



REPUBLIC OF KENYA



KENYA LAW
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**Chang'awa v Gertrude's Children Hospital (Cause 2203 of 2016)
[2023] KEELRC 1101 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1101 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2203 OF 2016**

JK GAKERI, J

MAY 8, 2023

BETWEEN

JEROME CHANG'AWA CLAIMANT

AND

GERTRUDE'S CHILDREN HOSPITAL RESPONDENT

RULING

1. Before the Court for determination is a Notice of Motion by the Respondent/Applicant dated March 16, 2023 filed under Certificate of Urgency seeking Orders That:-
 1. Spent.
 2. This Honourable Court do order a stay of execution of the Ruling delivered on February 16, 2023 by the Honourable Justice Dr Gakeri and any consequential orders arising there from pending hearing and determination of this Application.
 3. This Honourable Court do order a stay of execution of the Ruling delivered on February 16, 2023 by Honourable Justice Dr Gakeri and any consequential orders arising there from pending hearing and determination of the intended appeal.
 4. The Honourable Court be pleased to issue such further orders as it may deem fits in the interest of justice.
 5. The costs of this Application be provided for.
2. The Application is based on the ground set out on its face and supported by the Affidavit of Kenneth Afwande sworn on March 6, 2023 who depones that during pendency of the review application dated



July 21, 2022, the parties consented and settled the uncontested portion of the Judgement leaving out the housing allowance component which remained contentious and was the basis of the review application whose Ruling was delivered on February 16, 2023 and the applicant being dissatisfied has taken steps to appeal the ruling and had requested for copies of typed proceedings for a complete record of appeal.

3. The affiant states that the Claimant could extract the decree at any time and proceed to execute if a stay of execution was not granted which would render the appeal nugatory.
4. That the Claimant's income status was unknown to the Respondent/Applicant and the amount paid to the Claimant would be irrecoverable should the appeal succeed.
5. That the applicant stood to lose its property through attachment and sale by auction and the instant application rendered nugatory.
6. That if the orders are not granted, the Respondent hospital's operation risk being grounded.
7. That the Respondent intends to file its record of Appeal once its advocates received certified copies of proceedings, judgement and ruling.
8. That the Respondent is willing to abide by terms that this honourable court may deem fit to order including deposit of half of the judgement sum as security in court pending hearing and determination of the intended appeal.
9. That the Claimant stood to suffer no loss or prejudice if the orders sought are granted and the application was made without inordinate delay and it is in the interest of justice and equity that the orders sought be granted as prayed.

Grounds of Opposition

10. In opposition to the Notice of Motion, the Claimant/Respondent filed grounds of opposition dated March 16, 2023 stating that;
 1. The Applicant had lodged its Notice of Appeal in this court as opposed to the Court of Appeal where the appeal lies contrary to Section 75 of the Court of Appeal Rules.
 2. The Court cannot sit on appeal of its own ruling or judgement for it had already determined the issue of stay in its ruling delivered on February 16, 2023.
 3. The Applicant ought to pursue his application for stay of execution in the Court of Appeal as the court had already passed its orders.
 4. The Respondent/Applicant's application is incompetent, misconceived and unmeritorious in that this court lacks jurisdiction to make any orders in respect of matters in the Court of Appeal which court ranks higher than the Employment and Labour Relations Court.
 5. The Applicant's Application should be dismissed with costs.
11. None of the parties filed submissions in support of their case.



Findings and Determination

12. The singular issue for determination is whether the Notice of Motion dated March 6, 2022 is meritorious.
13. It is common ground that the Claimant filed the instant case against the Respondent on October 28, 2016 seeking various reliefs including reinstatement, unpaid house allowance, outstanding salary and 4 months notice and judgement was delivered on July 6, 2022 against the Respondent for the sum of Kshs 4,244,913.60 with costs and interest.
14. On July 28, 2022 during the hearing of the Respondent's Application dated July 20, 2022 and filed under Certificate of Urgency, counsel for the application indicated that he had spoken to counsel for the Claimant/Respondent a day earlier and prayed for a mention in the new term to explore ways of compromising the application and additionally prayed for a stay of execution which the court granted upto the date of mention on October 4, 2022, a duration of more than 2 months owing to the impending vacation in August and September 2022.
15. Instructively, on the designated date of delivery of judgement on July 6, 2022, the Respondent's counsel was not present and no stay order was granted.
16. From the record, it is evident that by letter dated February 21, 2023, the Respondent/Applicant's counsel wrote to the Deputy Registrar of the court asking for certified copies of proceedings, Judgement and Ruling of February 16, 2023 for purposes of appeal and directions were given on March 1, 2023 for typing to proceed but the file was withdrawn when the instant Application was filed on March 8, 2023.
17. All this time the Claimant/Respondent took no step towards commencement of execution and extended the stay by seven days effective March 16, 2023 and there is no evidence on record that the Claimant had extracted the decree in preparation of execution.
18. In its Notice of Motion dated July 20, 2022, the Respondent/Applicant sought a stay of execution of the decree arising from the judgement delivered on July 6, 2022 and all consequential orders thereto pending the inter partes hearing of the application.
19. The court found the Notice of Motion unmerited and dismissed it with no orders as to costs via a Ruling delivered on February 16, 2023.
20. The instant Notice of Motion seeks the stay of execution of the Ruling delivered on February 16, 2023 and any consequential Orders pending the hearing and determination of the application and intended appeal.
21. The salient issue for determination is whether the Ruling delivered on February 16, 2023 can be stayed as the Ruling itself dismissed the Respondent/Applicant's Notice of Motion dated July 6, 2022 and made no positive orders capable of being stayed.
22. Perhaps, the Respondent/Applicant envisions that a stay of the Ruling would avail it the stay of execution of the judgement and decree granted on July 28, 2022 which subsisted until October 4, 2022 and was not extended on October 4, 2022 as no request for extension was made by its counsel on record.
23. Order 42, Rule 6(1) of the *Civil Procedure Rules*, 2010 provide for the grant of stay in cases of appeals. The order 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.



24. 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.
25. It is trite law that whether a court will grant or refuse the order of stay pending appeal is a matter of discretion which must be exercised judiciously and within the mandatory provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010.
26. 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 must balance the interests of the Applicant with those of the Respondent.”
27. In the instant suit, the Applicant states that it stood to suffer substantial loss as the decretal amount would be irrecoverable from the Claimant/Respondent as he had no known assets or means to refund the same if the appeal were successful.
28. The Respondent did not specifically address this issue in his grounds of objection and the applicant had not shown that the Claimant was a man of straw.
29. In determining the issue for substantial loss, the court is guided by the sentiments of the court in James Wangalwa & another v Agnes Naliaka Chesolo [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 where execution has been levied and completed, that is to say the attached property have been sold as is the case here does not of itself amount to substantial loss under Order 42 Rule 6 of Civil Procedure Rules, 2010. 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], KAR 1018 and Pan African Insurance Co Ltd v International Air Transport Association HCCC No 86 of [2006]
31. From the Supporting Affidavit and evidence on record, it is evident that the Claimant/Respondent has neither extracted the decree nor threatened execution.
32. Relatedly, the applicant has not established any other factors which show that execution will occasion substantial loss if the appeal was successful.
33. With regard to the timing of the Notice of Motion, the court is satisfied that the applicant acted without unreasonable delay as the ruling, the subject matter of the application was delivered on February 16, 2023 and the application was filed on March 8, 2023.
34. Finally, as regards security for the due performance of the decree, the applicant deponed that it was willing to abide by the terms that this Honourable Court may deem fit including deposit of half of the judgement sum as security in court.
35. The Claimant/Respondent did not address this issue.



36. In determining this issue, the court is guided by the sentiments of F Gikonyo J in *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co Advocates and 2 others* [2014] eKLR , Gikonyo J stated 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 court is also in agreement with the sentiments of the court in *Focin Motorcycle Co Ltd v Ann Wambui Wangui & another* [2018] eKLR that,

“ . . . a proposal to provide security was a mark of good faith on the part of the applicant and that it was sufficient for the applicant to state that he is ready to provide security or propose the kind of security though it is the court’s discretion to determine the security . . . ”

38. In this case, the applicant has offered to provide security and has thus fulfilled the requirement for security.

39. Since the requirements of Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010 must be satisfied individually as the provision is couched in mandatory terms, the applicant has not demonstrated substantial loss which is the foundation of the application for stay pending appeal, it is the finding of the court that the requirements of Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010 have not been complied with for a stay of execution of the ruling to issue.

40. The foregoing finding is further reinforced by the fact that the Claimant/Respondent had not threatened execution since July 6, 2022 when the judgement was delivered and did not object to the grant of stay on July 28, 2022 and acquiesced to a 7 days stay on March 16, 2023 when the applicant’s counsel applied for 30 days.

41. Finally, since the proposed appeal is to the Court of Appeal, an eminently superior court in Kenya, second only to the Supreme Court, the apex court of judicature, although Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 gives this court jurisdiction to grant the order of stay, it is only fair that the courts defers to the Court of Appeal which will have a wider spectrum of issues to consider including the Memorandum of Appeal which this court does not.

42. In the circumstances, the court is disinclined to exercise discretion in favour of the applicant.

43. Accordingly, the Notice of Motion dated March 6, 2023 is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH 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 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

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