



**Karanja v Maxland Restaurant, Bar & Lounge (Cause
866 of 2016) [2023] KEELRC 1742 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1742 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 866 OF 2016**

JK GAKERI, J

JULY 11, 2023

BETWEEN

JOSEPHAT KIMANI KARANJA CLAIMANT

AND

MAXLAND RESTAURANT, BAR & LOUNGE RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the applicant dated April 4, 2023 filed under Certificate of Urgency seeking Orders That;
 1. Spent.
 2. Spent.
 3. The Honourable Court be pleased to stay the execution of the judgement delivered on September 24, 2020 incorrectly stated as June 8, 2021 and all consequential orders emanating there from pending the hearing and determination of the intended appeal against the Ruling delivered on March 14, 2023 dismissing the Respondent's Application dated September 21, 2022.
 4. The costs of and incidental to this application do abide the result of the intended appeal.
2. The Notice of Motion is based on the grounds set out on its face and is supported by the Supporting Affidavit dated April 3, 2023 sworn by Anthony Njoroge Gachiri who deposes that the Respondent's application for review of the judgement delivered on September 24, 2020 was wrongly decided as they learnt of the existence of the suit when they were served with the warrants of attachment on WhatsApp and had a strong defense. That the judge neither addressed the real issue and misapplied the law on the facts.



3. That they had an arguable appeal and had instructed counsel to appeal against the whole of the Ruling and decision.
4. The affiant depones that the arguable appeal raises serious triable issues with high chances of success as exhibited by the draft Memorandum of Appeal (not attached).
5. That if a stay is not granted, the applicant would suffer prejudice and harm of monetary value and the proceedings in the Court of Appeal will be affected negatively in a manner prejudicial to the Respondent's rights and interests.
6. The affiant states that the instant application is made in good faith and was ready to deposit the decretal sum in court.
7. In his grounds of opposition dated April 19, 2023, the Claimant asserted that the instant application was misconceived, frivolous, vexatious and abuse of court process and the orders sought were not warranted.
8. That the applicant had not demonstrated the substantial loss it stood to suffer if the application was unsuccessful or that the appeal will be rendered nugatory.
9. That the instant application was a delaying tactic to prevent the Claimant from enjoying the fruits of his judgement.
10. In his Replying Affidavit sworn on April 19, 2023 in opposition to the Notice of Motion, the Respondent depones that applicant had not met the requirements for the grant of an order of stay of execution pending appeal as it had not demonstrated substantial loss or irreparable loss will ensue if the order of stay pending appeal was not granted and the impugned decree was fully satisfied and settled.
11. The affiant states that he filed the instant suit on May 3, 2016 for unlawful termination of employment and non-payment of terminal dues.
12. That the grounds of appeal relied upon had limited chance of success.
13. That the instant Notice of Motion was a second thought, lacked merit and was an abuse of the process of the court intended to delay the enjoyment of fruits of judgement by the Respondent.
14. The affiant states that the application herein is intended to frustrate him.
15. The affiant disclosed that he was employed as a Chef at Olootepes Picnic Site at a gross salary of Kshs 50,000/= and was thus in a position to repay the decretal sum were the applicant to succeed in the intended appeal.
16. That it was in the interest of justice that the applicant pays the decretal sum awarded by the court on September 24, 2020.
17. That the applicant had not demonstrated how payment of Kshs 225,846/= will amount to substantiate loss or detriment.
18. That the applicant had not demonstrated good faith and the court should not exercise discretion in its favour.
19. The affiant prayed for dismissal of the application.



Applicant's Submissions

20. Counsel for the applicant relied on the Court of Appeal decision in *Butt V Rent Restriction Tribunal* (1982) KLR 417 to underscore the principles on which the court may grant a stay of execution such as its discretionary nature overwhelming hinderance, special circumstances of the case and security.
21. As to whether the application is merited, counsel cited the provisions of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010* to highlight the threshold for the grant of stay of execution namely substantial loss, without unreasonably delay and security.
22. Counsel invited the court to exercise its discretion in favour of the applicant as its appeal raised arguable points and had high chances of success.
23. As regards the threshold in Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010*, counsel urged that the applicant had come to court without undue delay as the instant application was filed on April 4, 2023 after the Ruling delivered on March 14, 2023.
24. On substantial loss, counsel submitted that the intended appeal raised serious triable issues of fact and law and the applicant had demonstrated the extent of likelihood of substantial loss.
25. That the applicant was a business and faced a real risk of suffering a huge financial loss if the order sought was not granted.
26. On security, counsel relied on the decision in *West Kenya Co Ltd V Luther Angatia* (2018) eKLR that;

“That right of appeal must be balanced against an equally weighty right; that the plaintiff to enjoy the fruits of the judgement delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”
27. That the applicant was ready to abide by the conditions that the court may give.
28. Counsel urged that it had fulfilled conditions prescribed by Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010*.
29. The court was urged to allow the Notice of Motion.

Claimant's Submissions

30. Counsel submitted that a reading of the instant application and the Supporting Affidavit revealed that the application was hugely hinged on the high chances of success of the intended appeal which would be rendered nugatory if execution proceeded, notwithstanding the fact that these grounds are applied by the Court of Appeal in determining how to exercise its discretion under Rule 5(2)(b) of the *Court of Appeal Rules, 2010*.
31. That reliance on these two grounds was a misconception as they do not apply in this court.
32. Counsel urged that the relevant provisions were the requirements of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010* under which three conditions must be established.
33. Counsel submitted that a reading of the Application and the Supporting Affidavit does not demonstrate that any substantial will result if a stay of execution was not granted.
34. That the failure to prove substantial loss rendered the application unsustainable as all the requirements must be satisfied.



35. That no evidence was adduced to show the substantial loss to be suffered, that the Claimant was not in a position to repay the decretal sum if the intended appeal succeeded and the Claimant's Replying Affidavit had not been controverted by the Applicant.
36. Reliance was made on the decision in [*Equity Bank Ltd V Taiga Adams Company Ltd*](#) (2006) eKLR on proof of substantial loss.
37. Also cited were the sentiments of the courts in [*Masisi Mwita V Damaris Wanjiku Njeri*](#) (2016) eKLR and [*James Wangalwa & another V Agnes Naliaka Cheseto*](#) (2012) eKLR.
38. Counsel further submitted that the issue of service by the Claimant raised by the applicant was mute as it was addressed in the Ruling delivered on March 14, 2023.
39. Finally, counsel urged that a grant of stay of execution would be highly prejudicial and unfair to the Claimant as he would have to wait longer to enjoy the fruits of his judgement.
40. The court was urged to dismiss the application.

Determination

41. I have considered the application for stay, grounds thereof, supporting affidavit and annexures. I have also considered the Replying Affidavit, grounds of opposition, Replying Affidavit together with submissions by counsel and the case law relied upon.
42. The singular issue for determination is whether the applicant has demonstrated that the order of stay of execution pending appeal is warranted.
43. The principles that govern the grant of stay of execution pending appeal are well settled and are captured in Order 42 Rule 6(2) of the [*Civil Procedure Rules, 2010*](#) which provides that;
 - "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 that the application has been made without undue 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."
44. Relatedly, the court is enjoined to ensure that the order of stay is only granted for sufficient cause having regard to the provisions of the [*Civil Procedure Act*](#).
45. As the Court of Appeal held in *Butt V Rent Restriction Tribunal (supra)*, the court's power to grant or refuse an application for stay of execution is discretionary and the discretion must be exercised judiciously within the parameters set out in Order 42 Rule, 6 of the [*Civil Procedure Rules, 2010*](#).
46. As adverted to elsewhere in this ruling, an application for stay of execution pending appeal must satisfy all the requirements of Order 42 Rule 6(2) of the [*Civil Procedure Rules, 2010*](#).
47. As regards substantial loss, the sentiments of the court in [*James Wangalwa & another V Agnes Naliaka Cheseto*](#) (2012) eKLR are instructive;

"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.”

48. Similarly, in *Equity Bank Ltd V Taiga Adams Co Ltd (supra)* cited by the Claimant/Decree-holder’s counsel, the court stated as follows;

“The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent - that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay-reimburse as/he is a person of no means. Here, no such allegation is established by the appellant.”

49. In the instant application, the applicant states in paragraphs 8 and 9 of the Supporting Affidavit that if the appeal succeeded, it was likely to cause the applicant “to suffer prejudice and harm of monetary value.” That unless the stay of execution was granted “the outcome of the applicant’s appeal and proceedings in the Court of Appeal will be affected negatively and as such will be prejudicial to our rights and interests as the appellants.”

50. The applicant makes no allegation that it stood to suffer substantial loss if the decretal sum would be irrecoverable from the Claimant/Decree-holder or that he was incapable of repaying the sum.

51. It makes no claim that its business, (which it has not disclosed) would be affected in any way if an order of stay of execution was not granted.

52. Noteworthy, the Claimant/Decree-holder affirmed in his Replying Affidavit that he was employed and capable of refunding the decretal sum in the event the applicant succeeded in the appeal, evidence the applicant has not responded to.

53. In its submissions, the applicant did not address the Claimant/Decree-holder’s averments or any form of substantial loss the applicant was likely to suffer.

54. Judicial authority is consistent that substantial loss is the cornerstone consideration in the exercise of discretion as to whether or not to grant an order of stay of execution.

55. In this case, the applicant has not tendered evidence or any averment as to the form of substantial loss it was likely to suffer, if the order of stay of execution was not granted. It has not demonstrated that execution, as a lawful process would occasion substantial loss or the Claimant/Decree-holder would not be in a position to repay the decretal sum.

56. The foregoing is further supported by the sentiments of Platt JA in *Kenya Shell Ltd V Kibiru & another* (1968) KLR 410 Platt Ag JA as follows;

“ . . . There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money if payment was made since the Respondents would be unable to repay the decretal sum plus costs in two courts . . . ”



57. Finally, the court is guided by the sentiments of Meoli J in *Jessikay Enterprises Ltd V George Kaboto Muiruri* (2022) eKLR as follows;

“As held in the Shell Case, substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to justify keeping the Respondent out of the fruits of his judgement. It is trite that without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and to justify keeping the decree holder out of his money . . .”

58. It is common ground that the instant application was filed without unreasonable delay and the applicant indicated its readiness to provide security for due performance by depositing the decretal sum in court which satisfies the 2nd and 3rd requirements of Order 42 Rule 6(2) of the *Civil Procedure Rule, 2010*.

59. Puzzlingly, and as correctly submitted by the Claimant/Decree-holder’s counsel, the applicant anchored its case essentially on the arguability of the intended appeal and the serious issues it raises an issue not for consideration by this court in this application.

60. Intriguingly, a copy of the Ruling to be appealed against was not annexed to the Notice of Motion.

61. The upshot of the foregoing is that the Notice of Motion dated April 4, 2023 does not meet the threshold of Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010* and is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF JULY 2023

DR. JACOB GAKERI

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 Civil 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.

DR. JACOB GAKERI

JUDGE

