



REPUBLIC OF KENYA



KENYA LAW
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**Thuita v Mount Kenya University (Cause E6519 of 2020)
[2023] KEELRC 266 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 266 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6519 OF 2020
AN MWAURE, J
FEBRUARY 2, 2023**

BETWEEN

CATHERINE WANGECI THUITA CLAIMANT

AND

MOUNT KENYA UNIVERSITY RESPONDENT

RULING

1. The respondent/applicant filed an application dated June 16, 2022 and sought the following orders:-
 1. Spent
 2. That this honourable court be pleased to grant an interim *ex parte* order of stay of execution of its judgment delivered in this matter on the December 16, 2021 pending the hearing and determination of this application
 3. That the execution of the judgment delivered in this matter on the December 16, 2021 and the resultant decree therefrom be stayed pending the filing, hearing and determination of the Applicant's intended appeal against the ruling of this court on the May 19, 2022 on the Applicant's application dated January 13, 2022.
 4. That this honourable court be pleased to issue such further orders, as it shall deem fit and just in the circumstances of this case.
 5. That the cost of this application be provided for.
2. The application is based on the ground that this honourable court delivered its ruling dismissing the Respondent's application dated January 13, 2022 on May 19, 2022 and the same was for stay of interim stay of *ex parte* judgment delivered in favour of the Respondent on the December 16, 2021.



3. The Respondent/Applicant was dissatisfied with the said ruling and appealed against the same by filing and serving the notice of appeal dated May 31, 2022 together with request for proceedings.
4. That there is a chance the claimant will proceed to execute the decree and the amount involved is colossal being Kshs 4,283,000/-.
5. They aver that the appeal has a high chance of success and would be prejudicial to the Applicant and will prejudice its cash flow.
6. He further states that the claimant has no known source of income should she be called to refund the decretal sum.
7. The supporting affidavit is sworn by Janet Kajwang the Human resource officer of the Applicant. She basically confirms what is stated in the grounds upon which the application is premised on.
8. She also further to the above states the application has been brought timeously and without any unreasonable delay.
9. She also says that the Applicant is ready to abide with any condition that this honourable court shall attach to the grant of this application.
10. The claimant Dr Catherine W. Thuita filed a replying affidavit dated June 23, 2022 where she basically said that the intended appeal is frivolous and the Applicant's action since the commencement of this suit has just been bent on frustrating her and meant to stop her getting the fruit of her judgment.
11. She says she has suffered a lot since she lost her job.
12. She says the Applicant has just been avoiding to pay her dues and to deny her the fruits of her judgment.
13. She states that should the court allow the application the Applicant should be ordered to deposit the funds in an interest earning account in the joint names of the respective advocates of the parties to the suit.

RespondentsApplicants submissions

14. The respondent/applicant in his submissions refers to order 42 rule 6(1) of *Civil Procedure Rules* which provide:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”
15. Applicant therefore submits that they stand to be condemned unheard and yet has an arguable appeal.



16. They relied in their submission to the case of *RWW v EKW* [2019] eKLR where the court held:
- “the purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.”
17. The court went further to say:
- “Indeed to grant or refuse an application for stay of execution is discretionary. The court when granting the stay however must balance the interests of the appellant with those of the Respondent.”
18. The applicant in their submissions further state that the decretal sum is colossal and Respondent has no known source of income and so is unlikely to pay the decretal sum should the Applicant succeed in the appeal.
19. Finally the Applicant says is a reputable institution of higher learning and capable of settling decretal sum should the appeal not succeed.

Claimant’s submissions

20. The claimant in her submission says since judgment was delivered in her favour the Applicant has been frustrating her and so she has suffered a lot.
21. She says the court is required in granting stay of execution to balance interests of both parties and not assist party to delay the execution of its decree. She submits that should stay be granted the Applicant should be ordered to deposit security of costs failure to do so then the stay should lapse

Decision

22. The court is set to determine whether to set aside the ruling delivered on May 19, 2022.
23. The prayer No 1 of the application dated June 16, 2022 is not tenable as the court already pronounced itself by the ruling delivered on May 19, 2022 whereby the same was dismissed.
24. The ruling delivered on May 19, 2022 the application was dismissed and the court did not set aside the *ex parte* judgment delivered on December 16, 2021 neither did the court grant a stay of execution pending the hearing and determination of the application and reasons for refusal to do so are clear.
25. For some strange reasons best known to the Applicant they are praying for the very same orders which were already dealt with and determined by the ruling of May 19, 2022.
26. The court finds the Applicants are really abusing the court’s processes and are asking the court to adjudicate on a matter it had already dealt with. This is not even an Application for review and so is not based on any legal feet. Actually this same Application herein is the same as in that application of January 13, 2022 whose ruling was delivered on May 19, 2022.
27. Section 7 of the *Civil Procedure Act* provides:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title, in court



competent to try such subsequent suit or suits in which such issue has been subsequently raised and has been heard and finally decided by such a court."

This is what is commonly referred as *res judicata*.

28. The court will not spend time going into the merits or otherwise of this application by the reasons given herein above and it is only left to declare this application is *res judicata* and so is dismissed in its entirety and costs are awarded to the claimant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF FEBRUARY 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

