



**Koech v Price Waterhouse Coopers Limited (Cause E299 of 2020)
[2023] KEELRC 1095 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1095 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E299 OF 2020
NZIOKI WA MAKAU, J
APRIL 26, 2023**

BETWEEN

JOYCE CHEPTOO KOECH CLAIMANT

AND

PRICE WATERHOUSE COOPERS LIMITED RESPONDENT

RULING

1. This Honourable is called to make a ruling on two applications filed by the Respondent dated July 25, 2022 and January 18, 2023. In the Notice of Motion Application dated July 25, 2022, the Respondent/Applicant sought for Orders that this Honourable Court be pleased to grant an interim order for stay of execution of the Judgment delivered herein on June 22, 2022 pending hearing and determination of the application and of the intended appeal. The Application was based on grounds that the said Judgment allowed the Claimant's claim against the Respondent/Applicant who, upon being dissatisfied with the decision, filed its Notice of Appeal. Further, that the Applicant has an arguable appeal as shown in the draft Memorandum of Appeal annexed to the Affidavit in support of the application thereof. It also stated that the Claimant had also lodged a Bill of Costs scheduled for taxation on July 27, 2022. The Applicant asserted that the threat of execution was imminent and real as it was apprehensive that once the bill was taxed, the Claimant would be at liberty to proceed with execution and the intended appeal would be rendered nugatory.
2. In response to the Application dated July 25, 2022, the Claimant/Respondent filed a Replying Affidavit averring that when she lodged and filed the Bill of Costs dated July 7, 2022 before the Taxing Master, there was no application for stay of execution of the Judgment and no orders for the same were made on the said date. She contended that the Applicant had not shown how it would suffer substantial or irreparable loss if the stay of execution of judgment was not granted and had brought the said Application with delay, with intent to drag the taxation of costs awarded to her. Further, that the question whether the Applicant has arguable grounds of appeal invites this Court to reconsider the case on merits, which offends the principle of the court being functus officio. She averred that no substantial



loss may result to the Applicant if taxation of the Bill of Costs proceeded and that no evidence had otherwise been placed before Court to prove the substantial loss it stood to suffer by taxation of the Bill of Costs. That taxation proceedings are an independent mandate of the Taxing Officer and the Bill of Costs dated July 7, 2022 was not subject of appeal. That the Applicant had thus failed to meet the threshold set for granting stay of the taxation of the Bill of Costs pending the outcome of the Court of Appeal and stay of the entire Judgment pending appeal. In the end, the Claimant/ Respondent prayed that the Court dismisses the Application dated July 25, 2022 with costs.

3. In the Notice of Motion Application dated January 18, 2023, the Respondent/Applicant seeks for Orders that this Honourable Court be pleased to issue an interim order for stay of the attachment and sale of the Respondent's movable properties, as described in the Proclamation Notice issued by Icon Auctioneers, and the accompanying Warrants of Attachment and Sale, both dated January 13, 2023. The Respondent/Applicant further seeks for this Court to lift the attachment and sale of the described Respondent's movable properties and for costs of the application to be provided for. The Application is based on the grounds that the Applicant's Application for stay of execution dated July 25, 2022 was placed before the Honourable Justice Dr Gakeri for hearing on September 28, 2022 as the trial judge was away. That the Honourable Justice Dr Gakeri then directed that the matter be placed before the trial judge for hearing on November 4, 2022 and the Claimant's advocate was to undertake not to proceed with execution until hearing of the Application. That the said Application was eventually slated for hearing on January 31, 2023 as the trial judge was still away. That however, despite the professional undertaking issued by the Claimant's advocate to the Court, the Claimant has commenced execution through the aforementioned Proclamation Notice and accompanying Warrants of Attachment and Sale. It is the Applicant's assertion that the Claimant's actions are calculated to render the Application dated July 25, 2022 nugatory and have the further effect of bringing the administration of justice into disrepute, as they violate the undertaking given to the Court. That it is therefore in the interest of justice and the overriding objective of the Court that the Orders sought herein are granted.
4. In response to this Application, the Claimant/Respondent filed two Replying Affidavits sworn by herself and her Advocate on record, Ms Beryl Achieng. The two aver that the Judgment rendered by this Court seven (7) months ago has not been set aside, varied or vacated by any Honourable Court and is thus duly in force. That the Applicant has neither settled the decretal amount nor lodged its appeal at the Court of Appeal and is simply employing delay tactics to frustrate the Claimant's enjoyment of the fruits of judgment. That as per the Court Order issued on September 28, 2022, the Honourable Justice Dr Gakeri never directed her Advocate to make any undertakings as alleged or at all and that the Applicant's depositions are falsehoods only intended to mislead the Court. They further aver that the proclamation notices were rightfully done since there were no orders staying execution of the judgment and the undertaking not to execute before November 8, 2022 had lapsed by effluxion of time. Ms Achieng further avers that her undertaking to the Court on September 28, 2022 was not to execute before November 8, 2022 as shown in the copy of the court proceedings marked JC-1. That the said undertaking expired and as at January 16, 2023, it was not capable of being breached when the Auctioneers issued the proclamation notices.

Respondent/ Applicant's Submissions

5. On the Application for Stay, the Applicant submits that Order 42 rule 6(2) of the [Civil Procedure Rules, 2010](#) provides the conditions for the grant of an order of stay of execution pending an appeal as follows:

"(2) No order for stay of execution shall be made under subrule (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."

6. The Applicant submits that the factors to be considered in granting stay of execution were set out in *Butt v Rent Restriction Tribunal* [1982] KLR 417 where Madan JA (as he then was) held that whereas it is the discretion of the court to grant or refuse a stay, what has to be judged in every case is whether there exists no particular circumstances in the case to warrant an order staying execution and that as a general rule, the court ought to exercise its best discretion in a way not to render the Appeal nugatory if successful. It is the Respondent/Applicant's submission that the test was further set out in *Halai & another v Thornton & Turpin (1963) Ltd* [1990] KLR 365 where the Court of Appeal held that:

“...the Superior Court’s discretion is fettered by three conditions. Firstly the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay.”

7. The Applicant further submits that it has met the threshold set out above as it has first established sufficient cause by demonstrating its desire of pursuing an appeal through arguable grounds of appeal contained in the Draft Memorandum of Appeal. On this submission, it relies on the case of *Kenya Airports Authority v Mitu-Bell Welfare Society & another* [2014] eKLR (Civil Application No 114 of 2013 (UR 77/2013)) wherein the Court of Appeal, in rendering its ruling on an application for stay of execution pending hearing of the appeal, held that an arguable appeal is no more than one that raises a legitimate point or points deserving judicial determination and that a single arguable point is sufficient to earn an appeal such appellation.

8. Secondly, the Applicant submits that the decree in issue herein is a monetary decree and that substantial loss would occur if the Applicant is compelled to pay out this amount and then it succeeds on the eventual appeal. In this regard, it cites the case of *Focin Motorcycle Co Limited v Ann Wambui Wangui & another* [2018] eKLR wherein the Court observed that an applicant does not need to go further after establishing that they are likely to suffer substantial loss and that the appeal may be rendered nugatory. That in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR, the Court of Appeal observed that in a money decree, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed and that the amount involved does not matter as long as the Respondent cannot pay back. It is the Applicant's submission that whilst the burden of proof shifts to the Claimant/Respondent to show that she can repay the decretal sum, she has not addressed this issue in her Replying Affidavit. On this submission it relies on the case of *John Nduba v African Medical and Research Foundation (Amref Health Africa)* [2021] eKLR wherein Onesmus Makau J observed that the emerging jurisprudence from the Court and the Court of Appeal is that it would be a daunting task to expect the Applicant to prove whether or not the Respondent is a man of means as such information and evidence is only within the Respondent's knowledge. According to the Applicant herein, as it stands, the Claimant has not demonstrated to this Honourable Court that she has the means to repay the decretal sum in the event the Applicant succeeds on appeal.

9. Thirdly, the Applicant submits that since it made the Application on July 25, 2022, which was less than a month after the Court rendered its decision, this cannot be construed as unreasonable delay



and it is further willing to furnish security should it be required to do so. For the foregoing reasons and submissions, the Respondent/Applicant humbly urges this Honourable Court to grant the orders prayed for in the Stay Application and the Proclamation Application.

Claimant/Respondent's Submissions

10. The Claimant/Respondent submits that guided by the principles in *Butt v Rent Restriction Tribunal (supra)*, should this Court be inclined to grant the stay sought, the same ought to be strictly conditional. That in this case, the intended Appellant boasts of being an international audit firm and tax advisory company operating in many countries and accordingly, a forthwith realisation of the judgment will not result in any substantial loss.
11. She further submits that among other better conditions that this Court may be pleased to give, the Respondent/Applicant ought to be ordered to release to her 75% of the decretal amount plus accrued interest within seven (7) days and that the other 25% be deposited in a joint interest-earning account held by both Advocates as security. Furthermore, that the Court be inclined to further direct the Applicant to lodge and serve its Record of Appeal within fourteen (14) days, failure to which the stay orders lapse and the full amounts held in the joint account released to the Claimant in full realization of the judgment. In addition, this Court be pleased to condemn the Respondent to pay Icon Auctioneers costs in the matter. It is the Claimant/ Respondent's submission that this proposition is premised on the holding of the Court the in case of *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee)* [2019] eKLR where it was held that discretionary relief of stay or execution pending appeal is designated for the benefit of both parties so that none of the parties is disadvantaged but to ensure that substantive justice is administered fairly and justly to all parties.
12. In an application for stay pending appeal as well as an application for stay of execution, various parameters have to be met. In regard to the stay pending appeal, there is the requirement that the applicant demonstrate that substantial loss may result to the applicant unless the order is made and that 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 him has been given by the applicant. It is also important to note that a court is guided by the principle that an appeal should not be rendered academic or nugatory.
13. In this case, the applicant has made application without unreasonable delay. There is evidence that the sum in the decree would lead to substantial loss and in this case render the intended appeal nugatory. As such, the Court is inclined to order for stay of execution as well the stay pending appeal. The Claimant sought partial disbursement of the decretal sum in the ratio 75:25% but the Court is reluctant to allow this as there is no affidavit of means filed to show the Claimant would be able to refund the 75% of the decretal sum should the Respondent succeed at the Court of Appeal.
14. The Court therefore directs that the Respondent is to place by way of security for the due performance of the decree or order of this Court, the entire decretal sum in a joint interest earning account to be opened in the names of the advocates on record. The account is to be opened within 21 days of today. The costs of the applications will abide the outcome in the Court of Appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2023

NZIOKI WA MAKAU

JUDGE

