



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Kuku Foods Kenya Limited (Cause 5 of 2020)
[2023] KEELRC 312 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 312 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 5 OF 2020
HS WASILWA, J
FEBRUARY 2, 2023**

BETWEEN

VIRGINIA NJERI KAMAU CLAIMANT

AND

KUKU FOODS KENYA LIMITED RESPONDENT

RULING

1. The application for determination is the Respondent /Applicant's, Notice of motion dated 18th October, 2022, brought pursuant to sections 1A, 1B (1) (a), 3A and 80 of the *Civil Procedure Act* Cap. 21 Laws of Kenya and all other enabling provisions of the law, seeking the following orders;
 1. That this application be heard ex-parte in the first instance and as a matter of urgency on the ground inter alia, that execution of the Decree passed herein on the 30th June 2022 against the Respondent is imminent. In the event of the execution of the said Decree the Respondent would suffer irremediable loss and damage.
 2. That this Honourable Court do order a stay of execution of the Judgement and order made by this Honourable Court on the 30th day of June 2022 pending the hearing and final determination of the Applicant's appeal.
 3. That this application be served on the Claimant /Respondent.
 4. That this Application be heard inter-parties on such date at such time as this Honourable Court may direct.
 5. That the costs of this application be provided for.
2. The basis upon this application is made is as follows;-
 - a. That the Applicant has an arguable appeal with a high probability of success.



- b. That if the said stay of execution is not granted, the Applicant's appeal will be rendered nugatory and the Applicant will suffer irreparable damage.
 - c. That unless this application is granted, the Respondent threatens to levy execution against the Applicant.
 - d. That the Applicant is ready willing and able to deposit such sum as this Honourable Court may order to be so deposited in a joint escrow account to the order of both the Applicant and the Respondent's Advocates.
 - e. That substantial loss will result to the Respondent unless the orders sought are granted.
 - f. That this application has been made without any unreasonable delay.
 - g. That this application ought to be granted in the interest of Equity and Justice.
3. The application is supported by the affidavit of Joseph Wangai Wanjuhi, the applicant's advocate. In the said affidavit, the deponent avers that the applicant upon receiving the judgement of Court, filed an application of stay dated 5th October, 2022, which they withdraw for lacking in form and filed this current application.
 4. It is averred that the Applicant intend to appeal against the entire judgment and has already requested for a copy of the judgement and typed proceedings to lodge the appeal. Further that they are apprehensive that execution will commence at any time unless stay of execution orders are granted.
 5. He urged this Court to allow the applicant's application to enable them file and prosecute the intended Appeal.
 6. The Application is opposed by the Claimant who filed a replying affidavit deposed upon on the 28th November, 2022. In the said affidavit the Claimant avers that judgement was delivered in this matter in presence of the Claimant and Respondent's Advocates, therefore that the applicant was aware of the Orders of the Court.
 7. It is stated that the applicant despite seeking for stay of execution pending appeal, it has not filed a notice of appeal to seek leave in the application to extend time to file the said Notice of Appeal, considering that time within which a notice to appeal has lapsed.
 8. The affiant contends that the applicant is wasting the Courts time because a similar application had earlier been filed and withdrawn without giving reason.
 9. The affiant avers that a Bill of costs has been filed which is yet to be determined therefore that there is no eminent danger of execution to warrant the granting of the Orders sought herein. Additionally, that the taxing master has refused to tax the Bill of costs because of this Application, which is stalling the case herein.
 10. It is stated that the application herein is non-starter, inept in law because it has been brought on the wrong provisions of law, that is section 80 of the *Civil Procedure Act*, which is on review when the application is seeking stay of execution, making the application procedurally faulty and should be struck out.
 11. She reiterated that the applicant has not filed any notice of appeal or sought extension of time to file the same, therefore the application should be dismissed with costs for being incompetent.
 12. Directions were taken on 6th December, 2022 for the application to disposed of by written submissions.



Respondent's Submissions.

13. The Claimant/ Respondent herein submitted on two issues; Whether the application merits for the grant of order of stay of execution of the judgement and order pending the hearing and determination of the applicant's appeal and Who should bear the costs of the application.
14. Before submitting on the issues identified, the Claimant submitted that the application herein is expressed to be brought under section 80 of the *civil procedure act*, which is the enabling provision on review which is not the issue for determination in the application. It was argued that the application is procedurally defective as it is premised on the wrong sections of the law and thus the jurisdiction of this Honourable Court has not been properly invoked. He argued that the Court cannot grant a stay of execution pending an appeal yet the application is anchored in the provision of the law seeking for review. To support this argument they relied on the case of *Njagi Kanyunguti Alias Karingi Kanyunguti & 4 Others Vs David Njeru Njogu* [1997]eKLR the Court of appeal held that :

“This appeal was provoked when Shields, J. declined to set aside his judgment, above, and dismissed the appellants' application in that regard. The appellants' application which bore the date 5th December, 1989, was expressed to be brought under O. IX A rule 10 and O. XXI rule 25 of the Civil Procedure Rules. We however, wish to observe at the outset that neither provision empowers a Court to set aside a judgment entered as above. The power to set aside a judgment entered pursuant to an ex parte hearing of a suit is donated by O. IX B rule 8 of the Civil Procedure Rules. It is therefore, obvious that the application was brought under an incorrect provision of the law. Although the principles upon which the Court acts in an application under O.IX A rule 10 and O. IX B rule 8 of the Civil Procedure Rules, respectively, are the same we do not consider that the both provisions are inter-changeable. If the Rules Committee had so intended there would have been no necessity for having the both provisions; and, it would have expressly said so. We, therefore, are of the view and so hold that the application was incurably defective.
15. To put more emphasize on their point, they relied on the case of *Salume Namukasa v Yozefu Bukya* (1966) EA 433 where Sir Udo Udoma CJ, as he then was observed:

‘Counsel must understand that the Rules of this Court were not made in vain. They are intended to regulate the practice of the Court. Of late, a practice seems to have developed of counsel instituting proceedings in this Court without paying due regard to the Rules. Such a practice must be discouraged. In a matter of this kind, might the needs of justice not be better served by this defective, disorderly and incompetent application being struck out.’
16. It was further submitted that the application has several contested facts but the Affidavit in support is sworn by an advocate instead of the applicant's representative.
17. The Respondent took issue with the Application as filed and submitted that the applicant is seeking stay of execution based on alleged intended Appeal, which draft has not been exhibited, neither has the applicant filed a notice of Appeal to affirm its intention of appealing the judgment of the Court and lay basis for the Orders sought in their application. Furthermore, that no notice of Appeal has been filed, neither has the applicant sought extension of time to file such a notice and appeal out of time,



therefore that the application is not merited. On this they relied on the case of *Inderjit Singh Saimbhi v Mobinder Singh Saimbhi & Another* [2010] eKLR, the Court held that

“No draft memorandum of appeal was annexed to the application. Accordingly I am not in a position to address the issue of the merits of the intended appeal if at all. See the case J.P. Machira (supra). It is incumbent upon the applicant to place before Court sufficient material upon which the Court may be able to exercise its discretion. No such materials have been placed before me. Accordingly I find the application lacking in merit. It is dismissed with costs to the Respondents.”

18. The Claimant went ahead and submitted on the substance of the application and stated that for an application for stay of execution of a decree or order pending appeal to succeed, the applicant must satisfy the conditions set out in Order 42 Rule 6(2), which are; that substantial loss may result to the applicant unless the order is made, the application has been made without unreasonable delay, and 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.
19. On whether the Applicant is likely to suffer substantial loss, it was submitted that the applicant has not demonstrated to this Court how it is likely to incur any substantial loss if the stay of execution is not granted. It was argued that the Claimant has not threatened to execute or levy for execution. Furthermore, that the Bill of costs is yet to be determined, therefore that there is no eminent danger of execution. It added that the Claimant is a man of means who is capable of refunding the decretal sum incase the intended appeal succeeds.
20. On whether the application herein has been made without unreasonable delay, the Claimant submitted to the negative and argued that judgment in the matter was delivered on 30th June 2022 in the presence of all advocates for the parties, but the Applicant chose to file the current application on 11th November, 2022 about 5 months after judgement without giving any reason for the delay.
21. It was also submitted that the applicant has not offered any security or has not demonstrated that it is willing to deposit any security to this Court as it is required by the law. It has not stated the kind of security it is offering for this Court to assess its adequacy. He argued that if the applicant was serious about the averment, it would have stated the nature of the security. From the foregoing, the Respondent submitted that the application falls short of the requirement under orders 42 Rule 6(2) of the Civil Procedure Rules, 2010. To support this, the Respondent relied on a plethora of case including the case of *Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR and the case of *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR,
22. On cost of the application, it was submitted that the applicant should bear the costs of the application and relied on the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR the Supreme Court has expressed itself as follows:

“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or Respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be



the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

23. The Applicant had not filed any submissions at the time of writing this ruling.
24. I have examined all the averments and submissions filed herein. The applicant has sought for stay of execution pending filing of an appeal.
25. The applicant has however not filed any appeal nor filed any application seeking to extend time for filing the intended appeal.
26. There is therefore no basis upon which the stay can be granted.
27. I find the application has no merit and is dismissed accordingly with costs.

RULING DELIVERED VIRTUALLY THIS 2ND DAY OF FEBRUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Konosi for Claimant – present

Respondent – Absent

Court Assistant - Fred

