



**Kimonye v Kenya Meat Commission (Cause 465 of 2017)
[2023] KEELRC 835 (KLR) (12 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 835 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 465 OF 2017
JK GAKERI, J
APRIL 12, 2023**

BETWEEN

JAMES KIMONYE DECREE HOLDER

AND

KENYA MEAT COMMISSION JUDGMENT DEBTOR

RULING

1. Before the court for determination is a Notice of Motion by the Applicant dated 14th December, 2022 filed under Certificate of Urgency seeking orders that:-
 1. Spent.
 2. The Honourable Court be pleased to stay the execution of the Judgement and decree delivered on 17th November, 2021 pending the hearing and determination of this Application.
 3. The Honourable Court be pleased to stay the execution of the Judgement and decree delivered on 17th November, 2021 pending the hearing and determination of the intended appeal.
 4. The costs of this Application be provided for.
2. The application is based on the grounds set out on its face and supported by the Affidavit of Anthony Ademba sworn on 14th December, 2022.
3. The affiant deposes that the matter proceeded ex parte without participation of the Judgement debtor/ Applicant and the application to set aside the ex parte judgement was dismissed on 5th December, 2022 and the Judgement debtor/ Applicant intends to appeal and has filed a Notice of Appeal to the Court of Appeal against the ruling delivered on 5th December, 2022.
4. That the Applicant has an arguable appeal and the application for stay was filed timeously.



5. The affiant further deposes that the Applicant will suffer irreparable damage if no stay is granted as the Applicant handles public funds and the Decree holder had no capacity to refund the same were the appeal to succeed.
6. The affiant repeats depositions made in the earlier application for stay that the applicant was unaware of the hearing and the former counsel on record did not avail himself for the hearing or defend the Bill of Costs which necessitated the previous application of Change of Advocates which the court allowed.
7. That the Decree holder claimed Kshs.10,967,566/= and the Applicant's Counter-claim was Kshs.6,011,556/= and its non-participation was attributable to a mistake of its counsel.
8. That the Decree holder had extracted the decree ready to execute the decretal sum and if the decretal sum was paid, and the appeal succeed, irreversible and irreparable damage would occur as the Decree holder had no known means to refund the decretal sum.
9. The affiant states that it was imperative that a stay of execution of the Order made on 17th November, 2021 be granted and subsequently the order made on 5th December, 2022.
10. That no prejudice will be occasioned to any party if the order of stay was granted and the Applicant stands to suffer irreparable loss if the order was not granted and the court had unfettered discretion to grant the orders sought.
11. That the counter-claim and defence raises weighty issues of law and facts.
12. Finally, the affiant states that it was in the interest of justice that the orders sought be granted.
13. In his Replying Affidavit, the Decree holder deposes that the applicant had not demonstrated the point of law it intends to place before the Court of Appeal as required by the Industrial Court Act, 2011 as it intended to appeal on facts and findings of the court.
14. The affiant states that the application does not meet the threshold in order 42 rule 7(1) of the Civil Procedure Rules, 2010 and in particular, provision of security for the due performance of the decree.
15. The affiant deposes that the grant or refusal of the orders sought was discretionary and the applicant had not established that the Decree holder was a man of straw were the appeal to succeed.
16. That the applicant has not demonstrated that it will suffer irreparable loss if the decree was executed as the process had barely been initiated and the Decree was entitled to enjoy the fruits of his judgement the fact that the applicant is a public institution notwithstanding.
17. The affiant states that discretion should not be exercised in the Applicant's favour as it would frustrate the Decree holder's quest for justice.
18. That if the orders sought were to be granted, the same should be conditional upon the provision of security for due performance by depositing the decretal sum pending the hearing and determination of the intended appeal.
19. That this matter has been pending for over 14 years and should not be delayed any further as the application herein is vexatious and a waste of time.
20. The affiant prays for dismissal of the Application with costs.



Applicant's submissions

21. Counsel for the Applicant isolated three issues for determination, namely;
 - i. Whether execution of the judgement and decree should be stayed pending the hearing and determination of this application.
 - ii. Whether stay should be granted pending the hearing and determination of the intended appeal.
 - iii. Costs.
22. On the 1st issue, counsel submitted that the Decree holder had already extracted the decree and was ready to execute.
23. Counsel then submitted on how the previous counsel on record for the Applicant did not attend court and the claim involved a colossal sum of money and public funds could be lost if the suit was undefended, a submission relied upon in the previous application.
24. That the Applicant had a strong defence and counter-claim and the applicant would not recover the decretal sum if the appeal was successful.
25. That the Decree holder had no known assets or means to refund the decretal sum.
26. That it was in the interest of justice that the judgement of 17th November, 2021 and decree be stayed for being prejudicial to the Applicant's right to be heard.
27. Counsel urged the court to be guided by order 22 rule 22 of the *Civil Procedure Rules*, that the Applicant had shown sufficient cause for stay of execution pending the hearing and determination of the Application.
28. As to whether stay of execution should be granted pending the hearing and determination of the intended appeal, counsel urged that the Applicant had already filed a Notice of Appeal in the Court of Appeal against the ruling delivered on 5th December, 2022.
29. Counsel further submitted on the proposed grounds of the intended appeal and urges the grounds set in out in the Supporting Affidavit.
30. On costs, counsel submitted that the court had discretion to award costs.
31. Untypically, counsel cited no judicial authority to reinforce his submissions.

Respondent's submissions

32. The Respondent's counsel identified three issues for determination, namely;
 - i. Whether the Applicant had met the conditions for the grant of stay of execution pending appeal.
 - ii. Whether the applicant is entitled to stay of execution of the Decree and Judgement delivered on 17th November, 2021.
 - iii. Whether the application is an abuse of court process.



33. As regard the 1st issue, counsel identified the principles governing the grant of stay of execution as set out in order 42 rule 6(2) of the [Civil Procedure Rules](#), 2010, as substantial loss, without unreasonably delay and security for the due performance of such decree or order.
34. On substantial loss, reliance was made on the decision in [James Wangalwa & another v Agnes Naliaka Cheseto](#) (2012)eKLR to urge that commencement of execution did not amount to substantial loss under order 42 rule 6 of the [Civil Procedure Rules](#), 2010.
35. On unreasonable delay, counsel urged that the decision sought to be appealed against was made 17th November, 2021 and ought to have been appealed against by 1st December, 2021 but the decision was not made until 5th December, 2022, a year and six months later and the applicant had not filed any application to regularise the Notice of Appeal and the delay had not been explained.
36. The decision in [Evans Mungasia Annob v Sierra Flora Ltd](#) (2022) eKLR was cited to urge that the application for stay was made after unreasonable delay.
37. As regards security, counsel urged that the grant or refusal of the application was discretionary having regard to the circumstances of the case and balancing the rights of the parties.
38. Counsel submitted that the applicant had neither offered nor deposited any amount as security for due performance.
39. Reliance was made on the decision in [Gianfranco Mantbi v Africa Merchant Assurance Co. Ltd](#) (2019) eKLR to reinforce the submission.
40. Counsel submitted that the applicant had not satisfied this conditions of the stay of execution.
41. On the 2nd issue, counsel submitted that the applicant had not provided sufficient material to justify a stay of execution of the judgement delivered on 17th November, 2021.
42. That the allegations that the defence and counter-claim raise triable issues was not supported by evidence as the court found in its earlier ruling on 5th December, 2022 and there was no evidence to justify the delay.
43. As to whether the application was an abuse of court process, counsel relied on section 7 of the [Civil Procedure Act](#) to urge that the issue was *res judicata*.
44. Reliance was made on the decision in [Godfrey Kinuu Maingi & 4 others v Nthimbiri Farmers Co-operative Society](#) (2014) eKLR in support of the submission that the application was an abuse of the court process.
45. Counsel submitted that an issue previously canvassed and determined by the court had found its way back for determination and was thus an abuse of the court process.
46. Finally, counsel submitted that the Applicant had not met the legal threshold for grant of the orders sought and the Memorandum of Appeal lacked merit.

Determination

47. I have carefully considered the Application, Replying Affidavit and the rival submissions by counsel. Accordingly, the issue for determination is whether the application herein is merited.
48. With regard to Application for stay of execution of the judgement and decree delivered on 17th November, 2021 pending the hearing and determination of this Application, the Respondent



submitted that this prayer had been litigated previously and was thus *re judicata* and an abuse of court process.

49. Section 7 of the *Civil Procedure Act* provides that;

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

50. In *I.E.B.C v Maina Kiai & 5 others* (2017) eKLR, the Court of Appeal itemised the specific requirements of the doctrine of *res judicata* i.e suit or issue was directly and substantially in issue in the former suit, suit between the same parties or parties under whom they or any of them claim, parties are litigating under the same title, issue was heard and finally determined in the former suit, the court that heard the former suit was competent to do so.

51. In its application dated 29th June, 2022 filed under Certificate of Urgency, the applicant prayed that the court be pleased to stay the execution of the judgement and decree delivered on 17th November, 2021 pending the hearing and determination of the application, the same order sought in the instant application.

52. When urging the grant of stay of execution in the previous application, counsel for the applicant relied on a non-existent order 46 rule 6(2) of the *Civil Procedure Rule*, 2010. Counsel further relied on order 42 rule 6(2) which addresses stay of execution pending appeal which was the case then as no appeal had been contemplated.

53. The stay sought in that application was pending the hearing and determination of the application exclusively and not for any further action to be undertaken.

54. In light of the foregoing, the court is satisfied that the issue was sufficiently dealt with in the former application and is thus *res judicata*.

55. As regards the order of stay of execution of judgement and decree delivered on 17th November, 2021 pending the hearing and determination of the intended appeal, the court proceeds as follows;

56. Order 42, rule 6(1) of the *Civil Procedure Rules*, 2010 provide for the grant of stay in cases of appeal.

57. Order 42 rule 6(1) empowers both the court appealed from and the court to which the appeal is preferred to hear and determine applications for stay of execution pending appeal.

58. Order 42 rule 6(2) prescribes the conditions necessary for the grant of stay of execution namely; substantial loss, absence of unreasonable delay and security for the due performance of the decree.

59. It is trite law that whether a court shall grant or refuse the order of stay pending appeal is a matter of discretion which must be exercised judiciously and within the mandatory provision of order 42 rule 6(2) of the *Civil Procedure Rules*, 2010.

60. In *RWW v EKW* (2019) eKLR, court stated as follows;

“Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay, however, must balance the interests of the Applicant with those of the Respondents.”



61. In this case, the Applicant states that it stood to suffer substantial loss if the order sought is not granted as the decretal sum would be irrecoverable from the Decree holder. That it is a public institution dealing with public funds and the Decree holder had no known assets or means to refund the decretal sum if the appeal was successful.
62. The Respondent on the other hand urges that no substantial loss had been shown or evidence adduced that the Decree holder was a man of straw.
63. In determining this issue, the court is guided by the sentiments of the court in *James Wangalwa & another v Agnes Naliaka Cheseto* (*Supra*) cited by the Respondent's counsel, on substantial loss. The court held as follows;

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself does not amount to substantial loss. Even when execution has been levied and completed, that is to say the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the *Civil Procedure Rules*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal . . . the issue of substantial loss is the cornerstone of both jurisdiction. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

64. (See also *Kenya Shell Ltd v Benjamin Keruga Kibiru & others* (1982 – 85), KAR 1018, *Pan African Insurance Co. Ltd v International Air Transport Association* HCCC No. 86 of 2006).
65. From the averments and evidence on record, the court is satisfied and finds that the applicant herein has not demonstrated that it stands to suffer substantial loss at this stage.
66. As regards the timing of the application, the court is satisfied that the applicant acted without unreasonable delay as the ruling sought to be appealed against was delivered on 5th December, 2022 and the instant application was filed on 16th December, 2022.
67. Finally, as regards security for the due performance of the decree, the Respondent submitted that the applicant had neither offered nor deposited any amount as security for due performance.
68. The purpose of security was aptly captured by Gikonyo J. in *Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates* as follows;

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant . . . I presume the security must be one which can serve that purpose.”

69. As regards the duty of an applicant in such a case, in *Focin Motorcycle Co. Ltd v Ann Wambui Wangui & another* (2018) eKLR, the Court stated as follows;

“Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruit of judgement. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine



the security. The Applicant has offered to provide security and has therefore satisfied this ground.”

70. In the instant application, the applicant neither offered to provide security nor submitted on it and arguably did not demonstrate good faith which would have demonstrated its willingness to forego something as it pursued the appeal before the Court of Appeal.
71. For the foregoing reasons, it is the finding of the court that the applicant has not satisfied the last requirement for the grant of stay.
72. Since order 42 rule 6(2) of the *Civil Procedure Rules*, 2010 is couched in mandatory terms, the three conditions must be satisfied for an order of stay to be granted and as found, the applicant has only satisfied one of the conditions. The court is disinclined to exercise discretion in favour of the applicant.
73. Accordingly, the Notice of Motion dated 14th December, 2022 is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF APRIL 2023

DR. JACOB GAKERI

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Dr. Jacob Gakeri

Judge

