



REPUBLIC OF KENYA



KENYA LAW
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**Wamiri v Agricultural Society of Kenya (Cause E764 of 2021 & 47 of 2019
(Consolidated)) [2023] KEELRC 3132 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3132 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E764 OF 2021 & 47 OF 2019 (CONSOLIDATED)
NJ ABUODHA, J
NOVEMBER 17, 2023**

BETWEEN

JULIET WAMIRI CLAIMANT

AND

THE AGRICULTURAL SOCIETY OF KENYA RESPONDENT

RULING

1. By an application dated 16th May, 2023 the applicant moved the Court seeking orders among other that:
 - i. This Honourable Court be pleased to grant an order of stay of execution of the Judgment of this Court delivered on 23rd February, 2023.
 - ii. That costs of the application be in the cause.
2. The application was supported by the affidavit of Caren Jaguga who deponed among others That:
 - A. That I am a female adult person of sound mind and disposition, retained in tire employ of the Applicant/Respondent as the Legal Officer, duly authorized, conversant with tire issues herein and competent to make and swear this affidavit for and on behalf of the Applicant/Respondent. In making this Affidavit, I shall place reliance upon the following list of documents. The bundle is attached hereto and marked as "CJ1" and running from pages 11 to 17 hereinafter.
 - B. That the suit herein was instituted by the Claimant/Respondent herein seeking various declarations against the Respondent for wrongful termination of employment.
 - C. That *vide* Judgement of the court as delivered on the 23rd February,2023 the honorable court made the following orders and declarations in favour of the Claimant/Respondent;



- a. A declaration That the Respondent terminated the Claimant's employment unfairly;
- b. A declaration That the Respondent discriminated against the Claimant in breach of the Constitution and the law and she is entitled to damages;
- c. Compensation awarded at ksh 3,466,071.70/-
- d. Damages awarded at ksh 3,000,000/-
- e. Salary arrears being ksh 339,002/-
- f. Costs of the suit.

(Reference is made to the Judgement as delivered on the 23rd February,2023 on record).

- D. That being dissatisfied by the said Judgement, the Applicant/Respondent preferred an appeal against the said Judgement whereby, it instructed their advocates on record to take over the conduct of the matter and institute an appeal against the said Judgement. The Respondent's advocates applied for certified copies of proceedings and Judgement which are yet to be provided to enable the Respondent file a Record of Appeal. (See pages IX to 12, for letter dated 1st March,2023 requesting for proceedings and certified copy of Judgement and payment receipt attesting as much).
- E. That the Respondent also filed a Notice of Appeal in this matter on tire 6th March,2023. (See pages 13to for a copy of the of Notice of Appeal dated 1st March,2023 and payment receipt thereof attesting as much).
- F. That the Respondent/Applicant is aggrieved by the whole of the said court Judgement decisions for reasons, among others;
 - i. That the learned Trial Judge erred in holding That there was no substantive justification for declaring the Respondent redundant and That the case under ELRC no 47 of 2019 where the Respondent was challenging the transfer by the Appellant was viewed by the Trial court as targeted and deliberate application of tire redundancy provisions to terminate employment yet there was a genuine reason for redundancy which was due to significant business downtown due to the challenges occasioned by Covid-19 Pandemic and further, the Respondent's previous position of marketing and publicity manager became superfluous since the Appellant had adopted digital marketing to save on costs and gains flexibility.
 - ii. That the learned Trial Judge disregarded the evidence by the Applicant's witness and erred in substituting her own business judgment with That of the employer and failing to hold That the decision to declare redundancy has to be That of the employer and as so long as the employer genuinely believed That there was a redundancy situation, then any dismissal was justified.
 - iii. That the learned Trial Judge erred in taking into account extraneous issues in holding That the position as held by tire Respondent is a core function and thus the Respondent ought not be declared redundant yet retain other functions which in the view of the Trial court were non-core such as the one held by tire Appellant's witness, Mr. Rotich.
 - iv. That the learned Trial Judge erred in holding That the provisions of section 40 of the Employment Act were not complied with as regards to consultation and thus



imposing upon the appellant conditions which are not contemplated by section 40 of the Employment Act.

- v. That the Learned Trial Judge erred in faulting the Appellant for not producing the report by Federation of Kenya Employees (FKE) which report merely offered an advisory opinion on the option available to the Appellant which included declaration of redundancy or Voluntary Early Retirement (VER) and the Appellant retained the discretion to choose the preferred viable option for employee separation.
- vi. That the Learned Trial Judge erred in law in failing to hold That Section 40(1)(c) of the Employment Act which provides That an employer to give due regard to seniority in time and the skill, ability and reliability of each employee in declaring redundant was inapplicable and unsuitable in the circumstances of the instant case.
- vii. That the learned Trial Judge disregarded the evidence of the Applicant's witness and erred in holding That the Respondent was discriminated and That she was the only employee declared redundant.
- viii. That the learned Trial Judge erred in awarding the Respondent a colossal sum over Kenya Shillings Seven (7) Million which include General Damages for discrimination which award lacks basis as the same is not contemplated under Section 40, Section 45 and 49 of the Employment Act and there is no basis for the further award not contemplated under the Law.
- ix. That the learned Trial Judge erred in arbitrarily abrogating the principle of freedom of contract and disregarded the evidence of the Applicant's witness by failing to consider the undisputed fact That the Respondent voluntarily initiated the clearance process upon which she was paid all her rightful terminal dues totaling to ksh 1,951,370/- in full and final settlement, acknowledging That she understood the contents therein and discharged the appellant from future claims and thus the respondent was estopped from disputing the circumstances surrounding her separation.

(Reference is had to the draft memorandum of Appeal at page 15 to 17 attesting as much).

- G. That the appeal is arguable and will be rendered nugatory if execution by the Claimant/ Respondent herein proceeds and orders sought herein are not granted. The Claimant, 'Respondent is person of no known means and the Applicant shall be unable to recover any monies from the Claimant in the likely event That the appeal succeeds and yet the Judgement sum herein would have been paid to the Claimant.
 - H. That the Applicant is ready to comply with reasonable conditions of stay to be granted by this court.
 - I. That there has not been any delay in filing the instant application before the court.
3. The Claimant/respondent filed a Replying Affidavit and deposed in the main That:
- i. That I am the Respondent herein well conversant with the facts of this suit hence competent to make and swear this Affidavit.
 - ii. That I have read and understood the Applicant's Notice of Motion Application dated 16th May, 2023 and the Supporting Affidavit sworn thereto, and the same has been explained to me by my counsels on record and I therefore proceed to respond as follows:



- iii. That at the outset, I wish to state That the instant Application is misconceived and made in bad faith, and only intended to prejudice my rights and stop me from enjoying the fruits of the judgment.
 - iv. That the deposition at paragraph 7 of the Supporting Affidavit is disputed as I am in a position to refund the decretal sum if the Appeal were to be allowed for reason That I hold jointly with Peter Karungo Njoroge, a Leasehold title to all the property known as Land Reference number 12715/11843 situated at Syokimau and measuring Approximately 0.0932 Ha. (Annexed hereto and marked "JW-1" is a copy of the Title)
 - v. That I have been informed by my property valuers, which information I verily believe to be true That the open market valuation for the land together with all developments thereon is estimated to attract a colossal sum of ksh 20,500,000. (Annexed hereto and marked "JW-2" is a copy of the Valuation Report).
 - vi. That as per the Judgment of the court, the total decretal sum awarded is only ksh 6, 805,073.70 which amount can be easily recovered from my disclosed asset.
 - vii. That the Applicant herein has not proved That the Appeal shall be rendered nugatory if the stay orders are not granted as I have sufficiently demonstrated my capability to refund the decretal sum should the intended appeal be successful.
 - viii. That the Applicant wishes to benefit from stay orders but has not proved their willingness and capability of depositing any security in court for the due performance of the Decree.
 - ix. That I am advised by my counsels on record, which information I verily believe to be true, That the right of Appeal ought to be balanced with the right of the decree holder to enjoy the fruits of judgment.
 - x. That the annexed draft Memorandum of Appeal contains untrue allegations of fact faulting the learned judge's detailed and well-reasoned judgment, which allegations remain unsubstantiated.
 - xi. That the Applicant has not demonstrated any irreparable losses they stand to suffer if the application is disallowed as they have failed to disclose their financial position and how the same shall be affected if they proceed and pay the decretal sum to the Claimant.
 - xii. That I am advised by my counsels on record, which information I verily believe to be true, That the instant application is fatally defective as it does not meet the threshold set under Order 42 Rule 6 of the [Civil Procedure Rules](#) for grant of stay of execution pending appeal.
4. In support of the application Mr. Wafula for the applicant submitted among others That the applicant had met the threshold for grant of stay of execution as provided under Order 42 rule 6 of the [Civil Procedure Rules](#). On substantial loss, Counsel submitted That the applicant had demonstrated That it would suffer substantial loss if the stay order is not granted and relied on the case of [Goeffrey Muriungi & Anor. v John Rukunga M'imonyo](#) [2016] eKLR where the Court stated among others That the purpose of stay pending appeal was to prevent a successful appellant from becoming a holder of a barren result for the reason That he cannot realise the fruits of his success on appeal. Counsel further relied on the case of [Antone Ndiaye v African Virtual University](#) where the Court stated That substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small That is of real worth or value as distinguished from a loss That is merely nominal. According to counsel, the claimant in the instant case has obtained a judgment



- of a colossal sum of ksh 6,805.073 as well as costs. There was a high and probable likelihood That the claimant shall vigorously pursue the execution.
5. Regarding the ability of the claimant to refund the decretal sum, Counsel submitted That the court should take the approach That balances the interest of both parties rights in order to attain almost a symmetrical balance between them. In this respect, counsel relied on the case of *Eluid Papoi Papa v Jigneshkumar Rameshbhai Patel & anor.* [2017] eKLR. Counsel therefore submitted That it was in the interest of justice That the Court grants a conditional stay. Concerning the title annexed to show the claimant had the capacity to refund the decretal sum, counsel submitted the land was jointly owned with a person not a party to the suit and a matrimonial property. Further the claimant did not attach a certificate of official search in order to ascertain the ownership of the property and whether the same was encumbered or not. In this regard, counsel relied on the case of *Kavin Aggrey Wakoli & Anor v Housing Finance Ltd & 2 Others* [2022] eKLR
 6. On the issue of security counsel submitted the applicant proposed a bank guarantee and contended That a bank guarantee was an acceptable way of furnishing security for the performance of a decree. This was a form of security envisaged under Order 42 rule 6 and further relied on the case *Geonet Communications Limited v Safaricom Plc* [2021]. Concerning undue delay Counsel submitted That the judgment was delivered on 23rd February, 2023. The Notice of Appeal was filed on 3rd March, 2023. The application herein was filed on 17th May, 2023. This was slightly over a month from the date the endorsed copies of the Notice of Appeal were collected. Counsel in this regard relied on the case of *Sankale Ole Kantai T/A Kantai & Co. Advocates v HFCK* [2014].
 7. Counsel for the claimant on the other hand submitted That on the issue of substantial loss, the claimant had made a comprehensive to the above allegation and furnished before the court tangible evidence That she was a person of means and a joint owner of LR. no 12715/11843 with a market value of ksh 20,500,000/- upon sale. The claimant was therefore not a person of straw. No substantial loss shall therefore befall the applicant if the stay was denied. On the authenticity of the contents of the valuation report, counsel submitted That once the claimant submitted the valuation report, the burden shifted to the applicant to disprove the investigations conducted by the valuers.
 8. On the issue of delay, counsel submitted That the judgment herein was delivered on 23rd February, 2023, the applicant however only filed the instant application on 16th May, 2023 nearly 3 months after the judgment. This, according to Mr. Ogembo was inordinate delay. In this regard Counsel relied on the case of *Charles Mwangi Kiiru v Boniface Maina Gichomo & Anor.* [2021]eKLR where the Court held That a delay of 2 months was inordinate.
 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 *Joseph Odide Walome v David Mbadia Akello* [2022] eKLR the court in support of the above provision held as follows;

An applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

 - a. Substantial loss may result to the applicant unless the order is made,



- b. The application has been made without unreasonable delay, and
 - c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
11. 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](#).
12. 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.
13. From the above it is clear That in the exercise of the Court’s discretion in granting or refusing to grant an order of stay is governed by the balancing of the fact That the decree holder has been successful and should not for good cause, be inhibited from enjoying the fruits of their judgment on the hand the intended appellant ought not to proceed on appeal on unsure ground That if successful they may not be able to receive restitution of the decretal already paid to the decree holder. It is in this regard That in order to balance the two competing interests, Order 42 rule 6 makes it a requirement That whenever the Court becomes of the view That stay should be granted, it should unless in exceptional circumstances be on condition That the applicant provides such security as the court may order for the due performance of a decree or order That the Court may ultimately make at the conclusion of the appeal.
14. The applicant has proposed to provide a Banker’s guarantee for the decretal sum. Order 42 rule 6 does not delimit the nature of the security to be provided by the applicant. This is therefore left to the discretion of the Court. A banker’s a guarantee is therefore a suitable security. In That regard the court hereby orders That within 30 days of this ruling, the applicant shall procure from a reputable financial institution, a guarantee to the full extent of the decretal sum herein and file same in court and serve the same on the respondent. In default, execution shall proceed.
15. It is so ordered.

DATED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2023

DELIVERED VIRTUALLY THIS 17TH DAY OF NOVEMBER, 2023



ABUODHA NELSON JORUM
JUDGE

