



Board of Management Ngata Secondary School v Onyango (Miscellaneous Civil Application E24A of 2023) [2023] KEELRC 2467 (KLR) (17 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2467 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E24A OF 2023**

**HS WASILWA, J
OCTOBER 17, 2023**

BETWEEN

**THE BOARD OF MANAGEMENT NGATA SECONDARY
SCHOOL APPLICANT**

AND

ROSEMARY DIANAH ONYANGO RESPONDENT

RULING

1. Before me for determination are two applications by the applicant. The first one is dated June 8, 2023, brought pursuant to section 3A, 79 G and 95 of the *Civil Procedure Act*, order 22 rule 22, order 42 rule 6, order 50 rule 3 of the *Civil Procedure Rules* and article 58 of the *Constitution*, seeking for the following orders;-
 1. Spent.
 2. This honourable court do enlarge time within which the applicants' herein are to file and serve an appeal out of time to the judgment delivered on January 27, 2023 by Hon Orege which has lapsed.
 3. Spent.
 4. That the honourable court be pleased to stay execution of judgement and decree in Nakuru CMELRC E164 of 2022 pending hearing and determination of the intended appeal.
 5. That the auctioneers do tax their bill to scale
2. The second application is a notice of motion dated June 12, 2023, filed pursuant to section 3A of the *Civil Procedure Act*, order 22 rule 22 and order 42 rule 6 of the *Civil Procedure Rules*, article 50 of the *Constitution* and all other enabling provisions of law seeking for the following orders; -



1. Spent.
 2. Spent.
 3. That the honourable court be pleased to stay execution of judgement and decree in Nakuru CMELRC E164 of 2022 pending hearing and determination of the intended appeal.
 4. This honorable court do make such further order(s) and/or direction(s) as it may deem necessary in the circumstances.
 5. The costs of this application be in the cause.
3. The basis upon which both applications are made are relatively similar and both are supported by the affidavits of Fronicah Shirika, a senior state Counsel in the office of the honourable Attorney General sworn on June 8, 2023 and June 10, 2023 respectively.
 4. The affiant states that pursuant to the judgement delivered by Hon Orenge on January 27, 2023, the applicant was ordered to pay the respondent herein Kshs 428,729. That they are aggrieved by the decision of the court and would like to appeal however the time within which a judgement can be appeal has already lapsed. Also that they are aware that it is mandatory for an advocate to seek leave to come on record after judgment.
 5. It is stated that the reason for the delay is that they were not aware of the case until they were served with the notice of entry of judgement and intention to execute on Saturday March 4, 2023, which they immediately filed an application to set aside the judgement on March 6, 2023, however the application was disallowed on May 24, 2023, informing their decision to appeal the judgement.
 6. He avers that the applicant has a good appeal with triable issues and a high chances of success. Further that the respondent will not be prejudiced if the application herein is allowed.
 7. In the second application seeking for stay of execution, the applicant stated that its apprehensive that the respondent herein will execute the decree, because, they have already been served with proclamation notice which lapses on June 13, 2023.
 8. The applicant reiterated his earlier application dated June 8, 2023 and urged this court to allow the applications as prayed.
 9. The applications are opposed by the respondent who filed a replying affidavit sworn on June 27, 2023. She took issue with the fact that the supporting affidavit to the application of June 12, 2023 was sworn on June 10, 2023 and the annexures therein sworn on June 12, 2023 an issue which she states is a fatal discrepancy that cannot be overlooked by the court.
 10. Contrary to the allegation by the applicant, the respondent stated that the applicants in the parent suit were duly served and admitted as much in the supplementary affidavit of Mrs Naomi K Mwangi dated March 22, 2023 at paragraph 4, that admitted that the applicant herein was served with the statement of claim and accompanying documents on September 23, 2022.
 11. The affiant avers that it followed due procedure of the law and duly served the pleadings on the applicant, but they ignored the summons and pleading until and entry of judgement was served on them that they woke up from their slumber and instructed the Hon Attorney General to act and set aside the judgement instead of seeking to appeal the decision of the trial court.
 12. It is the respondent's case, that the applicant herein choose to review the judgement of the court and upon it being dismissed is when it wants to appeal, a move that is dilatory in nature.



13. She stated that the stay of execution is normally predicated on an existing appeal, which has not been filed in this case.
14. He however contends that if the court is inclined to allow the application then the applicant be orders to deposit in court Kshs 428,729, being the decretal sum and pay the auctioneers their fees of Kshs 73,859.
15. Directions were given for the applications herein to be disposed of by written submission. The applicant filed on July 10, 2023, however, the respondent did not file any submissions.

Applicant's Submissions.

16. The applicant herein identified three issues for determination; whether leave should be granted to applicants to file an appeal out of time, whether the execution of the decree issued by the Honourable B. Oronge on the January 27, 2023 should be stayed pending the determination of the appeal and who should meet the costs of the applications.
17. On the first issue, it was submitted that the delay in filing the application for leave to appeal is excusable and justifiable because the applicant was first notified of this case in the notice of entry of judgement served on March 4, 2023, a Saturday and thus were unable to move the court till Monday the March 6, 2023, when they sought to set aside the *ex parte* judgement, however the said application was dismissed on May 24, 2023, informing the pursuit of the next remedy which was appeal of the judgement.
18. It was argued that even though they did not defend the suit in the trial court, the burden on proof was still for the claimant/ respondent herein to prove its case on a balance of probability as was held in the case of *Shamakame Adam Mbui v Kyoga Hauliers (K) Ltd* [2013] eKLR where the court stated that;

“...Causes are determined on the basis of pleadings and evidence placed before the court. This applies even in undefended causes and the parties should not assume that because a cause is undefended the obligation to discharge the statutory obligation upon the party is lowered.”
19. The issue on whether the draft appeal raises triable issues, was submitted in the affirmative. He expounded that the learned trial court erred in allowing underpayment for 39 months above the time limitation of 36 months and also the fact that the trial court awarded three (3) months' notice pay contrary to the employment contract that provides for one (1) month pay in lieu, which contract in any case had lapsed.
20. It was submitted that if leave to appeal is allowed, this court will be given an opportunity to evaluate the merit of the appeal and rendered justice to parties. In any event that the respondent will not suffer any prejudice that cannot be compensated by way of damages.
21. The applicant, in conclusion, urged this court to grant them leave to appeal out of time and stay execution until the said appeal is determined.
22. I have examined all the averments and submissions of the parties herein.
23. The applicants seek two orders before court. First being stay and the other being extension of time to file an appeal.
24. The application is predicated on the premise that the applicant herein was the claimant in the claim served them with notice of entry of judgment and intention to execute on March 4, 2023 which was a Saturday and that the execution is due to proceed but that they desire to file an appeal so that the court renders its decision on merit.



25. The respondents opposed this application submitting that the applicants failed to attend the hearing of the case at the lower court and so the application is not merited.
26. They however indicated that if the court desires to allow the application, the applicants should be ordered to deposit in court Kshs428,729/= being decretal sum plus 73,859/= auctioneers fees.
27. The applicants have contended that the claimant was awarded judgment contrary to law.
28. This in my view is a triable issue which this court ought to consider on merit.
29. I therefore exercise my discretion and allow the application allowing stay of execution pending appeal which appeal should be filed within 14 days.
30. The stay is granted on condition that the entire decretal sum be deposited in court and that auctioneers costs be agreed upon or taxed within 30 days to be paid accordingly.
31. Costs to abide the outcome of the appeal.

RULING DELIVERED VIRTUALLY THIS 17TH DAY OF OCTOBER, 2023.

Hon LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Masheti holding brief for Karanja for Respondents – present

AG – Miss Shirika for Applicant

Court Assistant – Fred

