



REPUBLIC OF KENYA



KENYA LAW
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**National Transport & Safety Authority v Nthiga (Miscellaneous Application
E005 of 2023) [2023] KEELRC 2707 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2707 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E005 OF 2023
AN MWAURE, J
OCTOBER 27, 2023**

BETWEEN
NATIONAL TRANSPORT & SAFETY AUTHORITY APPLICANT
AND
DENNIS MURIITHI NTHIGA RESPONDENT

RULING

1. The Applicant filed a notice of motion dated 16th January 2023 seeking the following orders:
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 3. That this Honourable Court be pleased to grant an order of stay of execution of the Judgement and Decree of the Honourable D.M Kivuti (PM) delivered on 4th July, 2022 in MCELRC E1314 OF 2020 Dennis Muriithi Nthiga v Ntsa and all consequential orders thereof herein pending the hearing and determination of the intended Appeal.
 4. That this Honourable Court be pleased to grant leave to the Intended Appellant/Applicant to file and serve its Memorandum of Appeal and Record of Appeal out of time.
 5. That if prayer (4) above is granted, the draft Memorandum of Appeal herein marked as Annexure “RKC-10” to the Supporting Affidavit be deemed as duly filed upon payment of requisite fees.
 6. That the Honourable Court be pleased to issue any further orders as it deems fit.
 7. That the costs of this Application be in the cause.
2. The application is grounded on the affidavit and further affidavit of Ronald. K. Cheruiyot and or the grounds on the face of the application.



Applicant's Case

3. The claimant states that judgment MCELRC E1314 OF 2020 Dennis Muriithi Nthiga v NTSA was delivered by Hon D.M Kivuti (PM) on 4th July 2022 in favour of the Respondent directing inter alia that the Respondent be reinstated with backpay of his salaries from the date of termination.
4. The Applicant avers that being aggrieved by the said judgment it intends to appeal against the same in its entirety and has filed a Notice of Appeal to that effect dated 8th July, 2022.
5. The Applicant avers that at the time of delivery of the said Judgment Hon D.M Kivuti (PM) had been transferred to a new station and consequently, there was delay in returning the Court file back to the Milimani Chief Magistrates Registry.
6. The Applicant avers that it has taken active steps to apply for the certified copy of the Judgement together with the typed copies of the proceedings with the intention of instituting the Appeal but the file was yet to be returned to the Registry by the trial magistrate who was on transfer.
7. The Applicant avers that it requested for certified copies of proceedings, Judgment and Decree vide a letter addressed to the Executive- Officer Milimani Chief Magistrate Court dated 12th July, 2022 and subsequently on 13th July, 2022 it followed up on its letter by visiting the Court registry and was issued with an official Inquiry Form.
8. The Applicant further avers that it made numerous follow ups at the court registry resting with its letter dated 9th December, 2022 seeking the typed copies of the proceedings in order to institute the appeal however to date the typed proceedings and certified copies of the judgment have not been availed to the Applicant and/or its Counsel by the Court Registry.
9. The Applicant avers that the delay in filing the appeal has been occasioned by the delay by the Court Registry in availing the certified copies of the typed proceedings and a certified copy judgment to enable it prepare its Memorandum of Appeal and Record of Appeal.
10. The Applicant avers that on 12th January 2023 this court issued a Garnishee Order Nisi and scheduled the said Garnishee Application for hearing on 19th January 2023 when the Court shall issue a Garnishee Order Absolute.
11. The Applicant avers that there is a real and imminent risk that the Respondent will proceed to execute the judgement and decree of the lower court and such execution of the decree at this stage will be extremely prejudicial to the Applicant as it shall render the intended appeal nugatory and occasion substantial loss to the Applicant.
12. The Applicant avers that the intended appeal is arguable with high chances of success therefore it is only fair and in the interests of justice that this Court grant an extension of time within which the appeal should be filed.

Respondent's Case

13. The Respondent opposed the application by a replying affidavit and further replying affidavit dated 24th January 2023 and 27th February 2023 respectively.
14. The Respondent aver that it sought to execute the decree dated 21st October 2022 by instituting Garnishee Proceedings through an application dated 8th November 2022 and filing a notice to show cause application dated 9th November 2022.



15. The Respondents avers that the Applicant filed an application under certificate of urgency dated 9th November, 2022 seeking for among other orders stay of execution of judgment delivered on 4th July 2022 pending hearing of the said application and the court directed that the application would be canvassed by way of written submissions but when the matter came up for mention for compliance, the applicant withdrew their application and filed another application for stay dated 13th December 2022 which was canvassed by way of written submissions and the court delivered its ruling on 12th January 2023 dismissing the application of stay with costs to the Respondent
16. The Respondent avers that upon dismissal of the aforesaid application dated 13th December, 2022, the Applicant filed response to the Garnishee Application and simultaneously filed a Notice of Preliminary Objection and an Application to set aside decree nisi and notice to show cause both dated 18th January, 2023 which are still pending before the lower court and interestingly the Applicant had also filed the application herein.
17. The Respondent further avers that the application is incompetent, unmerited, fatally defective and is otherwise an abuse of court process as the Applicant has failed to disclose that a similar application had been dismissed in the lower court and that substantially similar issues are before the court.
18. The Respondent avers that the Applicant's Notice of Appeal dated 8th of July 2022 is clear indication that the Applicant was well aware the said judgment being in place and therefore ought to have filed an application for stay of execution immediately after Judgment as Notice of Appeal does not operate as a stay of execution and the delay in filing an application for stay is therefore inexcusable and unreasonable as judgement was delivered on 4th of July 2022.
19. The Respondent further avers that the Applicant has failed to demonstrate the conditions and requirements stipulated under Order 42 Rule 6 Subrule 2 as the court needs to be satisfied that the application has been made without unreasonable delay, that they have high chances of appeal and that substantial loss may result.

Applicant's Submissions

20. The Applicant submitted that unless an order for stay of execution is granted, the Respondent will, in addition to paying the Respondent the decretal sum of Kshs. 3,593,324.00 and costs of Kshs. 179,38.10.00/-, be compelled to reinstate the Respondent to his position pay his salaries until the Appeal herein is heard and determined thereby rendering the Appeal nugatory.
21. The Applicant submitted that the Respondent has failed to demonstrate that he has the financial capacity to refund the aforesaid sum paid to him together with any future earnings should he be reinstated.
22. It was further submitted that the Respondent has failed to prove that the alleged contributions to his Pension Fund, Sacco and Sinking Fund as deponed in his Affidavit are available and/or sufficient to refund the aforesaid decretal sum together with any future earnings and the funds are in the custody of third parties whom the Applicant has no control over.
23. It was submitted that the Applicant could only move the court for stay of execution once execution proceedings were commenced as an application before that would be premature and cannot be entertained by any court. Having moved the Court immediately upon commencement of execution, the application for stay was filed without any unreasonable delay.
24. The Applicant submitted that the delay in filing of the intended Appeal is not inordinate as it was as a result of the administrative issues in the registry. The Applicant submitted that the application



herein was brought 5 months after the delivery of the judgement and during that period, he had not received a copy of the Judgement to enable it prepare a memorandum of appeal which is mandatory in an application for leave to file an appeal out of time. The Applicant was only able to retrieve a written copy of the judgement in January, 2023 whereupon it was able to prepare the draft Memorandum of Appeal and to bring the Application herein.

25. The Applicant submitted that the intended Appeal raises triable issues which ought to be heard and determined by this court on merit including whether or not the Respondent submitted a forged certificate to the Applicant; and whether the termination of the Respondent was substantively and procedurally fair.

Respondent's Submissions

26. The Respondent submitted that no substantial loss would ensue as that reinstatement of the Respondent and subsequent payment of his dues would be in exchange of services offered to the Applicant. By reinstating the Respondent therefore, he would continue working for Applicant in the same capacity as he holds the experience and expertise. In the event of a successful appeal, his services would be terminated and no substantial loss will have occurred.
27. It was submitted for the Respondent that the Applicant had every opportunity to file an application for stay of execution upon delivery of judgment or soon thereafter either at the lower court or the high court as per the provisions of Order 42 Rule 6 (1) of the *Civil Procedures Rules*. Nothing barred the Applicant from doing so and filing of the present application for stay comes seven months too late.
28. The Respondent submitted that the Applicant cannot state that it has satisfied the requirement for provision of security for the due performance of the decree as it has not complied with the entire judgment and/or decree as it is yet to reinstate the Respondent to his former employment or equivalent and salary will still be owing to the Respondent for the period pending his reinstatement.
29. It was submitted for the Respondent that the Applicant has not reasonably explained its inordinate delay. The Applicant states that delay was a result of administrative issues as Hon D.M Kivuti (PM) had been transferred to a new station and had not returned the court file to the lower court for the Applicant to obtain a copy of the judgment and proceedings. The Respondent submits this is untrue since his advocates were able to peruse the court file and apply for decree which was issued on 21st October 2022 as the file was returned to the Milimani Chief Magistrate's court registry soon after the delivery of the Judgment on 4th July 2022.
30. It was submitted for the Respondent that the draft memorandum of appeal does not raise triable issues with high chance of success. The unsuccessful nature of the previous application of stay in the lower court is enough proof that this application only amounts to a fishing expedition.

Analysis and Determination

31. The issues arising for determination by this court are:
 - a. Whether the Applicant is entitled to an order of stay of execution of the Judgement and Decree.
 - b. Whether the Applicant should be granted leave to file the Appeal out of time.
32. The principles guiding the grant of a stay of execution pending appeal are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:

“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.”

33. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

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 that appeal court reverse the judge’s discretion.

A judge should not refuse a 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.

The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

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 for costs as ordered will cause the order for stay of execution to lapse.”

34. Efforts made by the applicant to obtain proceedings were explained in detail and the difficulties in obtaining the same.

35. As submitted by the Respondent the Applicant has already paid the decretal sum and only outstanding issue in the execution is with regard to reinstatement of the Respondent. The Applicant cannot be locked out of corridors of justice and more so since it has demonstrated efforts made to obtain lower court proceedings in order to file the appeal

36. On the second issue, Section 79G of the *Civil Procedure Act* reads:-

“Time for filing appeals from subordinate courts ‘Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

37. The supreme court of Kenya sitting at Kisumu in the case of *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR while relying to its decision in the case of *Nicholas*



Kiptoo Arap Korir Salat v IEBC & 7 others Application No. 16 of 2014 [2014] eKLR the Hon. Judges reiterated the considerations to be made in such a case to be as follows:

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

Whether there will be any prejudice suffered by the respondents if the extension is granted;

Whether the application has been brought without undue delay; and

Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

38. The Applicant is blamed for having been slothful in filing the appeal as he filed the same about seven months after delivery of judgment. The court as it observed in its ruling on preliminary objection delivered on 24th February 2023 noted that the applicants were disabled from filing their appeal due to delay in procuring the proceedings from the trial court. This should not lock out an intendent appellant from his right to appeal.

39. The court was persuaded by the case of Abbas Sherally & Another v Ab Dul Faziboy Civil Application No 33 of 2003 where the court held:

“The right to a hearing is not only constitutionally entrenched but it is also the cornerstone of our rule of law and the right to be heard is valued and that right of a party to be heard before adverse or a decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified even if the said Decision would have been reached had the parties been heard because the violation is considered to be a breach of natural justice.”

40. The court is also guided by an authority cited by the intended appellant Co-operative Bank of Kenya Ltd v Uwino Kojo & Another supra:

“the Constitution of Kenya 2010 provides for unlimited jurisdiction in criminal and civil matters and appellate jurisdiction of the High Court under article 165(3)(a)(c) and (e) thereof. As an appellate court, it is guided by section 78 of the Civil Procedure Act and Order 42, Rule 32 of the Civil Procedure Rules in civil proceedings. Rule 32 provides as follows:

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross appeal.”

The reading of Rule 32 under order 42 of the Civil Procedure Rules empowers this court to exercise jurisdiction to consider and make orders of objections raised in respect of a



judgment or ruling from the lower court as is the case in the Applicant's Notice of Motion. That considerations may be exercised in the whole of the order, decree or partially as the case may be depending on the issue objected to by an appellant."

41. Flowing from the above the court therefore finds it is just and fair to allow the applicant to have an audience to appeal the judgment delivered on 4th July 2023 in MCERC E1314 of 2020. The respondent has already executed part of the judgment as he has managed to get the decretal sum and the costs from the garnishee KCB bank. The remaining prayer is as pertains to his reinstatement with backpay of his salaries from the date of termination.
42. The court therefore grants the order of stay of execution of the aforesaid judgment but only as relates to the reinstatement of the respondent to his original position but the prayer for the payment of the decretal sum will be determined by the appellate court.
43. The draft memorandum of appeal herein marked as Annexure RKC 10 be deemed as filed upon payment of requisite fees and record of appeal to be filed as well within 30 days from today's date.
44. Should the applicant fail to adhere to the above timelines these orders will lapse and the applicant will comply with the judgment delivered on 4th July 2022 in its entirety.
45. Costs of this application will be in the intended appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF OCTOBER, 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

