



**Shree Swaminarayan Academy v Odedo (Appeal E063 of 2022)
[2023] KEELRC 1997 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1997 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E063 OF 2022**

**M MBARŪ, J
JUNE 29, 2023**

BETWEEN

SHREE SWAMINARAYAN ACADEMY APPLICANT

AND

KENNEDY OCHIENG ODEDO RESPONDENT

RULING

1. The appellant filed application dated April 20, 2023 filed under the provisions of section 12(1) and (3) of the Employment and Labour Relations Court Act, rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and section 1(a), (b), (3), (3)(a) of the Civil Procedure Act, order 22 rule 22 and order 42 rule 6 of the Civil Procedure Rules and seeking for orders that;

This court be pleased to grant orders for stay of execution of the judgment delivered on August 25, 2022 by Hon Maureen Nabibya (SPM) and any orders arising thereto pending the hearing and determination of appeal No E063 of 2022

This court be pleased to allow the appellant's memorandum of appeal dated September 28, 2022 as properly on record.

2. The application is supported by the supporting affidavit of Morris Mrema Ndurya the supervisor in the security department of the appellant and aver that in a judgment delivered on August 25, 2022 the trial court awarded the respondent herein Kshs 347,400 in the absence of both parties. The judgment had been due for delivery on March 3, 2022 but was not issued and the appellant only received a letter from the respondent on September 20, 2022 that the court had delivered judgment. The appellant had no chance to arrest the execution pending its appeal since they were not present when the judgment issued.
3. Ndurya also aver in support of the application that the appellant filed application dated October 19, 2022 seeking stay of execution of the judgment delivered on August 25, 2022 but this application



was dismissed on April 6, 2023 hence this application seeking stay of execution to allow the appellant prosecute the appeal filed herein under ELRC appeal No E063 of 2022 which has high chances of success and will be rendered nugatory if stay orders are not issued.

4. The respondent filed the replying affidavit of the respondent and aver that upon delivery of judgment on August 25, 2022 he sent a letter dated September 20, 2022 to the appellant to settle the decretal sum but there was no response. Despite follow up and demand to pay, there was no response. At the lapse of 30 days allowed to lodge an appeal, the appellant did not settle the due amount.
5. The respondent also aver that on October 19, 2022 the appellant filed application seeking stay of execution at the lower court, this was after two months since delivery of judgment. This application was dismissed in a ruling delivered on April 6, 2023.
6. The instant application seeking stay of execution to allow the appeal be heard and determined is in a vacuum since there is no competent appeal pending. The appellant has always been aware of the judgment delivered on August 25, 2023 but never made application to have the time extended or that the appeal be admitted out of time. The appellant has not complied with the conditions required for issuance of stay pending an appeal by providing sufficient cause or security for the due performance of the judgment if the appeal is not successful which renders the application incompetent and should be dismissed with costs.
7. Both parties attended and made oral submissions.
8. The appellant submitted that judgment of the lower court was not delivered in time as initially required and the date of August 25, 2022 was not brought to their attention. This was the electioneering period and the respondent being a school was closed at the time and only after the presidential inauguration did the matter come to the attention of the appellant and upon reading the judgment, aggrieved, there are good grounds of appeal. To avoid prejudice, the appeal already filed should be heard on the merits. The appellant is ready and willing to deposit security. The appeal filed out of time, the court has the discretion to apply section 79G of the [Civil Procedure Act](#) and allow the appeal out of time. The record of appeal has been filed and served.
9. In response, the respondent submitted that there is no appeal upon which the instant application is premised upon. The appeal is filed out of time and the appellant failed to apply for extension of time within which to file its appeal. On the substantive issues, stay of execution can only issue where there is sufficient cause which the appellant has failed to establish. There is no security for costs offered to justify the court to issue a stay of execution.

Determination

10. Stay of execution pending appeal is regulated under the provisions of order 42 rule 6 of the [Civil Procedure Rules](#). An applicant seeking stay of execution pending hearing and determination of the appeal must satisfy the conditions outlined in the case of in [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, that;

... 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

11. once judgment has issued, it is lawful. A successful party must be allowed to enjoy the fruits of his judgment unless an application seeking stay of execution pending hearing of an appeal can demonstrate the substantial loss to be suffered and that where stay of execution is not allowed, the appeal shall be rendered nugatory.

12. In the case of *RWW v EKW* [2019] eKLR the court considered the purpose of a stay of execution order pending appeal, in the following terms;

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

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 appellant with those of the respondent.

13. At this stage, for the court to be satisfied that an applicant seeking stay of execution pending hearing and determination of an appeal is warranted, there must be a competent appeal, there must be a sufficient cause established by the applicant, and there must be offer of security for the due performance of the judgment if the appeal is not successful.

14. In employment and labour relation disputes, the right to appeal is secured under section 17 of the *Employment and Labour Relations Act, 2011*. An aggrieved party is required under rule 8 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* to lodge an appeal within 30 days from the date the challenged judgment issued;

8.

(1) Where any written law provides for an appeal to the court, an appellant shall file a memorandum of appeal with the court within the time specified for that appeal under the written law.

(2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.

15. An appeal must be filed within 30 days.

16. In this case judgement was delivered by the lower court on August 25, 2022. for the reasons given, the appellant was not able to file the appeal due to various reasons until September 28, 2022.

17. There is a time lapse of 3 days exceeding the 30 days required to file an appeal.

18. To assist the appellant, the rules of the court where not sufficient must be read together with the *Civil Procedure Act* and the rules thereto and section 79G of the *Civil Procedure Act* provides that;

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period



any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

19. Where there is good cause, an appellant is allowed to move court and give reasons why the appeal was not filed in good time and hence seek time extension to do so. Filing an appeal out of time without leave and then seek stay of execution cannot sanitise an incompetent appeal and the basis of which, a stay of execution is premised on.
20. The record of appeal too is not sufficient to allow an incompetent appeal filed out of time.
21. Accordingly, the appeal herein being incompetent, stay of execution is not warranted. Application dated April 20, 2023 is hereby dismissed. Costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

