



**Kingdom Bank Limited v Kirui (Miscellaneous Application
E001 of 2023) [2023] KEELRC 1614 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1614 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
MISCELLANEOUS APPLICATION E001 OF 2023**

HS WASILWA, J

JULY 4, 2023

BETWEEN

KINGDOM BANK LIMITED APPLICANT

AND

COLLINS KIPTOO KIRUI RESPONDENT

RULING

1. This Ruling is in respect of the Applicant's Notice of motion dated 14th March, 2023, filed under certificate of urgency pursuant to Sections 3A & 3B of the *Civil Procedure Act*, Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, order 22 Rule 22, Article 159(2)(d) of *the Constitution*, 2010 and all other enabling provisions of the law, seeking for the following Orders; -
 - a. Spent.
 - b. That pending the hearing and determination of this Application, the Honourable Court do issue orders staying of execution of the Judgement and Resultant Decree in Kericho CM ELRC No. E007 Collins Kiptoo Kirui V Kingdom Bank Limited, pending the hearing and determination of the Appeal.
 - c. That pending the hearing and determination of the Appeal, the Honourable Court do issue further stay of execution of the Judgement Kericho CM ELRC No. E007 Collins Kiptoo Kirui V Kingdom Bank Limited, pending hearing and determination of the Appeal.
 - d. That this Honourable Court be pleased to grant the Applicant leave to lodge an Appeal out of time against the Judgement and resultant Decree of the Honourable C. Olubusta(CM) delivered on 7th February, 2023.



2. The Application is based on the grounds on the face of the Application and the affidavit of Jackson Kimathi, the Respondent's legal officer, deposed upon on the 14th March, 2023. The grounds of the Application are as follows;
 - i. That on 7th February, 2023, the Honourable C. Olubusta delivered a judgment in Kericho CM ELRC No. E007 Collins Kiptoo Kirui V Kingdom Bank Limited in favour of the claimant for award of Kshs 756,000 for unfair termination, together with interest from the date of filing suit to payment in full. The claimant was also awarded costs of the suit and the counterclaim.
 - ii. That the Applicant herein is aggrieved by the entire judgement and intends to Appeal it.
 - iii. It is averred that the Respondent is likely to execute the decree herein unless the stay orders are granted by this Court. Further that if stay of execution is not granted the Appeal will be rendered nugatory.
 - iv. He stated that delay in filing the memorandum of appeal was occasioned by delay in receiving certified copy of the judgement which was supplied on the 22nd February, 2023 and received on 28th February, 2023.
 - v. It was stated that if the decretal sum is paid to the claimant, he will not be in a position to refund in the event the appeal succeeds, this is because the claimant has loan arrears with the Applicant herein which was raised in the trial Court but the Court declined to make any orders on the same.
 - vi. It is averred that the trial Court failed to consider that the claimant has breached his employment contract which warranted his dismissal under Section 44(c) of the Employment Act and therefore is not deserving of the reliefs granted.
 - vii. The Applicant maintained that it has an arguable appeal with high chances of success and in any case that the Respondent herein will not be prejudiced if stay Orders are granted.
 - viii. He stated that the Applicant is willing to deposit a bank Guarantee as security for due performance.
 - ix. He also stated that the Application herein has been filed timeously and urged this Court to enlarge time within which the Applicant can file its Appeal.
3. The Application is opposed by the Respondent who filed grounds of opposition on 4th April, 2023 which grounds are as follows; -
 - a. That the Miscellaneous application is factually and inevitably defective as it is provided on the wrong position of the law.
 - b. That there cannot be an order for stay of execution pending appeal as against a judgement as pleaded in the instant application as a matter of law.
 - c. That there being no decree executed, there is no danger of execution as alluded to by the amended Application.
 - d. That during the delivery of judgment, leave to file for stay of execution was granted in the lower Court proceedings and the Intended Appellant deliberately opted not to file the same. this being at their own instance.
 - e. That the Intended Appellant's counsel being present during the delivery of judgment on 7th February 2023: have not sufficiently explained the reason for the undue delay.



- f. That no evidence of distress has been proved in the Intended Appellant to warrant the hearing of this application.
 - g. That equity aids the vigilant not the indolent.
 - h. That all litigations must come to an end.
 - i. Any other ground to be adduced at the hearing thereof
4. The Application proceeded by written submission with the Applicant filing on the 16th May, 2023 and the Respondent on the 26th May, 2023.

Applicant's Submissions.

5. The applicant submitted on one issue, whether the Applicant has raised sufficient grounds to persuade the Court to grant the orders sought. It was submitted that section 79G of the *Civil Procedure Act* empowers this Court to enlarge time within which an Appeal can be lodged. It was argued that the decision to enlarge time is a discretion of the Court and the factors to consider are as listed in the case of *Thuita Mwangio V Kenya Airways Limited* [2003] eklr where the Court held that:-

“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 ... These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.”

6. Similarly, that in this case, judgement was delivered on the 7th February, 2023 while the present application was filed on 22nd March, 2023, 21 days after the lapse of 30 days within which an appeal can be filed. He argued that the delay is occasioned by failure to get certified copy of the judgement which was ready on 22nd February, 2023 and supplied to the Applicant on 28th February, 2023. He maintained that the delay in filling this Applicant is not inordinate in the circumstances.
7. On the prayer for stay of execution, it was submitted that the purpose for stay of execution is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the right of appeal are safeguarded and the appeal is not rendered nugatory as provided for under Order 42 Rule 6 of the Civil Procedure Rules. To support this they relied on the case of *Stanley Kiplangat Rono and another V William Kiprotich Cherus*[2021] eklr where the Court relied on *RWW Vs EKW*[2019] eklr that held that:-

“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. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

8. On substantial loss, the Applicant submitted that the amount in issue is a colossal sum that might not be recovered in the events the appeal succeeds, therefore that a stay of execution is necessary. In this they cited the case of Century Oil Trading Company Limited V Kenya Shell Limited Nairobi [2008] eKLR.
9. On whether the application has been made in a timeous manner, the Applicant submitted that it filed this Application on 22nd March, 2023, when judgement was delivered on 7th February, 2023 therefore that it filed it without any unreasonable delay. In this they relied on the case of Stanley Kiplangat Rono and another V William Kiprotich Cherus[*supra*] where Judge Odeny held that; -

“I also find that the application was filed timeously as the judgment was delivered on 25th November 2020 and the application together with the Notice of Appeal was filed on 26th November 2020”

10. On security for due performance, the applicant submitted that they are willing to provide a Bank Guarantee from a reputable Bank in order to secure the audience of the Court in the intended appeal. In this they relied on the case of Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR, where the Court cited the decision in Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR at page 7 the Court at the time referred to The Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Application No.18 of 2010, the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”

11. On chances of the Appeal succeeding, the Applicant submitted that the damages awarded to the Respondent herein were excessive and flew on the face of the binding authorities. He argued that that issue is arguable and the Court should grant it chance to ventilate on it.
12. The Applicant in conclusion, urged this Court to allow its Application as prayed as they have sufficiently justified the prayers sought therein.

Respondent's Submissions.

13. The Respondent also submitted on one issue whether the Court should grant stay of execution pending Appeal. It was submitted that as per Section 13 of the Employment and *Labour Relations Act* and Rule 32 of the Employment and Labour Relations Court (Procedure) Rules, the applicable



law in stay of execution is Order 42 Rule (6) 2 of the Civil Procedure Rules. Therefore, that since the Applicant has failed to cite these Court's rules and the Act, the Court has not been moved properly and therefore its jurisdiction cannot be invoked and the Court should down its tools as stated in the celebrated case of Owners of Motor vessel 'Lilian S' V Caltex Oil (Kenya) Limited.

14. On whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal as provided for under Order 42 Rule 6 of the Civil Procedure Rules. The Respondent submitted with regard to substantial loss that there is no cogent evidence tabled before this court to suggest any loss that will be visited on the Applicant. In fact, that the decree has not yet been extracted, thus there is no danger of execution. On that basis, it was argued that the prayer for stay should collapse on that ground.
15. To support this position the Respondent relied on the case of Wisely Patrick Simasi & 8 others V Lmanthe Hygiene Food [2015] eklr where the Court held that; -

“There is no dispute that, Order 42 rule 6 of the CPRs bars this court from granting stay of execution of its judgment pending appeal except when it is satisfied:

- (a) that substantial loss my result to the applicant if stay is denied; (b) that the application has been made without unreasonable delay; and (c) that the applicant is able and willing to furnish security to guarantee payment of the judgment debt in the event the appeal fails. This court is satisfied that the applicant is willing to comply with any conditions for stay which the court may order. The court is also satisfied that the application has not been brought after inordinate delay because it was filed within 3 months after the impugned judgment and before taxation of costs. The court is however not satisfied with the applicant's contention that the claimants will not be able to repay the judgment debt should the appeal succeed because they did swear any affidavit to prove that they will be able to refund the same. The said contention by the applicant is an attempt to shift the burden of proof to the claimant to prove their ability to repay the judgment debt should the appeal succeed. Respectfully, the court disagrees with the applicant on that wrong submission and echoes the Court of Appeal decision in the Nai. C.A No. 344 of 1999 Caneland Ltd and Others vs Delphis Bank Ltd, that the onus of proving the Decree holder's inability to repay the judgment debt should the appeal succeed rests with the applicant. Consequently the court is not satisfied that the applicant will suffer substantial loss if stay is not granted nor will her appeal will be rendered nugatory if it succeeds. On that basis therefore, the court finds and holds that the applicant's motion has not met the threshold for granting stay of execution pending appeal as set out by Order 42 rule 6 of the CPRs and it is dismissed.”

16. It was submitted further that general statement of loss is not sufficient to shift the burden of proof to the claimant, even where the process of execution has commenced. In this they relied on the case of Peter Mutuku Nthuku V Perimeter protection Limited [2019] eklr. Additionally, that since the Bill of costs is yet to be heard or decree extracted the Application herein has been filed prematurely. In this they relied on the case of Thomas N Nguti & 196 others V Kenya Airways Corporation [2021] eklr where the Court stated that; -

“it is not in dispute that the parties hereto have not yet agreed on the amount in respect of the judgement as it involves tabulation of amount which parties are yet to agree. In view of



the fact that the parties have not yet agreed on the decretal sum. I agree with the claimant that the application herein is premature as there is no risk of execution of the judgement at this stage. It is for this reason that I find no basis to grant the orders sought with the result that the application is dismissed.”

17. On security, the Respondent submitted that in the event this Court allows the Application, then the decretal sum be held in a joint interest earning account in the name of both counsels until the Appeal is heard and determined. It was argued that the alleged reputable financial institution has not be disclosed. Also that a bank guarantee does not accrue any interest and the Applicant may drag their feet in causing the Appeal to be heard.
18. On whether there is any arguable appeal, the Respondent submitted that argueability of the Appeal is not one of the consideration of this Court, however that when determining the probability of success of the Appeal, the Court shall be guided by the draft Memorandum of Appeal which has not be annexed to this Application, neither has the request for typed proceedings or notice of Appeal. It was argued that in absence of evidence of any effort undertaken by the Applicant to lodge the Appeal the Application is not merited. In this they relied on the case of *Wisely Patrick Simasi & 8 others V Lmanthe Hygiene Food [Supra]* where it was stated that;-

“As a parting shot the court wishes to echo the observations it made in ELRCC No. 199 of 2013 *Kennedy O. Okinyi versus Grain Bulk Handlers Ltd* which involved similar facts, thus:

“Although not within its mandate at this level, the court has considered whether or not there is any appeal on record. There is no doubt that a Notice of Appeal on record is the evidence of appeal for purposes of granting stay of execution. However such notice of appeal lapses if the rules of the Appellate court are not strictly adhered to. For example service of the notice of appeal and the Written Request for certified copy of typed proceedings and the judgment are crucial in determining whether or not the time for filing the record of appeal has stopped running. In this case there is no evidence on record that the appellant filed a written request for typed proceedings and judgment and served the same on the claimant within the time prescribed by the said rules of procedure for the Court of Appeal. The foregoing observation points to the possibility that the Notice of Appeal has since lapsed but as indicated above that is a duty for another court.”
19. The Respondent submitted that the trial Court considered the Applicant’s counterclaim and pronounced itself on the same that the Applicant herein did not prove the claim of outstanding loan. It was submitted further that Respondent is not a man of straws as alleged by the Respondent.
20. On delay in filling the Application, the Respondent submitted that no reason has been shown why the application was not filed in a timeous manner.
21. In conclusion, the Respondent submitted that the application herein lacks merit because it has not meet the conditions under Order 42 Rule 6 of the Civil Procedure Rules. He urged the Court to dismiss the Application with costs to the Respondent.
22. I have examined all the averments and submissions of the parties herein. The applicant seeks stay orders pending filing of an appeal. They also seek orders to allow them file the appeal out of time.
23. The applicants have indicated that the reason for failing to file the appeal within time was because they received a certified copy of the Judgment on 28th February, 2023 and filed this application on 22nd March, 2023.



24. The applicants have also offered to provide security to preserve the rights of the respondents.
25. In view of the fact that the applicants should not be denied their right of appeal and given that they are willing to give security to the Judgment; I will allow the application and grant the applicants leave to file the appeal out of time and in any case within 7 days from this date herein.
26. The applicants are also expected to deposit the entire decretal sum in an interest earning account held in joint names of counsels on record within 30 days.
27. In default the orders herein are vacated and execution may proceed.
28. Costs to abide the outcome of the Appeal.

RULING DELIVERED VIRTUALLY THIS 4TH DAY OF JULY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Okidi for applicant – present

Kihara for respondent – absent

Court Assistant - Fred

