



**Mutisya v Kenya Bankers Savings & Credit Co-operative Society Limited
(Cause E6534 of 2020) [2023] KEELRC 1470 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1470 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6534 OF 2020
NJ ABUODHA, J
JUNE 16, 2023**

BETWEEN

JAMES MUTUA MUTISYA CLAIMANT

AND

**KENYA BANKERS SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

RULING

1. By a notice of motion dated March 8, 2023, the respondent/applicant sought two main orders namely; stay of execution and the decree and judgment of the court delivered on September 29, 2022 pending the hearing and determination of an intended appeal. Second, the applicant sought orders that the honourable court extends time to file the Notice of Appeal out of time.
2. The application was supported by the affidavit of one Cynthia Omunga, the advocate for the applicant who deponed on the main that;
 - a. That I am an Advocate of the High Court of Kenya, practicing as such at the Firm of Musyoka Murambi &. Associates and in conduct of this matter on behalf of the Applicant, hence competent and authorized to swear this affidavit.
 - b. That the judgment that the Applicant wishes to appeal against, was delivered on September 29, 2022, where the Honorable Judge awarded the Respondent a sum of Kes 834,346.62 citing unfair and unlawful termination of his employment by the Applicant.
 - c. That the Applicant is aggrieved by the said judgment on grounds that the Court failed to consider the overwhelming evidence on record showing that the Respondent was lawfully terminated under the Employment laws.



- d. That this Honorable court be pleased to grant stay of execution pending the hearing and determination of this application and the intended appeal, as the Respondent's through his agents Eshikoni Auctioneers, issued the Applicant with a proclamation notice and warrants of attachment dated 1 March 2023. (Annexed hereto and marked CO-1 is a true copy of the Proclamation Notice and Warrants of Attachment).
 - e. That the proclamation notices and warrants of attachment lapsed on March 8, 2023, and the auctioneers will proceed with selling the Applicant's attached property through public auction.
 - f. That in the event the auctioneers proceed with the sale, the purpose of the intended appeal is likely to be rendered nugatory.
 - g. That the Applicant will suffer substantial loss if the sale proceeds as the Respondent is a man of straw and the Applicant may experience unnecessary difficulty in recovering the said amount, in the event the appeal is allowed.
 - h. That after Judgment was delivered on September 29, 2022, the Applicants embarked on internal discussions to consider all circumstances and pass a resolution on whether they intended to file an appeal.
 - i. That the Applicants finally settled on filing an appeal and instructed as to file an appeal on March 7, 2023.
3. The claimant opposed the application and filed a Replying Affidavit in which he stated in the main that;
- a. That I am the Claimant/Respondent herein seized of the facts of this matter hence competent to swear this affidavit.
 - b. That the Respondent/Applicant is not deserving the orders sought as shall be demonstrated hereunder.
 - c. That there is no appeal filed in the Court of Appeal to warrant consideration of the orders of stay sought.
 - d. That the application before the Honourable Court is an afterthought, alien in law, fatally defective, incompetent and must fail with costs.
 - e. That the instant application is orchestrated with malice brought in bad faith and only intended to further prevent me from enjoying the fruits of the judgment delivered on September 29, 2022 and ought to be refused with costs.
 - f. That I am informed by Mr A K Nyairo, Advocate which information I verily believe to be true and correct that; This Honourable Court has no power to extend time within which to file a Notice of Appeal. That the Respondent/Applicant's application does not meet the requirements of Order 42 Rule 6 of the *Civil Procedure Rules, 2010* to warrant consideration and grant of the prayers sought. No basis has been laid to warrant the grant of the orders sought. The orders being sought are not available to the Respondent/Applicant as there is nothing to stay since execution has been levied. The successful party before this court has a right to benefit and/or enjoy the fruits of this court's judgment. The provisions of the law cited on the face of the application are alien to the prayers sought and therefore none can legally issue. Equity aids the vigilant and not the indolent.



- g. That I am further informed by Mr A K Nyairo, Advocate which information I verily believe to be true and correct that the instant application cannot be allowed to see light of day for want of compliance with the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 because; The application has been brought close to six(6) months after the delivery of the judgment. No plausible reason has been given as to why the application was not filed promptly. The Respondent/Applicant has not offered any form of security for due performance of this Court's decree. The Respondent/Applicant has not demonstrated any substantial loss that they are likely to suffer if the Court's decree is given effect.
- h. That I am further informed by Mr A K Nyairo, Advocate which information I verily believe to be true and correct that this Honourable Court has no power to extent time within which to lodge a Notice of Appeal as this is a preserve of the Court of Appeal pursuant to the provisions of Rule 4 of the [Court of Appeal Rules, 2022](#).
- i. That the matter came up for judgment on September 29, 2022 when after the delivery of the judgment, the Respondent/Applicant's advocate sought stay of execution pending appeal but the Honourable Court advised the Respondent/Applicant's counsel to file a formal application for the Court's consideration. No such application was filed and no notice of appeal was filed within the stipulated time and no reasons have been advanced to explain the omissions.
4. The court has reviewed and considered submissions by both counsel for and against the application. The court has also considered authorities relied on by Counsel in support of their respective submissions and is grateful for the industry of counsel.
5. The principal parameters to be taken into account before the court grants and or refuses an order for stay of execution are contained in Order 42 Rule 6(2) of the Civil Procedure Rules. The applicant should satisfy the court that substantial loss may result to him unless the order is made, the application has been made without unreasonable delay and finally that the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
6. Substantial loss has been addressed by the court in the case of [James Wangalwa & another v Agnes Naliaka Chesoto](#) [2012] eKLR where the court stated:
- “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 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.”
7. This was further considered in the case of [Eric Mutuma & another v Mercy Mbae](#) [2021] eKLR the court held that:
- “Substantial loss is the corner stone in an application for stay. Evidence must be tendered, either in the matter of paying damages awarded would cause difficulty to the applicants



themselves, or that they would lose money if the payment is made to the respondent who would otherwise be unable to repay back should the appeal be successful.

8. On the issue of delay, Counsel for the applicant has stated that the respondent being a sacco society, the decisions making process took time. This explanation though sounds plausible, the court frowns upon the same because a judgment of a court of law is an important matter that requires urgent attention especially where it orders that money be paid at the risk of execution in default.
9. Whether to grant or refuse a stay of execution under Order 42 Rule 6(2) is entirely within the discretion of the Judge seized of the matter. Of course, such discretion must not be exercised whimsically but judiciously which is why Order 42 Rule 6(2) gives broad but not exclusive parameters within which the discretion should be exercised.
10. The applicant has indicated its willingness to deposit the decretal sum in a joint interest earning account in the name of both Counsels. The court will therefore so order as a condition for granting stay.
11. On the issue of extension of time to file a notice of appeal, the rules of this court do not have provisions on appeals hence the issue is left entirely to the discretion of the Judge. The practice has been to borrow from the Civil Procedure Act and Rules Section 95 of the Civil Procedure Act allows for extension of time. Further Section 7 of the Appellate Jurisdiction Act allows the High Court to extend time for giving notice of intention to appeal.
12. From the foregoing observations, the court will grant the applicant leave to file a notice of appeal within 30 days of this ruling and further that a conditional stay of execution is hereby granted that the Respondent/applicant shall deposit the decretal sum in a joint interest earning account to be opened for that purpose in the name of Counsel for both parties within 30 days of this ruling in default, execution shall proceed. Costs shall abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF JUNE 2023

ABUODHA J. N.

JUDGE

In the presence of:-

..... **for the Claimant**

.....**for the Respondent**

