



Kairo v John Hopkins Program for International Education In Gynecology and Obstetrics [Jhpiego] Kenya (Petition 11 of 2019) [2023] KEELRC 1248 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1248 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION 11 OF 2019**

AK NZEI, J

MAY 18, 2023

**IN THE MATTER OF: ARTICLES 20(1), (2), (3), (4), (22), (23), (27),
(28), 41(2) (B), 162 AND 165 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: CONSTITUTION OF KENYA [PROTECTION OF
RIGHTS & FUNDAMENTAL FREEDOMS] AND ENFORCEMENT OF
THE CONSTITUTION PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF: EMPLOYMENT ACT NO. 11 OF 2007

BETWEEN

DR JUDY NJERI KAIRO PETITIONER

AND

**JOHN HOPKINS PROGRAM FOR INTERNATIONAL EDUCATION IN
GYNECOLOGY AND OBSTRETICS [JHPIEGO] KENYA RESPONDENT**

RULING

1. The application before me is the respondent's notice of motion dated November 21, 2022. The following substantive orders are sought:-
 - a. that pending determination of the appeal, this Court be pleased to grant an order of stay of execution of the judgment delivered on October 13, 2022 and any resultant decree or consequential orders therefrom.
 - b. that costs of the application be provided for.



2. The application is expressed to be brought pursuant to sections 3 and 12(3) (i) and (vii) of the *Employment and Labour Relations Court Act, 2011*, Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and Order 42 Rule 6 of the *Civil Procedure Rules 2010*; and is supported by the annexed supporting affidavit of Miriam Tharao sworn on November 18, 2022. It is deponed in the said affidavit, *inter-alia*:-
 - a. that being dissatisfied with this Court’s judgment delivered on November 13, 2022, the Respondent lodged a Notice of Appeal and requested for typed certified proceedings to enable the Respondent to pursue it intended appeal.
 - b. that the Respondent has an arguable appeal with good chances of success, raising serious issues of law pertaining to redundancy.
 - c. that the Petitioner has begun the process towards recovery of the substantial decretal sum, has filed a bill of costs, and that the Respondent is reasonably apprehensive that after costs are determined, the Petitioner will commence execution for the full amount.
 - d. that the Respondent is apprehensive that if execution process proceeds, there is imminent risk that the Respondent will not recover the substantial decretal amount and costs in the event that the intended appeal is successful. That the Petitioner is not an employee of the Respondent and has relocated to the United States to pursue her further studies as stated in previous Court proceedings, and is beyond this Court’s jurisdiction.
 - e. that the Respondent has no information on the Petitioner’s assets in Kenya and/or her whereabouts.
 - f. that if the appeal is successful and the Court in the interim fails to grant an order of stay of execution, the appeal will be rendered nugatory and will be an academic exercise in futility.
 - g. that the decretal sum is substantial and the Respondent is likely to suffer substantial loss in the event that it is unable to recover the decretal sum. That the Respondent is a non-governmental organization relying on donor funding to carry out its humanitarian projects in the health sector, and that non-recovery of the decretal sum in the event that the appeal is successful will place the Respondent’s projects in jeopardy.
 - h. that the Respondent is willing to furnish security on such terms as the Court deems fit for the due performance of the decretal sum in the event that the appeal is not successful.
2. The application is opposed by the Petitioner vide grounds of opposition dated December 5, 2022 on grounds:-
 - a. that the application is fatally and incurably defective as it is founded on wrong provisions of the law.
 - b. that the application and prayers sought as currently couched are incapable of being granted in favour of the Applicant/Judgment debtor.
 - c. that the Applicant has not tendered any evidence proving that substantial loss would result unless the orders of stay are granted, noting that the claimant is a Kenyan and has now returned to the Country upon successful completion of her Doctoral Studies and residing in Nairobi.
 - d. that the Respondent on the other hand is a foreign entity with no fixed assets in the country and established under a Trust which entirely relies on donor funding for medical aid projects and not for decretal satisfaction. That the day to day management and operations of the



Trust is controlled from Baltimore in the United States of America and therefore a decision to relocate to another country cannot be controlled by this Court and the Petitioner, and that real prejudice will be occasioned upon the Petitioner not being able to enjoy the fruits of her judgment.

- e. that upon cursory glance at the draft memorandum of appeal, the judgment debtor has not demonstrated that it has an arguable appeal with a high probability of success, noting that the judgment was succinct on all issues raised and to which there is no ambiguity as to appreciation of the evidence by this Court which forms part of the purported basis of the intended appeal.
 - f. that there being no decree extracted confirms that the Respondent is not desirous to pursue their appeal, and consequently there exists no manifest danger of execution as alluded by the Applicant.
3. Both parties filed written submissions for and against the application pursuant to the Court's directions in that regard which, I have considered.
 4. The Respondent/Applicant seeks an order of stay of execution pending an appeal intended to be filed in the Court of Appeal against this Court's judgment delivered on October 13, 2022. A Notice of Appeal is shown to have been lodged/filed in this Court's Registry on October 27, 2022.
 5. The [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) are basically silent on stay of execution of this Court's orders and decrees, but Rule 32 of the Rules saves the provisions of the [Civil Procedure Rules](#) on execution of decrees and orders of this Court in this Court's said Rules. Further, Section 13 of the [Employment and Labour Relations Court Act](#) provides that a judgment, award, order or decree of this Court shall be enforceable in accordance with the Rules made under the [Civil Procedure Act](#). Rule 32 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) provides as follows:-
 - (1) The Registrar shall issue an order in execution of a decree.
 - (2) Rules on execution of an order or decree shall be enforceable in accordance [Civil Procedure Rules](#)."
 6. As already stated herein, the Respondent/Applicant is seeking a stay of execution of this Court's decree pending an intended appeal to the Court of Appeal. Order 42 Rule 6 (1) of the [Civil procedure Rules](#) is the provision of the Civil procedure Rules which provides for stay of execution pending appeal, and it provides as follows:-
 - "(1) no appeal or second appeal shall operate as a stay of execution of proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the Court from whose decision the appeal if preferred may apply to the appellate Court to have such order set aside."
 7. Under Order 42 Rule 6(4), an appeal to the Court of Appeal is deemed to have been filed when a notice of appeal has been filed under the Rules of that Court. Under the Court of Appeal Rules, a notice of appeal ought to be filed within fourteen days from the date of the judgment appealed from. This



Court's judgment was delivered on October 13, 2022, and a notice of appeal was filed on October 27, 2022. A notice of appeal was thus filed on the 14th day as the date on which the judgment was delivered is excluded pursuant to Rule 3 of Court of Appeal Rules. An appeal to the Court of Appeal is thus deemed to have been filed.

8. It ought to be appreciated that execution of a Court's decree is not an illegal or unlawful process. It is a lawful process initiated by a successful litigant. That is why, in my view, Order 42 Rule 6(2) of the [Civil Procedure Rules](#) provides:-

(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 provided by the Applicant.”

9. The application was filed timeously and it has been deponed on behalf of the Respondent/Applicant that the Respondent/Applicant is willing to furnish security for due performance of the decree. It has further been deponed on behalf of the Respondent/Applicant that the Petitioner has since relocated to the United States of America in pursuit of further studies and that the Respondent has no information relating to the Petitioner's assets in Kenya and/or her whereabouts, and that the risk of non-recovery of the decretal sum in the event of the intended appeal succeeding is real and significant. It was the Respondent/Applicant's further deposition that the intended appeal will be rendered nugatory and an academic exercise in futility if this Court does not grant the stay orders sought.

10. It was stated as follows in [Charles Mutethia Mutea & another v Ibrahim Mutua](#) [2009] eKLR as follows:

“but the critical consideration is whether the Applicants may stand to lose should they pay the decretal sum over to the Respondent and eventually the appeal were to succeed. It is this loss that must be prevented. How does this loss occur.” It will occur when the decretal sum is paid over to a party in whose favour judgment has been passed, who has no means to refund the same in case the appeal is successful.

In other words, if the person in whose favour a judgment has been passed is capable of refunding the decretal sum, then the Courts will normally not stay execution.

The other consideration in balancing the interest of the parties is whether the payment of the decretal sum will have the effect of crippling the operations or business of the Applicant. It is now settled that once the Applicant raises doubt about the Respondent's financial status, the legal burden remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed.”

11. The Court stated as follows in [Grace Wangechi Gikunju & another v Samuel Kangori Njuki](#) [2022] eKLR:-

“the duty to prove that the Respondent is in a position to refund the money was on him as it is him who knows the resources there are in his possession -see [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) (*supra*). The Respondent did not discharge that burden. All that he said is that he runs a business without disclosing the type of business he is involved in. This was not sufficient to prove that he was not a man of straw. He had



therefore not shown that he is in a position to refund the money in case the appeal succeeds. The apprehension by the appellant that they stand to suffer substantial loss is well founded.”

12. The Petitioner filed grounds of opposition whereby it was stated that she had returned to the county, but she did not swear any affidavit and/or file any evidence demonstrating her ability to refund the decretal sum, should the intended appeal succeed. The Court of Appeal stated as follows in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR:-

“This Court has said before and it would bear repeating that while the legal duty is on an Applicant to prove an 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 the Respondent or 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.”

13. The foregoing notwithstanding, it is to be noted from the evidence on record, and as stated in the Petitioner/Respondent’s grounds of opposition, that the Respondent is a foreign entity/non-governmental organization relying on donor funding and whose day to day management and operation is controlled from Baltimore in the United States of America. Any decision to either close or relocate the Respondent/Applicant’s operations to another country will be beyond the Petitioner/Respondent’s control and also beyond this Court’s control. In the event of such an eventuality, the Petitioner/Respondent will forever be prejudiced as she will lose the right to execute this Court’s decree, should the intended appeal fail. The interest of both parties must, therefore, be appropriately balanced.

14. In view of all the foregoing, I allow the Notice of Motion dated November 21, 2022 in the following terms:-

- a. there will be a stay of execution of this Court’s decree herein pending hearing of the intended appeal, but on condition that the judgment sum of Kshs 7,953,660 and interest thereon accrued so far is deposited in an interest earning bank account held jointly by counsel for both parties herein within fourteen (14) days from the date of this Ruling. The Petitioner shall nominate the bank.
- b. Subject to (a) above, the stay herein granted shall obtain for 90 days from the date of this Ruling.
- c. costs of the application are awarded to the Petitioner/Respondent.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI



JUDGE

Appearance:

Mr. Kihanga for Claimant/Respondent

Ms. Kithinzi for Respondent/Applicant

