



**Wareng High School v Sanga (Miscellaneous Application
E007 of 2023) [2023] KEELRC 1702 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1702 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
MISCELLANEOUS APPLICATION E007 OF 2023
MA ONYANGO, J
JULY 6, 2023**

BETWEEN

WARENG HIGH SCHOOL APPLICANT

AND

JONAH KIMUTAI SANGA RESPONDENT

RULING

1. The Notice of Motion dated 13th February 2023 seeks orders that;
 - i. Spent
 - ii. Spent
 - iii. That this Honourable Court do order a stay of execution of the judgment and decree in Eldoret CMCC ELRC No. 59 of 2018 made on the 16th December 2022 pending the hearing and final determination of the Applicant's appeal in the High Court;(sic)
 - iv. That upon grant of the orders above, the applicant be granted leave to file an appeal out of time;
 - v. That the costs of this application be in the cause.
2. The grounds upon which the application is made are that the Applicant has an arguable appeal with a high probability of success, that a temporary stay of execution for a period of 30 days effective 16th December 2022 has expired, that if the said stay of execution pending appeal is not granted, the Applicant's appeal will be rendered nugatory and the Applicant will suffer substantial loss, that unless the application is granted, the Respondent will certainly levy execution at any time against the Applicant, that substantial loss will result to the Applicant unless the orders sought are granted, that this application has been made without unreasonable delay and that this application ought to be granted in the interest of equity and justice.



3. The application is supported by the affidavit of State Counsel Edna Tigoï reiterating the grounds on which the application is founded on.
4. The application is opposed. The Respondent has filed a Replying Affidavit sworn on 27th February 2023. He states that on 27th September 2022, the matter proceeded in the presence of advocates for both parties herein and a date for mention to confirm filing of submissions was taken by consent and thereafter a date for delivery of judgment was taken; that the Respondent religiously served the Applicant with judgment notices whenever the matter was scheduled for delivery of judgment; that the counsel for the Applicant has in her affidavit averred that she failed to diarize the date of judgment after being served in the master diary; that the said inaction of the Applicant's advocates shows that the said advocate was indolent and not keen in defending the interests of the Applicant; that the applicant has merely stated that it will suffer substantial loss but has not demonstrated how it would suffer; that no sufficient cause has been tendered in court to warrant stay of execution and that no security has been offered by the Applicant.
5. The Respondent further deposes that no appeal has so far been lodged or filed by the Applicant; and that the annexed unfiled memorandum of appeal confirms that the same has been made up with the aim of seeking orders of stay of execution.
6. The Respondent contends that the application has been brought in bad faith after unreasonable and inordinate delay.
7. When this matter came up for directions on 13th March 2023 Ms. Cheruiyot who was holding brief for Mrs. Ng'etich for the Applicant informed the court that she had spoken to counsel for the Respondent and they had agreed to compromise the application and fast-track the appeal. Ms. Chumo who was holding brief for Mr. Kirwa for the Respondent informed the court that her instructions by Mr. Kirwa were that the application may be allowed subject to deposit of the decretal sum in a joint interest earning account. Ms. Cheruiyot however informed the court that the applicant is not able to meet the condition as it does not have money.
8. The only issue for determination by the court is therefore whether the application may be granted without deposit of the decretal sum as demanded by the Respondent decree holder.
9. The application was canvassed by way of written submissions. The Applicant filed its submissions on 12th April 2023 whereas the Respondent filed his submissions on 18th May 2023.
10. Stay of execution is provided for in Order 42 rule 6(2) of *Civil Procedure Rules* as follows: -
 - “(2) 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 and that the application has been made without unreasonable 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”.
11. These principles are well enunciated in *Butt vs Rent Restriction Tribunal* [1979] where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -



1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 2. Secondly, 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 the appeal court reverse the judge's discretion.
 3. Thirdly, a judge should not refuse an order of 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.
12. The Applicant has submitted that it does not have money to deposit as it is a school that depends largely on government grants. Further, that the Applicant is represented by the Attorney General and therefore protected from execution by the provisions of Order 42 Rule 8 of the *Civil Procedure Rules* which provides that no security is required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity. It is submitted that the Applicant who is a day public school is exempted from furnishing security.
13. The purpose of furnishing security is to protect the decree holder and ensure he is able to enjoy the fruits of his judgment should the appeal be dismissed. As observed by the court in *Butt v Rent Restriction Tribunal*, the court in exercising its discretion must consider the special circumstances of each case and its unique requirements. As submitted by the Applicant, it is a public school that is largely funded by the Government. The decretal sum herein, if the court on appeal finds it due, will be paid by the Government against whom execution can only issue upon authorization by the court as provided by the law.
14. I am satisfied that the Respondent will not suffer any prejudice should stay be granted with no order for deposit of security in this case as the ultimate responsibility to pay the decretal sum lies with the government of Kenya.
15. As this was the only issue that the Respondent objected to, the application is granted in terms of prayers c and d thereof. The Applicant is granted leave to file appeal out of time and there shall be stay of execution pending judgment in the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 6TH DAY OF JULY, 2023

MAUREEN ONYANGO

JUDGE

