



**Kenya Chemicals Workers Union v Roto Moulders Limited (Cause
408 of 2020) [2023] KEELRC 2154 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2154 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 408 OF 2020
MA ONYANGO, J
SEPTEMBER 21, 2023**

BETWEEN

KENYA CHEMICALS WORKERS UNION APPLICANT

AND

ROTO MOULDERS LIMITED RESPONDENT

RULING

1. There are two applications filed by the Judgment Debtor who was the Respondent in this suit. The first application is dated 28th July, 2022 and seeks the following orders-
 - a. Spent.
 - b. That this Honourable Court be pleased to order for a further stay of execution of judgment dated the 14th of July 2022 and any other consequential orders pending the hearing and the determination of this application.
 - c. That this Honourable Court be pleased to order for a further stay of execution of judgment dated the 14th of July 2022 and any other consequential orders pending the hearing and the determination of the appeal.
 - d. That the costs of this application be in the cause.
2. The said application was granted in the interim pending interpartes hearing of the application. The court fixed the application for hearing before presiding Judge on 20th September 2022.
3. On the hearing date for the application only the Decree Holder/Respondent in the Application attended court. In view of the absence of the Applicant the court discharged the stay orders.
4. The second application is dated 7th October, 2022. In the application the Applicant sought reinstatement of the interim orders discharged on 20th September 2022.



5. The application is supported by the grounds on the face of the application and the supporting affidavit of Joan A. Atim counsel for the Applicant. She states that the Applicant did not attend court as the matter was not cause-listed. Counsel further states that on the said date she appeared before Mbaru J who first heard the application ex-parte. That she was advised to seek assistance from the Registry.
6. The Respondent/Decree Holder filed a replying affidavit sworn by Mr. Peter Ouko Onyango who opposes both applications.
7. In his affidavit sworn on 19th October, 2022 Mr. Ouko states that the Respondent/Decree Holder was served with a hearing notice for the application and attended court on 20th September when the Applicant failed to turn up to prosecute the application.
8. Mr. Ouko stated that there was an addendum cause list which listed the application for hearing before Court No. 1. Further, that the order of the Duty Judge, Mbaru J. was explicit that the matter would be heard before the presiding Judge. He annexed a copy of the cause-list.
9. Mr. Ouko further deposed that no appeal has been filed as the Memorandum of Appeal annexed to the Application dated 28th July, 2022 is not filed.
10. He states that a successful litigant is entitled to enjoy the fruits of its Judgment and it is in the interest of justice that the application for stay be dismissed.
11. Mr. Ouko further deposed that the Applicant does not meet the threshold as per Order 42 Rule 6 (2) of the Civil Procedure Rules for grant of stay pending appeal.
12. The applications were disposed of by way of written submissions.
13. It is submitted for the Applicant that stay of execution is intended to ensure the substratum of the appeal is preserved. The Applicant relied on the decision in *RWW -v- EKW* [2019] eKLR. The Respondent further relied on the decision of the Court of Appeal in *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR.
14. The Applicant submits that it meets the conditions under Order 42 Rule 6 of the Civil Procedure Rules as it stands to suffer substantial loss if the orders prayed for are not granted, that the Claimant is unlikely to refund the decretal sum.
15. It is further the submission of the Applicant that the application was filed without delay and that it would suffer irreparable loss and its appeal would be rendered nugatory. The Respondent states that it is agreeable to furnishing security.
16. The Applicant submits that in view of the fact that some of the former employees were paid redundancy packages it would only be fair to recover the severance paid to them from the award of this court, arguing that if the same is not recovered it would amount to unjust enrichment. The Applicant relied on the decision in Civil Appeal No. 8 of 1978; *Chase International Investment corporation -v- Laxman Keshra & 3 others* [1978] eKLR.
17. For the Respondent/Decree Holder it is submitted that the Applicant sent a tabulation to the Decree Holder which it rejected as the Applicant had subtracted severance payments made to 5 (five) employees. The Respondent submits that the said employees are entitled to both the severance pay as well as the full awards of this court as awarded in the Judgment.

Analysis And Determination



18. Having considered the Application together with the grounds and affidavits in support thereof, the replying affidavit and the submissions filed by the Parties, the issues for consideration are whether the Applicant meets the threshold for grant of the orders sought.
19. The Application dated 7th October, is spent following the grant of stay orders on 8th November, 2022 as extended on 28th November, 2022. The only application for consideration is therefore the one dated 28th July, 2022.
20. The threshold for grant of stay of execution is provided under order 42 Rule 6 of the Civil Procedure Rules. The Applicant must satisfy to court that it will suffer substantial loss showed the stay of execution not be granted and that the appeal has been filed within unreasonable delay and that such security as that court may order for the due performance of the decree as many alternatively be binding on the applicant has been provided.
21. In the instant case the application was filed without unreasonable delay. The Applicant has further offered to comply with orders on deposit of security as the court may order.
22. The Applicant has however not demonstrated that it has filed a memorandum of appeal. The same is required to be filed within 60 days and no evidence has been adduced by the applicant to prove that the same has been filed even after the Respondent raised the issue in the replying affidavit sworn on 19th October, 2022.
23. A stay pending appeal can only be granted where there is proof that such an appeal has been filed within the period provided or that leave has been granted to file the same out of time. In the instant case the period for filing Memorandum of Appeal lapsed while the parties were negotiating which negotiations were unsuccessful. The Applicant has not demonstrated that such an appeal has been filed.
24. Although the court is bound to consider the provisions of Order 42 Rule 6 (2) when determining an application for stay, there is a presumption that the appeal has been filed. The purpose of staying execution under Orders 42 Rule 6 is to preserve the subject matter pending appeal. It presupposes that such appeal has been filed or that the applicant has such right of appeal that has not lapsed.
25. Where the time for filing appeal has lapsed and the appeal has not been filed, the grant of orders of stay serve no purpose.
26. The applicant having not satisfied the court that there is an appeal that has been filed in respect of which stay of execution pending its determination is sought, the grant of the orders is declined.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET

ON THIS 21ST DAY OF SEPTEMBER, 2023

MAUREEN ONYANGO

JUDGE

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