
8. That the respondent suspected that the appeal was meant to accord the applicant room to manoeuvre as it had been sleeping.
9. That deposit of security will ensure that the applicant will not abuse the court process.
10. The respondent prays for dismissal of the application with costs.
11. When the matter came up for inter partes hearing on September 22, 2022, the parties agreed to canvass the same by way of written submissions due on October 27, 2022 and both counsels had filed.

### **Applicant's submissions**

12. The applicant's counsel addressed three issues namely; whether the delay was unreasonable and the reasons, prejudice to the respondent and chances of success of the appeal.



13. On the first issue, it was submitted that the application herein was filed within 3 months after the judgement which in the applicant's view was not inordinate. Reliance was made on the decision in *Amal Hauliers Limited v Abdulnasir Abukar Hassan* (2017) eKLR where Weldon Korir J held that 4 months was not inordinate. It was further submitted that the delay was occasioned by the applicant's counsel on record who failed to file an appeal and was unco-operative.
14. As regards prejudice to the respondent, it was urged that none had been demonstrated. The decision of Ngugi J in *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* (2018) eKLR was relied upon in support of the submission.
15. It was further submitted that the applicant was willing to furnish security in the form of a bank guarantee or deposit of the decretal sum in a joint account of the two advocates.
16. Reliance was made on the decision in *Selestical Limited v Global Rock Development* (2015) eKLR as well as *Focin Motorcycle Co Ltd V Ann Wambui Wangui & another* (2018) eKLR and others on security.
17. Counsel submitted that the respondent had not indicated in his affidavit that he could refund monies paid to him should the appeal succeed.
18. The applicant urged that it had fulfilled the conditions prescribed by order 42 rule 6 of the *Civil Procedure Rules, 2010*.
19. As regards the chances of success of the appeal, it was urged that the appeal had high chances of success as the evidence on record was that the respondent was summarily dismissed and the amount awarded was excessive and erroneous.
20. Reliance was made on the decisions in *Athuman Nusura Juma v Afwa Mohamed Ramadhan* ca no 227 of 2015 and *Julius Kamau Kithaka V Waruguru Kithaka Nyaga & 2 others* C A no 14 of 2013 to urge that it was the duty of the full court to determine whether the appeal had chances of success.
21. The applicant urged the court to allow the application and grant a stay pending the appeal.

### **Respondent's submissions**

22. The respondent's counsel addressed issues of extension of time to file appeal, law on stay and costs.
23. On extension of time, reliance was made on the decision in *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission and 7 others* (2014) eKLR on the duty of the court to exercise its unfettered discretion under rule 4 Judicially and had to consider the length of the delay, reason for the delay and chances of success of the appeal and the degree of prejudice to the Respondent if the application is granted.
24. It was urged that the application before the court did not meet the criteria prescribed by law as it was not a right but discretionary, no reason for the delay had been provided and the respondent had commenced execution and the application for extension of time had no merit.
25. As regards the law on stay, reliance was made on the decision in *Board of Trustees National Social Security Fund v Caroline Wanjiru Karori* (2020) eKLR to underscore the basis on which the court exercises its jurisdiction, namely; arguability of the appeal and that if the appeal is successful, it shall not be rendered nugatory underpinned on the propositions that whereas the successful party should not be deprived the fruits of a judgement without just cause, the aggrieved party must not be deprived of the right to challenge it in the next higher court.



26. The respondent submitted that while he had not called for the decretal sum released to him but secured, the applicant on the other hand had not offered any security. That the decretal sum ought to be guaranteed.
27. Further reliance was made on the sentiments of Odunga J (as he then was) in *Victory Construction v BV (a minor suing through next friend PMM)* (2019) eKLR to reinforce the submission.
28. The respondent contended that the appeal by the applicant was intended to keep the respondent at bay and buy the Applicant unjustified time.
29. The decision in *Kenya Shell Ltd V Benjamin Kibiru & another* (1986) was also relied upon to urge the court to exercise its discretion on the basis of the evidence on record and that substantial loss must be proved for a stay order to issue and commencement of execution did not amount to substantial loss. (See *James Wangalwa V Agnes Naliaka Cheseto* (2012) eKLR.
30. Finally, the respondent submitted that the applicant had not demonstrated ability to pay the decretal sum if the appeal was dismissed.

### Determination

31. The singular issue for determination is whether the Notice of Motion application is merited.
32. Order 42 rule 6(1) of the Civil Procedure Rules, 2010 provides that;

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 reason 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 by an order of stay 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 sub-rule (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.

33. As elaborated in *Andrew Okoko v Johnis Waweru Ngatia & another* (2018) eKLR, the law on the exercise of the court's discretion for the grant of stay of execution pending appeal is well settled.
34. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2019 is couched in mandatory terms and operationalises Rule 6 (1).
35. In the *Andrew Okoko Case (supra)*, the court stated as follows;

“... The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the



court in a particular manner. The yard stick is for the court to balance and weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to the fruits of his judgement. . .”

36. Similar sentiments were expressed by the court in *Charles Irungu V Elizabeth Kalunda Wakano* (2021) eKLR.
37. The court is guided by these sentiments and will proceed to apply the law to the facts of the instant case.
38. In paragraph 7 of the Supporting Affidavit, the applicant states that it stands to suffer irreparable loss and damage if the stay of execution was not granted since the Respondent had already commenced execution after the issue of warrants and proclamation by Nairobi Connection Services Auctioneers on 18<sup>th</sup> July, 2022.
39. The Applicant however failed to explain how the irreparable loss or damage will ensue if the stay order was not granted. See *Silverstein V Chesoni* (2002) eKLR as well as *Shell Ltd V Kabiru & another* (1987) eKLR.
40. The respondent on the other hand submitted that the decretal sum had to be guaranteed, if the stay order was granted.
41. Relatedly, the respondent did not indicate whether the amount, if paid, would be recoverable were the appeal to succeed.
42. Guided by the sentiments of the Medi J in *Charles Irungu v Elizabeth Kalunda Wakano (supra)* and the Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* (2006) eKLR, specifically on the need to ensure that the intended appeal is not rendered nugatory, the court is persuaded that applicant may suffer substantial loss. (See also *International Laboratory for Research on Animal Diseases v Kinyua* (1990) KLR and *Reliance Bank Ltd v Norlake Investments Ltd* (2014) eKLR).
43. As regards the making of the application for stay of execution, it is evident that the judgement in Milimani Commercial Courts CMCC E1058 of 2022 was delivered on March 31, 2022 and the appeal should have been filed by May 1, 2022 and the application for stay as well as file the appeal was dated July 25, 2022 more than 3 months after the judgement.
44. In *Amal Hauliers Ltd v Abdulnasir Abukar Hassan (supra)* where the judgement was delivered on March 3, 2017 and the application for stay made on July 4, 2017, Weldon Korir J was satisfied that the delay was not inordinate as *inter alia* the applicant had already filed an appeal but taken no further action.
45. The applicant alleged that the delay was occasioned by its then counsel on record who neglected to implement its instructions and was uncooperative and had to change advocates as evidenced by the prayers sought in the Notice of Motion application.
46. Guided by the proposition that mistakes of counsel should not be visited upon the client, the court is inclined to find and hold that the application herein was filed without unreasonable delay in the context of order 42 rule 6(2)(a) of the Civil Procedure Rules, 2010.
47. As regards security and as correctly submitted by the respondent’s counsel, the applicant made no mention of security in its Supporting Affidavit which is a basic requirement for the grant of a stay of execution under order 42 rule 6(2)(b).



48. Similarly and to his credit, the respondent has not prayed that the decretal sum be released to him but the same be secured as the appeal progresses which is undoubtedly a reasonable accommodation of the applicant.
49. In view of the foregoing and guided by the sentiments of the court in *Butt v Rent Restriction Tribunal* that;
- “The general principle in granting or refusing 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 the appeal court reverse the judge’s decision,” the court is satisfied that this is an appropriate case for a stay of execution pending appeal.
50. As regards leave to file the appeal out of time and deem the Memorandum of Appeal dated July 25, 2022 as properly on record, the court proceeds as follows.
51. Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides that;
1. Where any written law provides for an appeal to the court, an appellant shall file a Memorandum of Appeal with the court within the time specified for that appeal under the written law.
  2. Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.
52. As regards extension of time, the court is guided by the provisions of the section 59 of the *Interpretation and General Provisions Act*, which provides as follows;
- Where in a written law, a time is prescribed for doing an act or taking a proceeding and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.
53. Finally, Order 50 Rule 5 of the *Civil Procedure Rules* confer upon the court jurisdiction to enlarge time where it is fixed by law, on such terms as the justice of the case may require.
54. The foregoing provisions of law are clear that courts of law have discretion to extend time for the filing of an appeal as held in *Joseph Odide Walome v David Mbadi Akello* (2022) eKLR where the court stated *inter alia*,
- “ . . . It is trite that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. That discretion however, must be exercised judiciously.”
55. Applying the foregoing provisions and propositions of law to the facts of the instant case, it is clear that the applicant had taken no step to lodge an appeal before execution process commenced and desires to do so after 3 months, which the court considers not inordinate in the circumstances particularly in light of the allegation that the former counsel did not act as instructed.
56. The court is persuaded that the application for leave to file the appeal out of time is merited.
57. Consequently, the Notice of Motion Application dated July 25, 2022 is granted on the following terms:



- a. Execution of the judgement and decree delivered by the Hon Senior Resident Magistrate A N Ogonda (miss) on March 31, 2022 in Milimani Civil Suit CMEL no E1058 of 2020 awarding the respondent the sum of kshs 561,677/= is stayed pending the hearing and determination of the appeal.
- b. The applicant is granted leave to file the appeal out of time and must do so within 60 days of the date hereof.
- c. The applicant shall deposit the decretal sum in a joint interest earning account in the name of the advocates on record within 45 days from the date hereof.
- d. In the event of default of (b) or (c) or both, the stay of execution order shall lapse unless otherwise extended by the court.
- e. Costs shall be in the appeal.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

