



REPUBLIC OF KENYA



Odida v Owano (Appeal E039 of 2022) [2023] KEELRC 734 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 734 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E039 OF 2022
CN BAARI, J
MARCH 23, 2023

BETWEEN

CHARLES ONYANGO ODIDA APPELLANT

AND

PAUL OSIALA OWANO RESPONDENT

RULING

1. Before court is the appellant's motion dated 16th November, 2022, brought pursuant to article 159 and 165(6) of *the Constitution* and section 65 of the *Civil Procedure Act*. The Respondent seeks orders That: -
 - i. Spent
 - ii. Pending the hearing and determination of the appeal herein, there be a stay of execution of the orders in the judgment and the resultant decree of Hon. Kennedy Cheruiyot delivered on October 11, 2022, in ELRC Cause No. 46 of 2022
 - iii. The Costs of this application be in the cause.
2. The application is supported by grounds on the face of the motion and the affidavit of Charles Onyango Odida, the appellant/applicant herein, sworn on November 16, 2022.
3. The Appellant's application is premised on a judgment rendered on 1October 1, 2022, against him, and for which he has lodged an appeal against. The Appellant avers that his said appeal has high chances of success and that unless the orders sought are granted, he stands to suffer substantial loss.
4. The Appellant further avers that the Respondent is a man of straw and should he execute the judgment, the Appellant may never recover the amount of the decree should his appeal succeeds.



5. The Respondent opposed the motion vide a replying affidavit sworn on November 28, 2022. The Respondent avers that the instant application is only bent on delaying his enjoyment of the fruits of his judgment.
6. The Respondent further avers that the Appellant has not indicated his willingness to provide security, and hence his application has not met the threshold for grant of orders of stay of execution.
7. The Respondent avers that this application has been brought one month after the delivery of the impugned judgment without an explanation on the delay.
8. Parties canvassed the application through written submissions. Submissions were filed for both parties and have been duly considered.

Determination

9. Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules*, provides for stay of execution in the following words:
 - “(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 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.”
10. The general rule in an application for stay orders is that if there is no overwhelming hindrance, a stay of execution ought to be granted so that an appeal, if successful, may not be rendered nugatory. Cotton L J in *Wilson v Church (No 2)* 12 Ch D [1879] 454 held:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
11. The grant of an order of stay is an equitable remedy and which is given at the discretion of the court. In exercise of its discretion in an application for stay orders, the Court is guided by the grounds set out in the case of *Stephen Wanjobi v Central Glass Industries Ltd* Nbi HCCC No. 6726 of 1991 where the Court emphasized that:

“For the Court to grant stay of execution there must be:



- (a). Sufficient cause.
- (b). Substantial loss.
- (c). No unreasonable delay and security offered for due performance of the decree.”

12. The Appellant’s case is that he stands to suffer substantial loss if the orders are not granted for reason that the Respondent is a man of straw, and may not be in a position to refund the decretal sum should the appellant’s appeal succeed. The Respondent has not rebutted this position or in any way provided prove that he can repay the amount in issue.

13. In *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007, the court stated: -

“.....The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

14. The application herein was filed one month after delivery of the impugned judgment. Although the respondent contend that there was delay in filing, I would not consider a one month delay as inordinate. The memorandum of appeal was also filed on October 31, 2022, which period is within the 30 days provided under the law, the judgment having been rendered on October 11, 2022.

15. It is however true that the Appellant has not confirmed his readiness to provide security, but which omission in my view does not disentitle him to the orders sought.

16. On substantial loss, the decretal sum is about Ksh. 450,000. This amount is substantial considering the possibility that the Respondent may not be in a position to make a refund.

17. In view of the foregoing, I find and hold that the Appellant has demonstrated sufficient cause, substantial loss, and that the application and memorandum of appeal were filed without unreasonable delay.

18. In the upshot, an order for stay of execution of the judgment herein, is hereby granted pending hearing and determination of the appeal in the matter.

19. The costs of this application shall abide the appeal.

20. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF MARCH, 2023.**

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Otieno Aluka present for the Appellant

Mr. Bagada present for the Respondent

Christine Omolo – C/A

