



**Wambogo v Radar Security Ltd (Cause 1142 of 2018)
[2023] KEELRC 1188 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1188 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1142 OF 2018
AN MWAURE, J
MAY 12, 2023**

BETWEEN

BENSON WAMAYA WAMBOGO CLAIMANT

AND

RADAR SECURITY LTD RESPONDENT

RULING

1. The Respondent/ Applicant by the Notice of Motion dated the December 20, 2022 filed under sections 1A, 1B, 3A and Order 42 of the [Civil Procedure Rules](#), 2010 is seeking for the following orders;
 - a. Spent
 - b. That leave be granted to the Respondent to file Notice of Appeal and Appeal out of time
 - c. That the Honourable Court be pleased to order for Stay of execution of the judgment and or decree made on the November 17, 2022 pending the hearing and determination of the intended Appeal herein.
 - d. Costs of the Application be provided for
2. The Application is supported by the grounds on the face of the Application and the affidavit of the Human Resource Manager, Rina Ondego. It is deposed that should the judgment herein proceed to execution; the Respondent would suffer irreparable loss and grave prejudice.
3. That the ability of the Respondent/claimant to refund the decretal amount is unknown and indeed there are triable issues with high chances of success and hence on failure to stay execution proceedings thereon, the Appeal stands to be rendered nugatory.



4. The claimant/Respondent filed the replying affidavit dated the 25th day of May 2023 and deposes that the application as filed is merely a scheme tailored by the Applicant to continue denying him what is lawfully owed, as clearly determined by the honourable court.
5. That the honourable court lacks jurisdiction to grant extension of time to file the Notice of Appeal as sought in the Notice of Motion. The Claimant says record of appeal has not been filed and endorsed by the Court of Appeal and neither has any evidence of the procurement of certified typed proceedings and judgment been shown. The intended appeal has not been served upon him personally or through his advocates on record.
6. The claimant/Respondent states that he is now gainfully employed and that he has managed to secure multiple investments and is able to reconstitute the applicant in the event of success of the Appeal.
7. The Respondent/applicant has not shown the court that it intends to deposit the judgment sum as security of costs immediately to demonstrate their seriousness. The claimant/respondent says that the substantial loss and prejudice that would be suffered has not been shown to the court.
8. The court gave directions to have the application canvassed by way of written submissions on the February 23, 2023.

Respondent/applicant's Written Submissions

9. The Respondent/applicant submits that the claimant/respondent has not filed the affidavit of means to confirm his financial means or status thus there is a risk of failure to compensate the Applicants should the intended Appeal succeed. The Applicant relied on the case of G n Mwema P/A (sic) Mt View Maternity and Nursing Home versus Miriam Bishar and Another 2018.
10. The applicant further contends that the principles guiding the grant of stay of execution pending Appeal are well settled and are provided under order 42 rule 6 (2) of the Civil Procedure Rules which provides that: No order of stay of execution shall be made under sub rule (1) unless 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.
11. Further that stay may only be granted for sufficient cause and that the court in deciding whether or not to grant the stay and in the light of the overriding objective stipulated in section 1 A and 1 B of the Civil Procedure Act, the court is no longer limited to the foregoing provision.
12. That in the instant case the Applicant stands to suffer substantial loss of over ksh 269,699.93/= as well as the costs and interests if stay is not granted. On the other hand, the Respondent/claimant has not demonstrated that it is able and willing to refund the same if the Appeal succeeds.
13. There were no submissions in the file and online for the claimant/Respondent.

Determination

14. The extension of time to lodge appeals from the superior court, is a different jurisdiction altogether covered by Rule 4 of the Court of Appeal Rules. The Court decidedly has no jurisdiction to entertain application for extension of time to file an appeal before the Court of Appeal. It is this Court that delivered the judgment being appealed from, and so it is the Court of Appeal to decide whether to grant an application for the extension of time to file an appeal under its Rules.



15. As for stay of execution the principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides:

“No order for stay of execution shall be made under sub-rule (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 given by the applicant.

16. Section 1A(2) of the [Civil Procedure Act](#) 2010 provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objectives are; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

17. The court in [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR, held that:

“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 [CPR](#). 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.”

18. Having pronounced myself on the prayer to extend time to appeal out of time the court finds there will be no gain in dealing with stay of execution at this point much as this court has jurisdiction and discretion to do so until the appellant succeeds in obtaining leave to appeal out of time. The court therefore holds that since it has no jurisdiction to grant prayer (b) of the notice of motion and since prayer (c) is closely tied to prayer (b) the respondent is better advised to file his application in the right court which has competent jurisdiction to determine his application in full. Therefore the respondent’s application dated December 20, 2022 is dismissed for the reason given and costs will be in the cause.

Orders accordingly.

Dated, Signed and Delivered virtually in Nairobi this 12th day of May 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

