



Helio Polymer Enterprises Limited v Lukhumwa (Employment and Labour Relations Appeal E012 of 2022) [2023] KEELRC 1362 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1362 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E012 OF 2022**

HS WASILWA, J

JUNE 8, 2023

BETWEEN

HELIO POLYMER ENTERPRISES LIMITED APPELLANT

AND

FERDINAND SHAKABA LUKHUMWA RESPONDENT

RULING

1. Before me for determination is the Appellant/ Applicant's Notice of motion dated March 9, 2023 filed under certificate of urgency and brought pursuant to Article Sections 3, 3A, 79G and 95 of the Civil Procedure Act, Order 42 Rule 6(1), (2) & (6) and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, seeking the following orders; -
 1. Spent.
 2. That this Honourable Court be pleased to grant stay of execution of the Judgement/Decree issued herein on the May 31, 2022 in Nakuru CMELR No 227 of 2019 pending the hearing and determination of the Application.
 3. The Honourable Court be pleased to enlarge/extend time within which to deposit the decretal sum in a joint interest earning account by 21 days.
 4. That this Honourable Court be pleased to issue any other order as it may deem fit just and appropriate.
 5. That the costs of the application be provided.
2. The application is supported by the grounds on the face of the application and the affidavit sworn on March 9, 2023 by Peter Chege, the advocate ceased of the conduct of this matter and based on the following grounds: -



- a. That judgement in the trial Court case Nakuru CMELRC No 227 of 2019 was delivered on the 31st May, 2022 in in favour of the Respondent herein as against the Appellant, which the Appellant herein was dissatisfied with and preferred this Appeal.
 - b. It is stated that the trial Court issued stay Orders for 21 days and for the entire decretal sum to be deposited in a joint account, which days have now expired and the they are apprehensive that the Respondent will commence execution proceedings.
 - c. The Appellant stated that the delay in depositing the decretal sum and filling this Application was occasioned by the change of directorship at the Appellant company and thus was not intentional
 - d. He added that the Appellant was unable to deposit the decretal sum within the stipulated timeframe because of the need to also change the signatories of the Bank accounts. Nonetheless, that the Appellant has since issued a cheque in the joint names of the Advocates in compliance of Court direction.
 - e. It is stated that the Respondent may not be able to recover the decretal sum in the event that the Appeal succeeds unless stay of execution orders are issued by this Court.
 - f. He urged the Court to extend time to allow them deposit the entire decretal sum into a joint account, because the money in issue is a colossal sum.
 - g. It is averred that the Respondent have taken out proclamation and warrant of attachment against the properties of the Appellant which they face imminent execution unless the Application is allowed. Further that if the Application is not granted, the Appellant is likely to suffer loss and the Appeal rendered an academic exercise.
 - h. They urged this Court to grant the Orders sought to protect the interest of the Applicant and meet the end of justice.
3. In opposing the application, the Respondents filed a replying affidavit by Betty Mwangi, the advocate for the Respondent, sworn on the March 29, 2023. The replying affidavit is based on the following grounds;
- a. That the application herein is bad in law, unmerited and an abuse of Court process because the appellant has failed to show any reasonable steps taken to comply with the stay Orders issued by the trial Court on the November 25, 2022.
 - b. She stated that the claim that the failure to comply with Court direction was because of change of directorship, was not backed up with any evidence. Further that if indeed there was any change of directorship, the Applicant should have communicated to them in response to their several letters demanding the payment of the decretal sum.
 - c. She stated that the cheque issued by the Appellant on February 28, 2023 was overtaken by events since the 21 days stay period lapsed on December 17, 2022.
 - d. It is averred that the Memorandum of Appeal in this case was filed on June 16, 2023, while the stay Application in the trial Court was delivered November 25, 2022, But no record of Appeal has been filed, intimating that the Appellant are not keen in speeding up the hearing of this appeal.



- e. It is her case that the Appellant did not invoke the provisions of section 44 of the *Employment Act* to bring the employer-employee relationship to a close, therefore that the Appeal has nil chances of success.
 - f. The affiant stated that the Appellant has approached this court with unclean hands and the remedies sought being equitable should not be granted because the Appellant has not demonstrated why this Court should allow the Application herein. Further that the Respondent continue to suffer prejudice at the hands of the Appellant who is not keen to meet timelines granted by the Court in prosecuting its Appeal.
 - g. The affiant stated that in the event that the Court allows the Application, then the Appellant should be condemned to pay auctioneers fees and interest of the decretal sum at the rate of 5% from the date the stay of execution orders lapsed on December 17, 2022, together with any other orders that this Court may deem fit to grant.
4. The application was disposed of by written submissions with the applicant filing on the April 18, 2023 and the Respondent on the April 25, 2023.

Applicant submissions.

5. The applicant submitted on two issues; Whether the application for stay of execution of the judgement/decree is merited and whether the Honourable court should grant an extension for the deposit of the decretal sum in a joint interest account.
6. On the first issues, the Applicant relied on the case of *RWW v EKW* [2019] eKLR, which considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

7. The Applicant then listed the condition to be satisfied before stay application is allowed by relying on the decision in *MFI Document Solutions Ltd v Paretto Printing Works Limited* [2021] eKLR where the court in discussing applications for stay of execution and what considerations are required adopted the requirement listed in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 in which the court held that;-

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
8. On that basis, it was submitted that the powers of discretion that the court is conferred in determining applications for stay of execution should only be a resolution of last resort or some overwhelming hindrance that causes the appeal to be rendered nugatory. He argued that the Honourable court ought not to deny a stay of execution to appeal when a party has demonstrated on reasonable grounds.
 9. This view according to the Applicant was held in the Court of Appeal decision in [Richard Nchapai Leiyangu v IEBC & 2 Others](#), Civil Appeal No 28 of 2013 the court expressed itself as follows:-

“we agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship results from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the cause of justice”
 10. Accordingly, that the applicant did not have the intentions of frustrating the respondent from enjoying his fruits of judgement, but rather sought to exercise their right of appeal. It is further noted that the appellant/applicant had every intention of satisfying the conditions for their appeal because they had already furnished the respondent with account opening forms for their execution so that the decretal sum would be duly deposited as security in compliance with earlier court directions. However, the delay arose that was occasioned by circumstances beyond the Respondent’s control on the change of directorship. He thus argued that these is a reason that is sufficient to warrant extension of stay orders bearing in mind the substantial loss that will be suffered by them.
 11. The Applicant then submitted on the conditions required for stay Orders to issue as provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#) and argued with regard to substantial loss that the applicant is at risk of their assets, that they use to conduct business, being attached and auctioned should the Respondent proceed with execution proceedings. This will result in unforeseen injury on part of the appellant/applicant.
 12. On security for performance of the decree, the Applicant submitted that it is ready and willing to comply with court directions, and that it is only seeking the indulgence on enlargement/extension of time to comply with the court’s directions. Further that no prejudice will be suffered by the Respondent since the subsistence of an existing appeal is not denied.
 13. On whether extension of time is merited, the Applicant listed the factors for consideration by court in the determination of the same by relying on the case of [Nicholas Kiptoo Arap Korir Salat v IEBC & and 7 others](#) Application No. 16 of 2014 [2014] eKLR where the Honourable judges reiterated the considerations to be made in such a case to be as follows;-
 - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;



2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
14. Based on this, it was argued that indeed extension of time is not a right of a party but is an equitable remedy granted in line with the principles of natural justice enshrined in our constitution. Nonetheless, that the right to appeal ought not be disfigured by excusable technicalities. He added that the Honourable court has the inherent and discretionary powers to enlarge the time to comply with the requirements of appeal of this suit in pursuit of the ends of justice in line with the provisions of Section 95 of the *Civil Procedure Act* as read with Order 50 Rule 5 of the *Civil Procedure Rules*. In supporting this argument, they relied on the case of *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR where the Court held that:
- “Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal.”
15. In conclusion, the Applicant urged this Court to allow the Application in support of the spirit under Articles 48 and 50 of *the Constitution*.

Respondent’s Submissions.

16. The Respondent submitted on one main issue; whether the appellant is entitled to enlargement of time. It was argued that the Court’s power to extend time for doing any act is set out under Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*. Therefore, that enlargement of time is not as of right but a discretion of the Court which an applicant is obligated to place all material upon which the Court is to exercise its discretion. These principles are enumerated in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* Application No 16 of 2014 [2014] Eklr.
17. It was submitted that the trial court granted the Applicant 30 days stay of execution with effect from June 16, 2022. That the Applicant herein upon lapse of the stay order sought for stay Orders vide a notice of motion dated August 22, 2022, which application was considered and the Court allow it on November 25, 2022 on condition that the appellant herein deposit the entire decretal sum in a joint interest earning account in the name of both advocates within 21 days. He added that the stay orders lapsed on December 17, 2022 and the Applicant waited till February 28, 2023 to issue the cheque and subsequently filed this Application. He argued that the Applicant has not demonstrated the allegation that there was a directorship issue to delay the depositing of security as ordered by the Court and to warrant extension of the same or issuance of fresh stay orders by this Court.



18. The Respondent submitted that if indeed there was any issue regarding the delay in depositing the decretal sum, the Applicant ought to have communicated to them in response to their numerous reminder letters, seeking to have the money deposited in a joint account. It was further argued that at the time the Application herein was filed, the Respondent's right to execute had crystalized and they already engaged auctioneers.
19. The Respondent maintained that the Application herein is a delay tactic employed by the Applicant to further delay this case and deny them the fruits of their judgement, considering that this appeal was filed on 16th June, 2022 and no steps have been taken to either prosecute it or even file a record of Appeal in readiness for hearing. To support this argument, the Respondent relied on the decision by Aburili J in *Allan Otieno Otsula v Gurdev Engineering and Construction Limited* [2015] eKLR.
20. The Respondent also relied on the case of *Diplack Kenya Limited V William Muthama Kitonyi* [2018] eKLR where the Court held that; -

“Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour and the rule is that where there is no explanation, there shall be no indulgence.”
21. Similarly, that since no explanation has been given for the delay in complying with stay direction, the Applicant should not be granted the prayers sought. However, that if this Court is inclined to allow the Application and enlarge time, then time line should be set and orders made for the security to be deposited in 7 days, the record of Appeal filed in 14 days to speed up the hearing and determination of the Appeal.
22. In conclusion, the Respondent urged this Court to grant them costs of this Applicant in any event.
23. I have considered the averments of the parties herein. This court vide an order of May 31, 2022 in CM ELRC No 227/2019 issued stay orders on condition that the decretal sum be deposited in a joint interest earning account.
24. Despite the court granting the applicants time to deposit the amount in issue within a specified period, the applicant avers that they failed to do so due to some limitations on their part hence this application to extend time within which to act on the order of the court.
25. The respondents aver that the orders sought should not be granted as they proceeded to execute due to failure by the applicants thus causing them to incur auctioneers costs.
26. I note that the order of stay is sought due to a pending appeal that has been preferred.
27. In my view, if the order of stay is not granted, then the appeal may be rendered nugatory.
28. I will therefore allow stay order and allow the applicants a further 2 weeks within which to deposit the decretal sum as earlier ordered on condition that they pay auctioneers costs either agreed upon or taxed.

RULING DELIVERED VIRTUALLY THIS 8TH DAY OF JUNE, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Achieng holding brief for Chege for Appellant – present

Mwangi holding brief for Sheth & Wathigo for respondents – present



