



REPUBLIC OF KENYA



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**Zewde v Sauti Moja Marsabit (Sued thro' the Board Chairperson) & another
(Cause E003 of 2020) [2023] KEELRC 1061 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1061 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E003 OF 2020
ON MAKAU, J
APRIL 27, 2023**

BETWEEN

JACOB ALEMU ZEWDE CLAIMANT

AND

**SAUTI MOJA MARSABIT (SUED THRO' THE BOARD
CHAIRPERSON) 1ST RESPONDENT**

BERNARD NDAMBO 2ND RESPONDENT

RULING

1. On 28th September 2022, Marete J delivered a judgment in this matter awarding the claimant Kshs.789,250.00 as damages for unfair termination of employment. On 7th November, 2022 the respondents appointed a new Advocate and brought the Notice of Motion dated 1st November, 2022 seeking the following orders:-
 - a. Leave to change Advocate.
 - b. Stay of execution of the judgment delivered on 28th September, 2022 and all proceedings pending the full hearing and determination of the intended appeal in Court of Appeal at Nyeri.
 - c. Costs of the application to abide the outcome of the appeal.
2. The application is premised on the grounds set out in the body of the motion and the supporting affidavit sworn by the 2nd Applicant on 1st November, 2022. In brief the applicants contend that they are dissatisfied with the said judgment and they have preferred an appeal; that they are apprehensive that the claimant may levy execution against them; that the judgment is of substantial amount and the claimant will not be able to refund the same if the appeal succeeds; that the claimant has not furnished any documentary evidence to prove his financial standing; that unless stay is granted the intended appeal will be rendered nugatory and occasion irreparable loss and damage to the applicant; that the



applicants are ready, willing and able to furnish security in court by way of bank guarantee from a reputable bank within Kenya as the court may deem fit; that the application is made in good faith and will not occasion any prejudice to the claimant.

3. The claimant has opposed the application vide his own Replying Affidavit sworn on 23rd January 2023 in which he deposes that the application lacks merits and it should be dismissed; that the impugned judgment was delivered in presence of counsel for both parties; that if dissatisfied with judgment, the applicants ought to have filed a Notice of Appeal within 14 days of the Judgment as required under Rule 77 (1) and 2 of the *Court of Appeal Rules*, 2022; that the applicants never filed any notice of Appeal within the required 14 days or at all; that they have since moved to the Court of Appeal at Nyeri in Civil Application No.90 of 2022 seeking extension of time to file a Notice of Appeal against the judgment herein, vide Notice of motion dated 11th November 2022; that the motion is yet to be determined; and that in the absence of any Notice of Appeal validly filed, stay of execution of the said judgment cannot issue.
4. On 1st February 2023, the court granted the leave to the applicants to change advocate and allowed the Notice of Change of Advocates already filed in court with the consent of the claimants' counsel.

Submissions

5. Mr.Wambugu Advocate for the applicants urged for granting of stay pending appeal contending that the applicants will suffer substantial loss if stay is denied. He cited the case of *Kenya Shell Ltd v Benjamin Karuga Kiburi & another* [1986] eKLR where the Court of Appeal held that substantial loss is the corner stone for granting stay pending appeal and that is what should be prevented.
6. Further reliance was placed on the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR where the Court of Appeal held that once an applicant expresses fear of substantial loss, the evidential burden shifts to the respondent to prove his pecuniary capacity.
7. It was further submitted that the court has judicial discretion to grant or deny stay as was held in the case of *Bhatt v Rent Restriction Tribunal* [1979] eKLR.
8. As regard the delay before filing the application, it was submitted that the previous counsel was to blame for failing to act on instructions with speed. The court was therefore urged not to punish the applicants for their advocate's mistake. Reliance was placed on the case of *Vishal Stoves Suppliers Ltd v RSR Stores 2006 Ltd* [2020] eKLR where the court excused a delay of one year two months caused by a counsel who had a certificate of medical incapacitation.
9. Mr.Muriithi Advocate for the claimant opposed the application and submitted that application for stay at this stage is only considered through the lenses of order 42 rule 6 of the *Civil Procedure Rules*, 2010; that the rules requires that a Notice of Appeal has been filed; that in this case no such notice of appeal has been filed; that the applicant filed another application in the Court of Appeal seeking leave to file Notice of Appeal out of time; that the Court of Appeal is yet to determine the said application; that in the circumstances there is no pending appeal to necessitate granting of stay.
10. Reliance was placed on my decision in the case of *Jackson Kivilu v Alba Petroleum Ltd* [2016] eKLR where I held that a Notice of Appeal must be in place in order for court to issue stay of execution pending appeal. In the instant case it was submitted that the application for stay lacks legs to stand on for want of a Notice of Appeal.
11. As regards delay in filing the application for stay, it was submitted that the applicant has not explained the delay of 40 days taken before filing the application herein. Further, the blaming of the former



counsel for the delay is not contained in the Supporting Affidavit and therefore it is an allegation from the bar.

12. In his rejoinder, Mr. Wambugu admitted that the applicants have filed application before the Court of Appeal for extension of time to Notice of Appeal and that is the basis for seeking stay herein.

Analysis

13. The main issues for determination herein are:
 - a. Whether there is a competent appeal pending.
 - b. Whether the stay of execution should issue pending the appeal.

Competent Appeal

14. There is no denial that since 28th September, 2022 when the judgment herein was delivered, no Notice of Appeal was filed to impugn the same. The applicants have indeed admitted that they have filed an application before the Court of Appeal seeking extension of time within which to file a Notice of Appeal. Rule 42(1) of the *Civil Procedure Rules* provides that:-

“No appeal or second appeal shall operate as stay of execution or proceedings under a decree or order appealed from except appeal case if in so far as the court appealed from may for sufficient cause order stay of execution of such decree or order...”

15. The language used in the above mandatory provision and the purposive interpretation thereof contemplates that stay may only be granted in a case where an appeal has been preferred and upon demonstrable sufficient cause. In my view an appeal for purposes of stay pending appeal before the Court of Appeal would suffice if the applicant has filed the appeal or a Notice of Appeal under Rule 77 of the Court of Appeal Rules.
16. A notice of Appeal is supposed to be filed within 14 days of the decision against which an appeal is preferred. Without such Notice, Appeal validly filed in accordance with the Court of Appeal rules, as in this case, complicates matters for an applicant seeking stay of execution pending appeal. The logical question one would ask is, which appeal is pending?
17. This court is minded that, the purposes of granting stay is to protect a party's right to pursue and be heard on his/her appeal. Once the time to exercise that right to pursue and be heard on appeal has lapsed, the court has no basis granting stay of execution since such action would in my view amount to abuse of judicial discretion and engaging in absurdity.
18. Having said that, I believe that the applicants should seek stay of execution before the Court of Appeal under Rule 5(2) (b) of the *Court of Appeal Rules* where they will be required to satisfy the twin principles namely, that they have an arguable appeal; and that the appeal or intended appeal will be rendered nugatory if the execution of the impugned decree is not stayed.
19. In this case, I cannot grant stay of execution of the judgment of the court since there is not competent appeal or Notice of Appeal filed. Consequently, I dismiss the application with costs.
20. The Good news is that, costs have not yet been taxed by the taxing officer of the court, and therefore by dint of section 94 of the *Civil Procedure Act*, execution cannot proceed without the leave of the court.

DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF APRIL, 2023.

ONESMUS N. MAKAU



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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

