



**Owuor v Prime Fuels (Kenya) Limited (Cause 361 of 2016)  
[2023] KEELRC 869 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 869 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 361 OF 2016  
HS WASILWA, J  
APRIL 18, 2023**

**BETWEEN**

**OLIVIA OWUOR ..... CLAIMANT**

**AND**

**PRIME FUELS (KENYA) LIMITED ..... RESPONDENT**

**RULING**

1. Before me for determination is the Respondent/ Applicant's Notice of Motion dated November 24, 2022, filed under certificate of urgency pursuant Rule 17 and 32 of the Employment and Labour Relations Court(Procedure) Rules, Order 42 rule 6 and Order 51 of the Civil Procedure Rules, sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and all other enabling provisions of the law, Seeking for the following Orders; -
  1. Spent.
  2. Pending the hearing and determination of this application interpartes, this Honourable Court be pleased to grant stay of execution of the judgement delivered on the March 17, 2022 and the consequential decree and more specifically the intended attachment and sale of the Respondent's motor vehicle as proclaimed by Charlton auctioneers on November 10, 2022.
  3. Pending the hearing and the determination of the intended appeal against the judgement and decree of this Honourable Court dated and delivered herein on March 17, 2022, this Honourable Court be pleased to grant a stay of execution of the said judgement and consequential decree.
  4. The costs of this application abide the outcome of the intended appeal against the judgement and decree of this Honourable Court dated and delivered on the March 17, 2022.
2. The application is premised on the following grounds;



- a. That this Court delivered its judgement in this matter on March 17, 2022 and found the termination of the claimant was unfair and unjustified and awarded her compensation equivalent of 10 months' salary and also costs of the suit with interest.
  - b. The Applicant being dissatisfied with the decision of the Court and being that time within which an appeal can be lodged expired, has moved the Court of appeal for extension of time to appeal the decision of this Court vide in application serialized as COACAPPL E008 of 2022, *Prime Fuels (Kenya) Limited V Olivia Owuor*.
  - c. That the said application before the Court of appeal discloses the reasons for the Respondent's delay in lodging the appeal on time and the delay in itself is not inordinate.
  - d. That the intended Appeal has reasonable chances of success as can be seen in the draft memorandum of Appeal annexed herein.
  - e. It is stated that while the parties are waiting for direction on their application from the Court of Appeal, the Respondent, decree holder, has instructed Charlton Auctioneers to execute the decree and have already attached 10 trucks belonging to the Respondent's on the November 10, 2022 for the purposes of sale.
  - f. The Applicant states that having lodged an application for extension of time to Appeal the judgement of the Court, the execution proceedings that have been commenced by the Respondent pose imminent danger to them, which is likely to render the Intended Appeal nugatory. Furthermore, that the Respondent has not disclosed his source of income and power to refund the decretal sum in the event the appeal succeeds.
  - g. He urged this Court to allow the Application for stay of execution and preserve the subject of Appeal.
3. The Application is supported by the affidavit of Dedan Wachira, the advocate ceased of the conduct of this matter on behalf of the Application. The affidavit basically reiterated the ground of the Application.
  4. The Application is opposed by the Respondent who filed a replying affidavit sworn on December 16, 2022 by Bosire Kennedy Mark, the advocate ceased of this case on behalf of the Respondent herein.
  5. In the said affidavit, the affiant stated that the application herein is an abuse of Court process because a similar application has been filed by the Applicant in the Court of Appeal on the November 23, 2022.
  6. He stated that since the time within which an appeal can be lodged has since lapse and without any orders for extension of time for the intended appeal to be filed, the Appeal is non-existent as no notice of Appeal under Rule 75(2) of the [Court of Appeal rules](#) had been filed, Thus the Orders sought are without any basis. It is his contention that the orders being sought in this court are stay Orders and not enlargement of time Orders under Order 50 of the [Civil Procedure Rules](#), 2010.
  7. He confirmed that indeed the applicant moved the Court of appeal for extension of time by the application dated November 23, 2022 but the reason given for delay are not justifiable. Furthermore, that the delay is more than Nine (9) Months which the applicant has not given explanation for the said delay.
  8. The deponent stated that the applicant has not tabled any evidence before this Court to suggest that the decree holder is not in a position to refund the decretal sum if the same is paid to him.



9. He maintained that the application herein does not have legs to stand on in absence of a substantive Appeal or a notice of Appeal.
10. The Applicant, pursuant to leave of this Court issued on the January 19, 2023, filed a supplementary affidavit deposed upon on the February 9, 2023 by Loise Wanjiku, the Applicant's Human Resource officer.
11. In her affidavit, the affiant stated that the application before court of appeal seeks for extension of time within which they can lodge a notice of Appeal and substantive Appeal, unlike the application before Court that seeks stay of execution of the judgment of this Court, therefore are not similar as alleged by the Respondent and cannot amount to abuse of Court process.
12. The deponent stated that having filed an application for extension of time and annexed the draft notice and Memorandum of appeal in this Court and the Court of appeal, the appeal process has been set on motion and the application is hinged on that intended Appeal.
13. She stated that among the reason for delay as explained in the application before Court of appeal was due to redundancy process which was going on at the Respondent and also the fact that their principal advocate resigned without properly handing over.
14. It is her case that once a party allege that the decree holder is unable to refund the decretal sum, the evidentiary burden shifts to the decree holder to prove that fact.
15. She stated also that the application before court is not seeking to reopen the suit as alleged but only seeking for this Court protection as it pursues its intended Appeal which has been tabled before the Court of Appeal. She thus pleaded with this Court to allow the application in terms of prayer 3 and 4 of the Application.
16. Direction were taken for the application to be disposed of by written submission which the Applicant filed on the February 17, 2023, however the Respondent chose to rely on her replying affidavit.

#### **Applicant's Submissions.**

17. The Applicant submitted from the onset that stay Orders do not operate in a vacuum. He argued that they have filed an application seeking for extension of time to enable them lodge the Appeal at the Court of Appeal. He submitted that even without a substantive Appeal, this Court is clothed with inherent jurisdiction to issue stay of execution Orders. To support this argument, they relied on the case of *Regina Wanjiru Njunji V Wabome Thairu* [2014] eKLR where the Court faced with a similar application held that; -

“It is not in dispute that rather than filing notice of appeal the applicant has not filed any appeal against the said order and therefore as at the time of this ruling there was no appeal pending to enable the court issue stay of execution of the orders pending the determination of the appeal. It is also not in dispute that this matter has been pending before various courts for the last 28 years and whereas no party should be denied access to justice, the right of appeal must be balanced against the equally weighty right that the successful party has to enjoy the fruits of the judgment delivered in his favour... in the interest of justice I hereby grant the applicant stay of execution of the order of my brother Justice Seron...”



18. With regard to the principles that the Court must establish in granting stay of execution Orders, the Applicant submitted that Order 42 Rule 6 of the *Civil Procedure Rules* list these conditions and cited the case of *Loice Khachendi Onyango V Alex Inyangū & Another* [2017] eklr where the Court held that;

“The relief for stay of execution is discretionary but the discretion must be exercised 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. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the *Civil Procedure Rules*. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly 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.”

19. On undue delay, it was submitted that the delay in lodging the appeal was occasioned by the redundancy process that affected its management and delayed in insurance of instruction to advocate to lodge the Appeal. Further that the Applicant’s principal advocate who had conduct of the matter resigned before properly handing over the files he was handling, delaying the matter further. He thus urged the Court not to visit the mistake of the said counsel on the Applicant. In this they cited a plethora of cases including the the case of *Vishva Stone Suppliers Company Limited V RSR Stone (2006) Limited* [2020] eklr and the case of *Geoffrey Oguna & Anor V Mohammed Yusuf Osman & 2 others* [2022] eklr.

20. On substantial loss, it was submitted that the Applicant is likely to incur huge losses if execution is not allowed as, their motor vehicles are on the verge of being sold. It was submitted that the Respondent is not a lady of means, an issue that the applicant has raised and was not controverted by the Respondent in its replying affidavit. He argued that once the applicant raised questions on her financial status, it was her duty to table evidence before the Court and justify her financial position and capability of refunding the decretal sum in the event the appeal succeeds. In this they relied on the case *Kepha Moreno Bosire v Titus Naikuni & another* [2020] eKLR, where lady justice Maureen Onyango cited the case of *National Industrial Credit Bank Limited V Aquinas Francis Wasike & Another* [2006] eklr. where the Court stated as follows;-

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

21. Accordingly, it was submitted that the Applicant is likely to suffer loss if stay of execution is not granted by this Court.

22. On security, the Applicant submitted that it is willing to abide by any conditions that this Court will grant in granting the prayer for stay of execution. To support this, they relied on the case of *Arun C Sharma V Ashana Raikundalia t/a/ Raikundalia & Co advocates & 2 others* [2014] eklr.



23. In conclusion, the Applicant submitted that it has fulfilled all the conditions pre-requisite for stay of execution Orders under Order 42 Rule 6 and urged this Court to exercise its discretion and allow their application.
24. I have examined all the averments and submissions of the parties herein.
25. The applicant seeks stay orders on the ground that he is pursuing an order to file an appeal out of time.
26. The applicants further aver that they have valid reasons as to why the appeal was not filed within reasonable time.
27. The respondents opposed this application and aver that the applicants have filed a similar application at the Court of Appeal.
28. The applicants content that the application at the Court of Appeal is for extension of time to file an appeal out of time.
29. I take note of the fact that indeed the applicants have filed an application before the Court of Appeal to file an Appeal out of time.
30. That being the position and in order to render any intended appeal nugatory, I will allow stay of execution on condition that the entire decretal sum is deposited in a joint interest earning account held in the names of Counsel on record within 60 days.
31. In default execution may proceed.

**RULING DELIVERED VIRTUALLY THIS 18<sup>TH</sup> DAY OF APRIL, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:-

Bosire for Claimant – present

Wachira for Respondent – present

Court Assistant – Fred

