



**Makau v DIB Bank Kenya Limited (Petition E164 of 2022)
[2023] KEELRC 2146 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2146 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E164 OF 2022
NZIOKI WA MAKAU, J
SEPTEMBER 21, 2023**

BETWEEN

PETER MULE MAKAU PETITIONER

AND

DIB BANK KENYA LIMITED RESPONDENT

RULING

1. On July 3, 2023, the Respondent/Applicant filed a Notice of Motion Application dated June 27, 2023 seeking to be heard for Orders:
 - a) Spent.
 - b) That pending the inter-partes hearing and determination of the application, this Honourable Court be pleased to grant an ex parte order of Stay of Execution of the Judgment delivered by the Honourable Nzioki wa Makau J, in this matter, on June 14, 2023, the decree arising therefrom and all the consequential orders.
 - c) That pending the hearing and determination of the Intended Appeal, this Honourable Court be pleased to grant an order of stay of execution of judgment and decree delivered by the Honourable Nzioki wa Makau J., in this matter, on June 14, 2023 and all the consequential orders therefrom.
 - d) That the court gives any other directions as it may deem just and expedient in the interest of justice.
 - e) That the costs of this application be provided for.
2. The Application was premised on the grounds that the Honourable Court determined the Petition in favour of the Petitioner/Respondent herein, awarding him Kshs 10 Million and Kshs 10,200,000/- as general damages for constitutional breaches or violations and six (6) months' salary compensation



respectively. That the Respondent/Applicant being aggrieved with the Court's decision, preferred a Notice of Appeal against the Judgment on June 19, 2023 intending to appeal against the whole judgment. That the Applicant had also requested for certified copies of typed proceedings, Judgment and Decree arising from the matter. It was the Applicant's contention that the Petitioner was likely to proceed to execute the Judgment and Decree to the Applicant's extreme loss and damage and that since there was no order of stay of execution in place, the Applicant is exposed. Further, should the appeal succeed, the Petitioner shall not be able to refund the onerous aggregate amount of Kshs 20,200,000 awarded to him and that considering the time it may take to hear and determine the appeal, the appeal would be overtaken by events if execution proceeds. The Respondent/Applicant asserted that it was ready and willing to deposit the total award in an Escrow Account as security for the due performance of the decree as may be directed by the Honourable Court. Further, that the Intended Appeal raises serious and triable issues of both fact and law and has high chances of success that may be rendered nugatory if stay is not granted. It also asserted that the Application had been filed without unreasonable delay and that it was in the interest of justice it be allowed.

3. The Application was supported by the Affidavit of Njeri Waitimu who averred that if the Intended Appeal should fail, the Applicant is a financially stable institution with a well-established asset base and is capable of settling the judgment sum without any difficulty. That the Petitioner/Respondent on the other hand would not suffer any prejudice if stay of execution pending appeal is granted since he would be entitled to his judgment if the appeal does not succeed. Furthermore, any delay may be compensated to the Petitioner by way of costs.
4. In response, the Petitioner/Respondent filed a Replying Affidavit dated July 18, 2023, averring that the firm of M/S Marende & Nyaundi Advocates were not properly on record for the Applicant having not sought leave of court. He urged the Court to thus strike out the Application herein with costs for being an abuse of the Court process. Nevertheless, the Petitioner/Respondent averred that he was desirous of executing at the earliest and that no good and/or reasonable basis for granting Stay of execution orders had been laid out before this Court to allow the Application herein. That the Applicant's Intended Appeal is also neither arguable nor capable of succeeding as it is an afterthought and further, the Applicant had not attached a draft Memorandum of Appeal for the Court's consideration. He further averred that the Applicant had not offered any security deposit, indicating that the Application herein was made in faith and was calculated to deny him the fruits of justice. He denied that the appeal would be rendered nugatory, arguing that the Applicant had not demonstrated that he is a man of straw and thus urged the Court to dismiss the Application with costs. It was the Petitioner's prayer that if the Application was however to be allowed, the Court should direct the Respondent/Applicant to deposit the entire decretal amount in a joint interest-earning account.

Respondent/Applicant's Submissions

5. The Respondent/Applicant submitted that its Motion was grounded on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* that:
 - (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.



6. The Respondent submitted that sub-rule 4 thereunder provides that an appeal to the Court of Appeal shall be deemed to have been filed when, under the Rules of that Court, a Notice of Appeal has been given. It was the Applicant's submission that the following are the issues for determination by this Court:
- a) Whether the firm of Marende and Nyaundi Advocates are properly on record.
 - b) Whether the Application meets the threshold for grant of stay of execution.
 - c) Whether the Court is required to determine the merits of the intended appeal based on a draft memorandum of appeal.
7. As regards the first issue, the Applicant submitted that on June 26, 2023, the firm of Marende & Nyaundi Advocates filed a duly executed Consent to Change Advocates dated June 22, 2023 between them and the firm of J.B Kangwana Advocates. That to effect the change, a Notice of Change of Advocates dated June 22, 2023 was filed and served upon the Petitioner/Respondent on June 26, 2021. That the requirement of Order 9 Rule 9 of the Civil Procedure Rules was thus complied with as the provision contemplates change of Advocates after judgment has been rendered to be effected either by order of court or consent of outgoing and proposed incoming advocates. That the reasoning behind this provision was articulated in the case of *S.K. Tarwadi v Veronica Mueblemann* [2019] eKLR in which the Court stated that the essence of Order 9 rule 9 of the *CPR* was to protect advocates from mischievous clients who wait until judgment is delivered and then either sack the advocate or replace them. It was the Applicant's submission that the firm of Marende & Nyaundi Advocates was thus properly on record and that it was guided by the decision of the Court in *West Kenya Sugar Co Ltd v Jacob Wanja Weruga* [2022] eKLR where the Court found that it was satisfied that the incoming advocate was not a stranger having filed notice of change and consent with outgoing advocate before lodging the instant application. On whether it had met the threshold for grant of stay, the Applicant submitted that for an order of stay of execution under Order 42 to be issued, two factors must be satisfied. That these two factors were set out in the case of *UAM v MOA* (Civil Appeal E033 of 2022) [2022] KEHC 15405 (KLR) (17 November 2022) (Ruling) as follows: firstly, that substantial loss may result to the applicant unless stay is granted; and secondly, that such security as the court orders for the due performance of such decree or order as may ultimately be binding upon an applicant has been given (Order 42 rule 6(2) of the *Civil Procedure Rules*). It further submitted that the instant Motion was filed timeously and had thus passed the test for grant of stay of execution. Regarding the first limb of substantial loss, the Applicant opined that the decretal sum of Kshs 20,200,000/- was not a small amount of money and it would likely be engaged in various debt recovery suits seeking to recover the said amount from the Petitioner/Respondent. That it was incumbent upon the Petitioner to show that he has sufficient assets or liquid funds to repay the money and that it is not the Applicant who has to demonstrate his inability to refund. That the Petitioner/Respondent had however not proved to this Court that he is not a man of straw and is able to refund the decretal sum without any financial difficulty in these hard economic times, in the likely success of the Appeal. In support of its submission, the Applicant cited various case law including the reasoning of the Court in *Ann Wanjiru Waigwa & another v Joseph Kiragu Kibarua* [2009] eKLR that:

“... as a general proposition that an appeal arising out of a money decree would rarely be rendered nugatory. The applicants' fears are however founded on the fact that the respondent may not be in a position to refund the decretal sum in the event that they are successful in the appeal. That fear is not really unfounded as the respondent had no answer to this bold statement. Had he in his replying affidavit deponed that he was a man of means



and would be in a position to refund the decretal sum in the event of the appeal succeeding, I would have perhaps looked at the application rather differently...

... Given the fact that the respondent has not come out boldly to proclaim his ability to refund the amount in the event of the appeal succeeding, there can be no doubt that the applicants are likely to suffer substantial loss if execution of the decree is not stayed pending disposal of the appeal...” [Emphasis by Applicant]

8. It was the Applicant’s submission that the Petitioner/Respondent’s silence on his inability or capacity to refund the decretal sum confirms its fears that he will be unable to refund the same in case the appeal ultimately succeeds, thus occasioning substantial loss to it. That the Court in the case of *Joshua Kitonyi Ndambuki v Stellamaris Ndunge Yenge & Onesmus Muthuku Ndolo* [2021] eKLR espoused that a man’s property is so peculiarly within his knowledge that an applicant may not reasonably be expected to know them and that in such circumstances, whereas the legal burden remains on the applicant, the evidential burden shifts to the respondent to show he would be in a position to refund the decretal sum, where the applicant has disclosed reasonable grounds that the respondent will not be in a position to refund the same if the appeal succeeds. That in the case of *Bonface Kariuki Wabome v Peter Nzuki Nyamai & another* [2019] eKLR, the Court asserted that none of the respondents had attempted to discharge this evidential burden and that it was enough for the applicant to depone that the respondents were not able to refund and was not expected to dig deep into their financial standing. The Applicant’s submission was that on account of the Petitioner’s own assertion sworn under oath that he is not a man of straw and is currently jobless, an order of stay of execution should issue to avoid the substantial loss upon the Applicant.
9. As regards the limb of such security as ordered by court, the Applicant submitted that parties herein had joined issue on deposit of the security. It thus prayed for an order to issue directing the deposit of the security under terms deemed fit by the Court. It relied on the reasoning of the Court in *Kellen Wangari Gitonga v Judith Majuma Matimbo* [2022] eKLR making reference to the case of *Ndubiu Gitabi & another v Anna Wambui Warugongo* [1988] 2 KAR 621 in which the Court of Appeal expressed itself that so long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It was the Applicant’s submission that the deposit of the security will ensure that neither party loses based on the outcome of the intended Appeal and prayed that the conditional order of stay of execution be issued.
10. On the third issue for determination, the Applicant submitted that the argument that the intended Appeal was neither arguable nor capable of succeeding because it had not attached the Draft Memorandum of Appeal is wrong and misleading. That it is not the business of the Labour Court under Order 42 Rule 6 of the *Civil Procedure Rules* to assess the prospects of the appeal, as that is within the precincts of the Court of Appeal. That it was therefore unnecessary for this Court to establish the arguability or success of the appeal as it entertains the Application herein as a trial court and not as an appellate court. The Applicant was further guided by the decision of the Court in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR that the High Court is only supposed to be satisfied that substantial loss will occur unless stay of execution is granted; which is the cornerstone of the jurisdiction of the High Court. It further cited the case of *In the Estate of Peter Walter Kowalczyk (Deceased)* [2021] eKLR in which the Court held that although the applicant had not attached a draft memorandum of appeal, this did not supersede Order 42 Rule 6(4) to the extent that the applicant had lodged an appeal by virtue of lodging a notice of appeal. In conclusion, the Applicant submitted that it had met the threshold for grant of an order of stay of execution and beseeched the Court to allow its Application dated June 27, 2023 with orders to the Applicant.



Petitioner/Respondent's Submissions

11. The Petitioner/Respondent submitted that the Applicant had not laid out any good and/or reasonable basis before this Court for granting of the stay of execution orders. That to deny him the fruits of his judgment after the unlawful termination of his employment would be a miscarriage of justice. He urged the Court to consider the averments in his Replying Affidavit and to decline the Motion herein based on the finding of the Court in *James Mogaka v Kenya Commercial Bank Limited* [2021] eKLR in which the Court dismissed held that a mere notice of appeal is insufficient for purposes of grant of stay pending appeal as there should be some arguable grounds upon which the intended appeal is premised. Further, in the absence of the prosed actual Memorandum of Appeal, the Court was handicapped in determining whether there was indeed an appeal being preferred. The Petitioner/ Respondent also cited the case of *Stephen Munene Njagi v Tharaka Nithi County Government & another* [2018] eKLR in which the Court dismissed the application for stay of execution on the basis that the same was not merited and ordered the respondent to pay costs of the application to the claimant. The Petitioner submitted that the Court should decline the motion.
12. The first issue to determine is whether the firm of M/s Marende & Nyaundi Advocates are properly on record. The law envisages leave being sought where judgment has been entered and another firm intends to take over the conduct of the suit. In this case, a consent was executed between the former advocate and the advocate who made the application. Whereas this is not a tidy way to ensure representation post judgment, the Court will allow the firm of Marende & Nyaundi Advocates to come on record for the Respondent/Applicant. The only remiss for the Advocates now on record is that they will forego any costs should their motion before me succeed.
13. Having disposed of the issue of representation, the Court must consider whether there are sufficient grounds for grant of the stay sought by the Respondent. The Respondent has brought the application seeking stay of the judgment of the Court timeously. As such, it argues that the sum against which the intended appeal is premised is a large sum and that should it be successful on appeal, the successful appellant would have difficulty in obtaining a refund from the Petitioner, respondent in the intended appeal. The provisions for stay are clear. The court must be satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay. The intended appeal is not seen to be a diversionary or delaying tactic as the Notice of Appeal was filed 5 days after the decision was made. That is not an afterthought nor can it be said to be merely calculated to ensure the Petitioner does not enjoy the fruits of his judgment. Granted there will be a period intervening between the decision I made and the determination by the Court of Appeal, it would be in the interests of justice that there be a stay. The Respondent/Applicant has made an offer for security. This satisfies the second limb of Order 42 which is to the effect that 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. Granted the sum awarded is not a pittance, it would be the direction of the Court that the Respondent do deposit the entire decretal sum being Kshs 20,200,000/- in an interest earning account in the joint names of the Advocates for the Petitioner and Respondent. Such deposit to be made within 21 days of this Ruling. Should there be failure to deposit the sum as a result of the Respondent/Applicant's default or for reasons/factors wholly attributable to it, the stay granted to lapse on the 22nd day following my Ruling. No costs awarded on the application.
14. It is so ordered.

Dated and delivered at Nairobi this 21st day of September 2023

Nzioki wa Makau



JUDGE

Page 3 of 3

