



REPUBLIC OF KENYA



KENYA LAW
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**Juma Hardware Limited v Tungani & 2 others (Miscellaneous Case
E081 of 2023) [2023] KEELRC 1890 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1890 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E081 OF 2023
NZIOKI WA MAKAU, J
JULY 12, 2023

BETWEEN

JUMA HARDWARE LIMITED APPLICANT

AND

MIRIAM TUNGANI 1ST RESPONDENT

EUNICE KHAYESI MUSIANGARA 2ND RESPONDENT

PAUL NYANGECHI CHUMA 3RD RESPONDENT

RULING

1. The Applicant seeks stay of execution of the judgment and decree emanating from the Milimani Chief Magistrate's Court in CMEL E438 of 2021. The Applicant in the main seeks the following orders:
 - i. Spent
 - ii. That there be an order of stay of execution of the Judgment and Decree of the Subordinate Court in Milimani Chief Magistrate Employment and Labour Relation Cause No E438 of 2021 delivered on March 9, 2023 pending the hearing and determination of this Application inter partes;
 - iii. There be an order of stay of execution of the Judgment and Decree of the Subordinate Court in Milimani Chief Magistrate Employment and Labour Relations Cause No E438 of 2021 pending the hearing and determination of the intended Appeal;
 - iv. This Honourable Court be pleased to grant leave to the Applicant to file a Notice of Appeal and Memorandum of Appeal out of time against the said Judgment of the Subordinate Court in Milimani Chief Magistrate Employment and Labour Relations Cause No E438 of 2021;



- v. The Notice of Appeal dated April 6, 2023 and the Draft Memorandum of Appeal dated April 11, 2023 be deemed duly filed and properly on record; and
 - vi. The costs of this Application he prodded for.
2. The motion was premised on the grounds on the face of it as well as the supporting affidavit sworn by Mr Denny Odongo, Human Resource at the Applicant. He depones that the intended Appeal raises serious triable issues with high chances of success which necessitate that this Honourable Court stay the execution of the Judgment and Decree of the Subordinate Court so as to preserve the substratum of the Appeal to enable the subject Appeal be determined on merit without being rendered nugatory. He further depones that the Applicant will suffer significant and irreparable reputational and financial harm, which is likely to have a significant impact on its business, if the Respondents are allowed to proceed with the execution of the Judgment of the Subordinate Court. He thus urges the grant of the motion by the Applicant.
 3. The Respondents were opposed and filed a replying affidavit sworn by Mr Lemmy Regau Nyawade, Advocate for the Respondents. In brief, he asserts that the application by the Appellant/Applicant is on abuse of the court process and is being used to delay justice that is in favour of the Respondents in that the Applicant does not bring about special circumstances or unique requirements to necessitate a stay of execution as prayed. He depones that the Appellant/Applicant has failed to demonstrate adequately or at all what substantial loss they may face unless a stay of execution is issued. He thus urges the dismissal of the motion by the Applicant.
 4. The matter was to be canvassed by way of written submissions. From the Court record, only the Applicant filed submissions and no submissions were filed by the Respondents.
 5. The Applicant submits that the Respondents in this case are former employees of the Applicant and that if execution is allowed to proceed and the Applicant succeeds, the Applicant might not be able to recover the said sums from them. The Applicant cites the case of *Johnson Mwiruti Mburu v Samuel Macharia Ngure* where Nyamu J (as he then was) held that a Respondent's possible inability to pay the decretal amount was sufficient to justify grant of stay of execution pending appeal. The Applicant further relied on the decision of the Court of Appeal in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR* where it was held that:

'Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is matter which is peculiarly within his knowledge.'
 6. The Applicant submits that it has raised concerns that the Respondents, being its former employees, may be unable to repay the decretal amount if execution proceeds and the Applicant succeeds in the appeal. It is submitted that in response to the application, the Respondents filed a reply but failed to provide evidence of their ability to repay the sum in the event of a successful appeal. The Applicant therefore submits that it has sufficiently demonstrated the potential futility of the appeal if a stay is not granted. It submits that it is therefore in the interests of justice to grant a stay pending the hearing and determination of the intended appeal.
 7. As to whether the Applicant should be granted leave to file the appeal out of time, the Applicant submits that the principles to guide the Court in determining the question as to whether to extend time



or not were set out in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No NAI 255 of 1997* (unreported) where it was held as follows:-

' It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted."

8. The Applicant asserts that it has provided a valid explanation for the delay in filing the appeal, citing a lack of communication from its former advocates. The Applicant submits that the Respondents have not rebutted this explanation and that this justification was deemed acceptable in the case of *Richard Muthusi v Patrick Gituma Ngomo & another [2017] eKLR*.
9. The Applicant submits that this Court has the discretion to determine whether to allow an application for extension of time, such discretion is to be exercised in favor of an Applicant where the Court is satisfied that the reasons provided for the delay are reasonable and that allowing such application would not prejudice the Respondent. The Applicant submits that these are the principles that were set by the Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others [2014] eKLR*. The Applicant thus urges the grant of the application for leave as well as the stay sought.
10. The Applicant seeks leave to appeal out of time. From the material placed before the Court, it would seem the Applicant's previous advocates were lackadaisical in their handling of the suit to the extent they did not alert the Applicant of the outcome once judgment was delivered by the Learned Magistrate. As such, it suffered through no demonstrable fault on its part and has approached the Court seeking relief at the earliest instance. Granted the draft memorandum of appeal, there is an arguable appeal which justice in this case demands that it be ventilated through the intended appeal. As such, it is fit to grant extension of time. That disposes of the leave to appeal and the next issue is whether there ought to be a stay of execution pending the hearing of the intended appeal.
11. The principles to be exercised for grant of stay of execution at this level of the proceedings are fairly well settled. Essentially, these are that no order for stay of execution shall be made 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 and 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.
12. In this case, the Applicant has indicated that it would suffer substantial loss if the decree is executed, judgment satisfied and once it succeeds in the appeal find that the Respondents who are its former employees unable to refund the sums paid out. As there is possibility of an intended appeal being rendered nugatory if stay is not granted, there would be basis to surmount this first hurdle. The Applicant has not offered security. Whereas this would be seen as near fatal, in the interests of justice, the Court will grant the stay sought on condition that the Applicant deposits the entire decretal sum, as well as costs per the decree served upon it, in an interest earning account in the joint names of the advocates now on record for the parties within 14 days of this Ruling and if the sum is not so deposited solely on account of delay/intransigence of the Applicant, the stay granted will stand automatically vacated. The costs of the motion before me shall abide the outcome in the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 12th day of July 2023



Nzioki wa Makau

JUDGE

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