



REPUBLIC OF KENYA



**KENYA LAW**  
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**Moseti v University of Nairobi (Employment and Labour Relations Appeal  
E014 of 2021) [2023] KEELRC 1172 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1172 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E014 OF 2021**

**JK GAKERI, J**

**MAY 16, 2023**

**BETWEEN**

**CALLEN N MOSETI ..... APPELLANT**

**AND**

**UNIVERSITY OF NAIROBI ..... RESPONDENT**

**RULING**

1. This is a Notice of Motion by the Respondent/Appellant dated March 17, 2023 for orders that:-
  1. Spent.
  2. Spent.
  3. There be a stay of the judgement and decree delivered on February 1, 2023 pending the hearing and determination of the intended appeal arising from Nairobi ELRC Appeal No E014 of 2021.
  4. The Honourable Court be pleased to make such further orders to meet the ends of justice.
  5. Costs of this Application be in the intended appeal.
2. The Application filed under Certificate of Urgency is expressed under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 42, Rule 6, Order 50 Rule 6, Order 51 Rule 1 of the [Civil Procedure Rules](#) and other enabling provisions and is based on the grounds expressed on its face and the Supporting Affidavit of Mr Bernard Njuguna who deposes that the Respondent/Applicant is aggrieved and dissatisfied with the judgement delivered by the Hon Justice Jacob Gakeri on February 1, 2023 and intended to appeal to the Court of Appeal (indicated as this court) and had filed a Notice of Appeal dated February 2, 2023.



3. The affiant further depones that the judgement is likely to be executed following extraction of the decree by the Appellant/Respondent herein as there were no orders as to costs.
4. That the application was made without unreasonable delay and the Applicant was ready and willing to satisfy the conditions of stay that may be set by this Honourable Court.

### **Response**

5. The Appellant/Respondent filed a Replying Affidavit sworn by self on April 11, 2023.
6. The affiant depones that the Notice of Motion herein is incompetent, a non-starter and an abuse of the court process and should be struck out with costs as the applicant had not advanced any valid reason(s) to justify a stay of the judgement which was entered into regularly.
7. That the applicant has not demonstrated that it would suffer substantial loss if the stay was not granted.
8. That there was neither a Proclamation nor attachment and nothing prevented the applicant from filing the appeal as envisioned and none had been filed to date.
9. The affiant further states that the application had not been made in good faith as it was a tactic by the Applicant to further stretch litigation as no material has been presented to demonstrate the prejudice the Respondent stood to suffer if the orders sought were not granted.
10. The affiant states that the court should consider the interest of the applicant and those of the Respondent who has been waiting for the judgment since 2018 when she retired from the applicant's employment.
11. It is the Respondent's case that it is unfair for the Applicant to continue actively discriminating her on payment of gratuity as other employees were paid at the rate of 31%.
12. That being a successful litigant, the Respondent was entitled to enjoy the fruits of the success.
13. The Respondent prays for the striking out of the Notice of Motion.
14. When the Notice of Motion came up for hearing on April 13, 2023, counsel for the Respondent submitted that he was opposed to the orders sought as execution had not commenced and the Application was unwarranted.
15. Counsel submitted that the Applicant was at liberty to make the application in the forum that will hear the appeal.
16. Counsel for the parties agreed not to file written submissions and a ruling date was fixed.

### **Determination**

17. After careful consideration of the Notice of Motion, Supporting Affidavit and Replying Affidavit, the singular issue for determination is whether the Notice of Motion is merited.
18. This ruling turns on whether the Applicant merits the order of stay of execution of judgement delivered on February 1, 2023 pending the hearing and determination of the intended appeal.
19. The law governing application for stay of execution is well settled.
20. Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 provides for the grant of stay of execution in cases of appeals.



21. The order empowers both the court appealed from and the court to which the appeal is preferred to hear and determine the application for stay of execution pending appeal.
22. Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, on the other hand prescribes the condition necessary for stay of execution.

These are;

- i. Substantial loss.
  - ii. Absence of unreasonable delay.
  - iii. Security for the due performance of the decree.
23. It is trite law that whether a court will grant or refuse the order of stay of execution pending appeal is an exercise of discretion which must be exercised judiciously and within the mandatory provisions of Order 42 Rule 6(2) above.

24. In *RWW V EKW (2019) eKLR*, the 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.'

25. In the instant application, the Applicant avers that it stood to suffer irreparable loss and the appeal shall be rendered nugatory.
26. Regrettably, the Supporting Affidavit makes reference to neither substantial loss nor irreparable loss or the form such loss could assume.
27. The sole ground relied upon is that 'the judgement herein is likely to be executed following the extraction of the decree by the Appellant/Respondent.'
28. Evidently, execution has not commenced, as counsel for the Respondent confirmed in court on April 13, 2023.
29. In determining this issue, the court is guided by the sentiments of the court in *James Wangalwa & another V Agnes Naliaka Cheseto (2012) eKLR* 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 property has 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 jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.'

30. (See also *Kenya Shell Ltd V Benjamin Keruga Kibiru & others (1982 - 85), 1 KAR 1018, Pan African Insurance Co Ltd V International Air Transport Association HCCC No 86 of 2006*).



31. From the averments by the Applicant and evidence on record, the court is satisfied and finds that the Applicant has not placed before the court sufficient material to demonstrate that it stands to suffer substantial loss if the orders sought are not granted.
32. The Applicant has neither alleged that if the decretal sum was paid to the Respondent, that the same would be irrecoverable nor has the decretal sum been alluded to.
33. As regards the timing of the Notice of Motion, the court is satisfied that the Applicant acted without unreasonable delay as the judgment sought to be appealed against was rendered on February 1, 2023 and the Notice of Motion herein was filed on March 22, 2023.
34. Finally, as regards security for the due performance of the decree, the Applicant made no reference to the provision of security but indicated its willingness to satisfy the conditions of stay that the court may impose.
35. Although, under Order 42 Rule, 6(2) of the Civil Procedure Rules, 2010, it is for the court to determine the nature and extent of the security to be provided, a proposal by the Applicant to provide a particular security signifies good faith as was held in *Focin Motorcycle Co Ltd V Ann Wambui Wangui & another (2018) eKLR* where 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 fruits 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.'
36. 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.'
37. The sentiments of the court in the above decisions do not apply on all fours to the circumstances of this case. Other than intimating that it was ready to abide by the conditions of stay that the court may prescribe, the Applicant's Replying Affidavit makes no reference to the provision or proposal for the provision of security which is a mandatory requirement under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.
38. In other words, the Applicant has not demonstrated good faith as it ought to. Good faith is demonstrable by the conduct of the Applicant and the extent it was prepared to go to satisfy the judgement already in force as it pursues its appeal as opposed to abiding by the conditions prescribed by the court which are mandatory, in any case.
39. In sum, the Applicant has neither offered nor indicated that it was ready and willing to provide security.
40. Needless to belabour, Order 42 Rule, 6(2) of the Civil Procedure Rules, 2010 is couched in mandatory terms and the three conditions must be satisfied and the Applicant has only satisfied one of the conditions.



41. Flowing from the foregoing, it is clear that the Notice of Motion herein is for dismissal and it is accordingly dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF MAY 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

