



**Kenya Petroleum Oil Workers Union v Kenya Pipeline Company Ltd (Employment and Labour Relations Cause 6 of 2020) [2023] KEELRC 1652 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1652 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 6 OF 2020**

**HS WASILWA, J**

**JULY 6, 2023**

**BETWEEN**

**KENYA PETROLEUM OIL WORKERS UNION ..... CLAIMANT**

**AND**

**KENYA PIPELINE COMPANY LTD ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Applicant's Notice of motion dated 16<sup>th</sup> November, 2022, brought pursuant to section 7 of the [Appellate Jurisdiction Act](#), order 42 rule 6 of the [Civil Procedure Rules](#), order 51 rule 1 of the [Civil Procedure Rules](#), section 3A of the [Civil Procedure Act](#) and all other enabling provisions of law, seeking for the following Orders; -
  - 1) Spent.
  - 2) Spent.
  - 3) That the Honourable Court be pleased to order stay of execution of the Judgement entered on 6.10.2022 pending the hearing and determination of the Applicant's intended appeal against the said judgement.
  - 4) That the Applicant be at liberty to apply for further Orders and or directions as the Honourable Court may deem just to grant.
  - 5) That the costs of this Application be provided for.
2. The application is based on the fact that the Applicant is aggrieved by the Judgement of Hon. Justice Hellen Wasilwa delivered on 6.10.2022. That it discovered its aggrieved by the said decision when they received a copy of the judgement and analyzed it. Therefore, that the judgement was filed in a timely manner.



3. That the intended Appeal raises several triable issue as is captured in the draft memorandum of Appeal, which issues are meritorious and deserving a chance in Court.
4. He stated that the Applicant will suffer substantially because the money involved, though not specified in the judgment, is colossal and unless stay of execution is granted the applicant will suffer substantial loss which cannot be remedied by damages.
5. He stated further that its willing to furnish security in form of Bank Guarantee for due performance of the decree.
6. It is their case that the judgement was not clear with regard to the amount to be remitted to the claimant and also that it did not state the the number of Union members who were eligible to join the claimant union.
7. He contends that the open-endedness of the judgement gave the claimant and open cheque that escalated the number of unionisable employees from 44 members that it swore on oath to 209 members. Further that the Orders by the Court to remit union dues from 2019 when the employees received their full pay could cause grave injustice to the Applicant herein.
8. The Application herein is also supported by the the affidavit sworn on 16<sup>th</sup> November, 2022 by Elizabeth Rop, the Applicant's legal officer. The Affidavit reiterated the grounds of the Application and urged this Court to allow the Application for stay until the intended Appeal is heard and determined so that the said appeal is not rendered nugatory.
9. The Application is opposed by the Respondent who filed a replying affidavit deposed upon on the 29<sup>th</sup> November, 2022 by George Okoth Omollo, the Respondent's secretary General.
10. The Respondent stated that the Application herein is premature because, they have not extracted the Decree or issued any proclamation notices to put execution in motion and thus there is no immediate threat of execution as alleged by the Applicant to warrant the issuance of the stay Orders sought.
11. He maintained that since not execution proceedings have commenced, the *status quo* is unknown and there is nothing that can be stayed by this Court. In any case that the applicant has not demonstrate the particular loss it will incur incase stay orders are disallowed. Additionally, that the Respondent has capacity to refund the decretal sum in the event the Applicant's Appeal succeeds.
12. The Respondent stated that the Respondent was duty bound under Section 48(2) of the [Labour Relations Act](#) to deduct and remit union dues to the Union from the date when checkoff forms were submitted to them which was in 2019. Also that receipt of the said checkoff forms was not denied.
13. The affiant stated that the Applicant cannot absolve itself from the obligations created under the CBA which is currently in force, even when restructuring its operations.
14. The Respondent maintained that the judgement of this court is clear and nothing requires any interpretation. He added that the allegation by the Applicant that the judgement is unclear is a tactic employed to delay this matter indefinitely and deny it the fruits of its judgement. Further that if indeed the judgement needed any clarification the Applicant should have filed an application before this Court seeking such clarification and not an Appeal.
15. Since the appeal is lodged on the premise of alleged ambiguous judgment, the Appeal in itself is amorphous and any application that arises from it cannot stand. Thus the entire Appeal is not arguable.
16. The affiant prayed for the Application herein to be dismissed and the decree holder be allowed to execute the judgement to enjoy the fruits of their judgement.



17. Directions were taken for the Application herein to be heard after taxation was completed which taxation was done and a ruling delivered on 4<sup>th</sup> April, 2023, taxing the Bill of cost at Kshs 310,991.60.
18. As soon as the taxation was completed the Applicant filed an affidavit under certificate of urgency sworn on 23<sup>rd</sup> May, 2023 by Karen Muriithi, the Applicant's legal officer, stating that the once taxation was completed, the Respondent sent them an email on 15<sup>th</sup> May, 2023 threatening to commence contempt proceedings against the managing director of the Applicant if payment was not received in 7 days.
19. She stated that it's on the strength of this email, that they are apprehensive that the Respondent will commence execution proceedings to their detriment when they have appealed the decision of this Court.
20. She added that its willing to abide by any direction that this Court will order in favour of issuing the Stay of execution orders as sought in their application of 16<sup>th</sup> November, 2022.
21. In response to this Affidavit, the Respondent filed a supplementary affidavit deposed upon on the 5<sup>th</sup> June, 2023 stating that the costs in this suit has been determined at Kshs 310,991.60 which amount is relatively low and the Applicant should remit it to the Respondent.
22. He maintained that it's the Union's right to receive dues from its members and urged this Court to decline the Application herein and allow execution proceedings to commence.
23. The Application was canvassed by written submission with the Applicant filing on the 3<sup>rd</sup> February, 2023 and the Respondent on the 19<sup>th</sup> June, 2023.

#### **Applicant's Submissions.**

24. The Applicant submitted on two issues; whether the Applicant should be granted the Order of stay of execution pending Appeal and who should bear costs of this Application.
25. It was submitted that order 42 rule 6 of the *Civil Procedure Rules* is the primary law on stay of execution pending Appeal which provides for the conditions that must be met before stay Orders are issued. He reiterated this condition by relying on the case of *HGE v SM* [2020] eKLR where the Court held that;-

“An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.”
26. On what amounts to substantial loss, the Applicant relied on the case of *James Wangalwa and another v Agnes Naliaka Cheseto* [2012] eKLR where the Court held that ;-

“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 *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. This is what substantial loss would entail.”

27. Accordingly, that the Applicant’s accounts and assets are at risk of being attached and sold when the subject matter herein has been appealed against. It was argued further that the Respondent might not be in a position to refund the decretal sum if the Appeal succeeds because the Respondent has not disclosed its financial worth when the burden of proving their capability to refund the decretal sum falls on them as was held in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another* [2006] eKLR where the Court stated that:-

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. 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 a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.” This Position was reiterated in the case of *Victor Ogola v Mary Waithe Kibiu*[2021] eKLR.

28. The Applicant submitted that the Appeal is arguable on both points of law and fact and that it has high chances of success.
29. The Applicant also submitted that they filed this Application in a timeous manner and that its willing to comply by any orders that the Court will give in granting the stay Orders. Therefore, that since its willing to offer security for due performance of the decree, the Respondent will not be prejudiced in any way.
30. It was argued that the Applicant has met all the conditions under order 42 rule 6, and urged this Court to be convinced by the decision of the Court of Appeal in *Butt v Rest Restriction Tribunal* [1979] eKLR and allow the Application as prayed.
31. On costs, the Applicant submitted that costs follow event as stated in section 27 of the Civil Procedure Act and reiterated in *Cecilia Karuru Ngayu v Barclays Bank Of Kenya and another* [2016] eKLR. He urged this Court to grant them costs of this Application.

### **Respondent’s Submissions.**

32. The Respondent submitted on two issues; whether the Applicant has established the orders for stay of execution pending Appeal and whether the Applicant being in defiance of Court Orders is deserving of discretionary Order of stay.
33. The Respondent submitted that the guiding law in issuing stay of execution pending Appeal orders is order 42 rule 6 of the *Civil Procedure Rules*. It argued that no decree in this case has not been extracted or any execution proceedings commence, thus the Application herein is premature. He added that even if execution is commenced the same is a legal process that cannot be used as a ground to issue stay orders. In this they relied on the case of *James Wangalwa and another v Agnes Naliaka Cheseto*(*Supra*) where the Court held that; -

“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 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.”

34. It was argued that even if this Court was to allow the stay of execution, it's not clear what exactly is to be stayed because the status quo is yet to be ascertained. Further that the judgement is a monetary decree that cannot render the Appeal nugatory.
35. The Respondent submitted that since no interim orders were issued by this Court the judgement of this Court delivered on 16<sup>th</sup> November, 2022 should have been acted upon and the Union dues remitted to the Respondent, failure to which the Applicant is in contempt of Court Orders. In this they relied on the case of Mengich t/a Mengich & Co advocates and another v Joseph Mabwai & 10 others [2018] eKLR where the Court cited with authority the case of In Econnet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another that stated:-

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”
36. Similarly, it was submitted that despite the fact that the application was filed timeously, the Applicant has failed to demonstrate the extend of loss its likely to incur by reason of execution of costs. Also that the Application has been filed prematurely and the same ought to be dismissed with costs borne by the Applicant.
37. I have examined all averments and submissions of the parties herein. I note that the applicants herein seek stay orders for the reasons that they have filed an appeal at the Court of Appeal.
38. They have indicated that they are willing to provide security as may be ordered by this court.
39. The applicants have contented that the court did not state the number of unionisable members for which the applicant was to remit union dues.
40. This position is however not true in view of the judgment of the court at paragraph 13 & 17 where the number stated was 209 for the forwarded check off forms.
41. That notwithstanding, it is clear that there is already an appeal filed against the orders of this court.
42. In order not to prejudice the appeal and render it nugatory, I will allow the application for stay on condition that the applicant provide a bank guarantee for the performance of the decree to the tune of 2Million within 30 days.
43. In default, execution to proceed.

**RULING DELIVERED VIRTUALLY THIS 6TH DAY OF JULY, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**



## **JUDGE**

In the presence of:-

Kogaka holding brief Onyonyi for Claimant – present

Wachira for Applicant – present

Court Assistant – Fred

