



**Issak v University Of Nairobi (Cause E015 of 2021)
[2023] KEELRC 2312 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2312 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E015 OF 2021
NJ ABUODHA, J
SEPTEMBER 29, 2023**

BETWEEN

ALI BUULE ISSAK APPELLANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

RULING

1. The Claimant filed application dated March 17, 2023 seeking for orders of stay of execution of the Judgment and decree issued on January 26, 2023 pending hearing and determination of the application and the intended appeal to the Court of Appeal being Appeal No E015 of 2021.
2. The application was supported by the Affidavit of Bernard Njuguna the Registrar, Administration of the Respondent herein who averred that the Respondent was aggrieved and dissatisfied with the Judgment delivered by the Honourable Court (Mbaru J) on January 26, 2023 and has appealed against the same by filing a Notice of Appeal dated January 26, 2023 and that the Appellant/Respondent may commence the process of execution of the Judgment following the taxation of the Appellant’s Party & Party Bill of Costs dated February 27, 2023.
3. The Applicant further averred that the application had been made without unreasonable delay and that the Applicant was willing to satisfy the conditions of stay that may be set by the court.
4. In reply the Appellant/Respondent filed their replying Affidavit sworn on April 11, 2023 and averred that the Applicant’s Application for stay for execution was incompetent, a non-starter and an abuse of this honourable court’s process and should be struck out with costs to the Respondent.
5. The Respondents further averred that the Applicant had not advanced any valid reasons justifying a stay of the honourable Court’s Judgment which was entered regularly and apart from allegations of substantial loss the deponent had not demonstrated that substantial loss would be occasioned if stay was not granted, there was no proclamation and or attachment that had been done on the Applicant.



6. The Respondent further averred that typed proceedings and judgment have all been ready and nothing had stopped the Applicant from preferring an appeal if indeed it was aggrieved and that no appeal had been filed to date.
7. The Respondent averred that the Application had been brought in bad faith and was a tactic by the Appellant to stretch litigation since nothing had been presented to demonstrate that the Applicant would be prejudiced if the orders sought were not granted and that the Respondent as a successful litigant ought to be left to enjoy the fruits of his judgment after a long battle in court. The respondent therefore prayed that the Application be struck out with costs to the Respondent.
8. The Application was disposed of by written submissions with each party submitting in support of their respective pleadings.

Determination

9. The grounds upon which this Court exercises the discretion to grant a stay of execution are well governed by the [Civil Procedure rules](#) under Order 42 Rule 6 which stipulates as follows;
 - (2) No order for stay of execution shall be made under subrule (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.
10. In the case of *Halal & Another v Thornton & Turpin Ltd* [1990] eKLR citing the case of [Rasiklal Somabhai Patel v Parklands Properties Ltd](#) it was stated:

“that before a Court could decide the application (for stay of execution) it must have regard to the requirements of Order XLI rule 4(2) of the Civil Procedure Rules under which the applicant had to satisfy the court of two matters...Firstly, that substantial loss may result to the applicant unless the application is granted, which prima facie means that if the appeal succeeds, the respondent would not be in a position to make full restitution. Secondly, the applicant had to give such security as the court may order. Those are the requirements under Order XLI rule 4(2) of the Civil Procedure Rules.
11. On the issue of substantial loss, this has been ably explained by Gikonyo J in the case of [James Wangalwa & Anor v Agnes Naliaka Cheseto](#) [2012] Eklr. Where the learned Judge observed:

“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.



12. Further In the case of *Kenya Shell Ltd v Kibiru & Another* [1986] eKLR the Court of Appeal as per Platt JA.- stated:

“...It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money

13. Kuloba J (as he then was) in the case of *Machira t/a Machira & Co. Advocates v East African Standard* [2002] eKLR stated as follows:

in the exercise of the court’s discretion in a judicial fashion, the court cannot legitimately look at a matter on one assumption alone, favouring one party and ignoring the other party. In applications of this nature there is no rule of law or practice or sound principle requiring a court to start and proceed on initial presumption that the appeal or intended appeal shall succeed and so prima facie the applicant is the preferred party. There would be no sound principle to back up such a presumption. The matter must remain in the discretion of the court always exercised judicially, ie circumspectly and considering all the material circumstances of the case and excluding everything that is extraneous, and never shutting one’s eyes to the interests of any party...As the appellant or intended appellant exercises his right of appeal nothing ought to be done which will jeopardize his interests in case his appeal if successful, or which may be a futile endeavour trying to take further steps; but on the reverse side of things, from the point of view of the party who is, at least for the time being, successful to a point, nothing should be done to unduly delay or deny expeditious justice to him in the event that the appeal or intended appeal in question fails...”

14. As observed in the cases cited above, a judgment of a Court of law is a debt and enforcement thereof per se cannot constitute a substantial loss. The applicant for stay becomes a judgment debtor until the appeal is successful. Therefore to pay ones debt cannot by any manner of interpretation constitute a substantial loss. In this case the Applicant has not illustrated how paying the Respondent his pending gratuity will amount to a substantial loss yet the proclamation and attachment has not yet commenced.
15. The court is therefore of the view that the Respondent cannot wait indefinitely to enjoy the fruits of his judgment while the applicant is literally cat-walking its way to file an appeal if any against the judgment of the Court.
16. The application is therefore found without merit and is hereby dismissed with costs.
17. It is so ordered

DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2023

ABUODHA JORUM NELSON

JUDGE

