



Kenya Union of Domestic Workers Educational Institutions, Hospitals and Allied Workers v Asande & another (Cause E005 of 2020) [2023] KEELRC 1010 (KLR) (25 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 1010 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E005 OF 2020
HS WASILWA, J
APRIL 25, 2023**

BETWEEN

**KENYA UNION OF DOMESTIC WORKERS EDUCATIONAL INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS CLAIMANT**

AND

ANDREW MAOGA ASANDE 1ST RESPONDENT

EGERTON UNIVERSITY 2ND RESPONDENT

RULING

1. This ruling is in respect of the 1st respondent/ applicant's notice of motion dated March 16, 2023, filed under certificate of urgency pursuant to section 12 of the *Employment and Labour Relations Court Act*, rule 17 of the *Employment and Labour Relations (Procedure) Rules, 2016* and all other enabling provisions of law, seeking for the following orders; -
 1. Spent
 2. Spent.
 3. That this honourable court do order a stay of execution of the judgement delivered on the February 9, 2023 by the Honourable H. Wasilwa and any consequential orders arising therefrom pending the hearing and determination of the intended appeal.
 4. That the honourable court be pleased to issue such further orders as it may deem fit in the interest of justice.
 5. That the costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the affidavit of Janet Bii, the applicant's legal officer, deposed upon on the March 16, 2023.



3. In the affidavit, the deponent stated that judgement in this suit was delivered in favour of the claimant as against the respondents on February 9, 2023.
4. Being dissatisfied with the judgment of the court, the applicant filed a notice of appeal on March 9, 2023 and requested for typed proceedings and judgment for the purposes of preparing a record of appeal.
5. She stated that the applicant has a good arguable case with immense chances of success and unless, the orders are granted by the court, they are bound to suffer substantial and irreparable loss and damage.
6. He stated that among the evidence tendered before the trial court was the fact that the union secretary admitted to allowing the 2nd respondent, a shop steward to collect the union dues on their behalf, a fact which was not considered by this court in its judgement. Further that to allow the payment of the decretal sum would amount to double payment and unfair enrichment because the deducted union dues were all paid to the claimant union.
7. She contends that they might not be in a position to recover the decretal sum in the event the appeal succeeds because, they do not know the financial worth of the claimant and its ability to refund the decretal amount.
8. She avers that the claimant has already extracted a decree and instructed auctioneers to execute on their behalf, who have already proclaimed some goods and if the stay of execution orders is not granted, the appeal will be rendered nugatory.
9. The affiant stated that they have filed the application in a timely manner and are willing to abide by any terms that the honourable court may deem fit in allowing the application.
10. She added that the claimant union has a recognition agreement and an active collective bargaining agreement with the applicant and thus urged the court to allow them pursue the appeal and not condemn them to double payment.
11. She also stated that since the applicant is a government institution, they are likely to pay the costs of the appeal in the unlikely event that the appeal is thrown out.
12. The application is opposed by the claimant, who filed a replying affidavit deposed upon by Albert Njeru Obed, the Secretary General of the claimant union. In the affidavit, he stated that the entire application lacks merit and should be dismissed with costs.
13. He avers that the honourable court rightfully held that the applicant herein illegally withheld union dues it deducted from the claimant's members without any justification and failed to follow the law and remit the said dues to the designated bank account as provided for under section 50 of the [Labour Relations Act](#).
14. That the application herein is a calculated ploy, aimed at denying the claimant union, their fruits of judgment and urged the court to disallow the application.
15. He stated that the union has been in existence from 1960 and thus it enjoys a table financial status, thus will be in a position to refund the decretal sum in case the judgement of this court is overruled in the Court of Appeal.
16. The deponent took issue with the time within which the notice of appeal was served and stated that the appeal will not crystalize because the notice was served outside the 7 days' notice provided for under rule 75(2) of the [Court of Appeal Amendment Rules, 2022](#).



17. He stated that the mere fact that there are strong grounds of appeal, does not necessarily justify the granting of stay of execution orders but that the applicant need to establish all the other grounds for stay such as substantial loss, security for costs and undue delay.
18. He contends that the issues raised in the appeal are similar issue to the ones raised in the main suit which this court has considered and rendered itself on. Additionally, that it's an established principle that no order of stay can be granted in a money decree unless the court is satisfied of substantial loss against the applicant, which the applicant has failed to demonstrate.
19. The application was disposed of by written submissions with the applicant filing on the March 27, 2023 and the respondent on the March 28, 2023.

Applicant's Submissions.

20. The applicant submitted that the conditions to be satisfied in an application for stay of execution pending appeal are captioned under order 42 rule 6 of the *Civil Procedure Rules*. He argued that the applicant filed the application herein in a timely manner, it having been filed on March 16, 2023 about a month after the judgment of this court was rendered. Furthermore, that the notice of appeal was filed on February 17, 2023, demonstrating the speed within which the applicant lodged the notice and this subsequent application herein.
21. On substantial loss, it was submitted that if the judgement is allowed for execution, they are likely to suffer substantial loss, that will paralyze its operations. He argued that the applicant is a public university that is currently underfunded by the Government of Kenya and if execution is allowed to proceed and the applicant's property taken away, they will not be in a position to continue opening doors for its student and lecturers, thus running of its day to day operation will be greatly prejudiced. Also that the appeal will be rendered nugatory.
22. It was also submitted that the financial status of the respondent union is unknown and if the decretal sum is paid to them, they might not be in a position to refund it in the event the appeal succeeds. To support this argument, the applicant relied on the case of *Antoine Ndiaye v African Virtual University* [2015] eklr where the court citing the decision in the Ugandan case of *Sewankambo Dickson v Ziwa Abby* HCT-00-CC MA 0178 of 2005 which court held that;

“...substantial loss is a qualitative concept. It refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a commercial court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”.
23. Justice Gikonyo further held that;-

“The relief of stay of execution pending appeal is governed by order 42 rule 6 of the *Civil Procedure Rules*. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the *Civil Procedure Rules*, that;
 - a. The application is brought without undue delay;



- b. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered; and
 - c. 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.
24. They also relied on the decision of *Jeneth Chepkemoi Machira & another v Laikipia University* [2021] eKLR where Justice Nderitu relied on the case of in *Butt v Rent Restriction Tribunal* (1979) where the Court of Appeal opined that;
- “A court should not deny an applicant stay if there is likelihood that such denial may render the appeal nugatory. An appeal is rendered nugatory if it becomes an exercise in futility or merely academic. If for example the outcome of an appeal reverses the decision of the lower court and the appellant is not able to retrieve whatever he/she had paid in execution of the decree, then the outcome of the appeal is irrelevant and the same is nugatory. Such a situation would arise if, for example, the money paid out pursuant to a decree is not recoverable or that the status quo has shifted so much as to not afford the successful appellant *restitutio integrum*.”
25. It was submitted that the applicant has a good and arguable appeal that should be given a chance. Moreover, that the applicant and the respondent union have a recognition agreement and an active collective bargaining agreement, whose relationship should be maintained.
26. It was submitted that since the respondent union has already instructed auctioneers who have proclaimed the respondents goods, the same are likely to be sold if the orders sought are not granted by the court and the appeal will be rendered nugatory. He argued further that it is willing to abide by any terms that this court may order.
27. On security, it was submitted that, the facts in this case are unique because the applicant is a government institution and has a continued relationship with the respondent union, which serves as enough security in this case. Also that in the event the appeal fails, the applicant will be in a position to pay the costs of the appeal.

Respondent’s Submissions.

28. The respondent submitted from the onset that the applicant has not satisfied the three conditions required before orders for stay of execution are granted. He argued that the intended appeal does not raise an arguable issue in law. He added that the applicant has not demonstrated the substantial loss it will incur if stay orders are not allowed. Furthermore, that they have not demonstrated that the claimant herein will not be in a position to refund the decretal sum if the appeal succeeds. In this they relied on the case of *Carter & Sons Ltd v Deposit Protection Fund Board & 2 others* civil appeal No 291 of 1997 -where the court held that;
- “It was also contended that the intended appeal has strong probability of success. In our view, the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. A party is expected to prefer an appeal only when there are strong reasons for doing so.”
29. The respondent submitted that while exercising discretion, this court is directed to weigh the success of the litigants against the interest of the applicant and in doing so ensure that no party suffer prejudice. In this they relied on the case of *M/S Portreitz Maternity v James Karanja Kabia*, civil appeal No 63 of 1997.



30. On security, it was submitted that the applicant has not offered any security. He added that in money decree, stay of execution is normally not allowed unless the court is satisfied that substantial loss will be visited on the applicant and also that security for due performance has been given. In this they relied on the case of *Halai & another v Thornton & Turpin (1963) ltd* [1990] eklr.
31. He also submitted that the appeal will not crystalize because the notice of appeal was served outside the 7 days' notice period as provided for under rule 75(2) of the *Court of Appeal, Amendment Rules, 2022*.
32. It was submitted for the respondent in conclusion, that the applicant has not met any conditions pre-requisite for granting of stay of execution orders and argued that it is in the interest of justice that the application be dismissed.
33. The application before court is of stay. The applicants have filed an appeal currently pending before the court of appeal.
34. This court cannot deny the applicant's stay as sought as the denial may render the appeal nugatory.
35. I will therefore grant stay on condition that the entire decretal sum is deposited in a joint interest earning account held in joint names of counsels on record within 90 days.
36. In default execution may proceed.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF APRIL, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Jaoko for Claimant Respondent – present

Achieng holding brief for Masese for Respondent - present

Court Assistant – Fred

