



**Mwaniki v Kenya Union of Commercial Food and Allied Workers (Petition
1 of 2021) [2023] KEELRC 2776 (KLR) (3 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2776 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION 1 OF 2021
ON MAKAU, J
NOVEMBER 3, 2023**

BETWEEN

CHARLES NJOGU MWANIKI PETITIONER

AND

**KENYA UNION OF COMERCIAL FOOD AND ALLIED
WORKERS RESPONDENT**

RULING

1. This ruling relates to the respondents Notice of Motion dated 24th May 2023 brought under Order 22 rule 25 of the *Civil Procedure Rules* and it seeks the following orders:
 - a. That a stay of execution of the decree issued on 13th April 2023 be granted pending the hearing and determination of this application.
 - b. The Court be pleased to grant a stay of execution of the decree issued on 13th April 2023 pending the hearing and determination of this appeal against the judgement and decree made by Hon Justice Onesmus Makau.
 - c. The cost of this Application be provided for.
 - d. Any other orders that meet the ends of justice be given by this Honourable Court.
2. The Application is premised on the grounds set out in the body of the motion and it is supported by an affidavit sworn by Boniface M. Kavuvi dated 24th May 2023. Basically the applicant's case is that it has filed an appeal against the judgment delivered in this suit on 13th April 2023; that the appeal has good chances of success; that unless stay of execution is granted substantial loss will be suffered and the appeal rendered nugatory as elected Branch Secretary will be deregistered and fresh elections conducted; that the applicant is willing to abide by any conditions and terms to security as the Court may deem fit to impose for purposes of granting the stay orders.



3. The petitioner has opposed the Application vide his Replying Affidavit sworn dated 9th June 2023. In brief he denies that the Court awarded him Kshs 100,000; and that the judgement had irregularities. He further contended the said allegations are false and unsupported by any evidence. He deposed that a judgment cannot be irregular where all parties were granted an opportunity to be heard. Further, that the Applicant did not at any point during the proceedings complain of any irregularity. Consequently, he contended that the application was a mere afterthought and in fact dead on arrival.
4. He urged the Court to not grant stay as court's discretion should not be exercised on basis of falsehood. He contended that he will suffer prejudice if stay is granted since the current term of office for the Respondent's Officials is likely to lapse before the appeal is determined.

Factual background

5. By a letter dated 25th September 2020, the Registrar of Trade Unions issued a notice to all the registered Trade Unions, Employers' Organizations and Federations to hold elections for new officials as the five years' term was coming to an end. The elections were scheduled in three levels. First, Branch elections to be held between 4th January and 31st March, 2021. Second, the National elections were to be held between 1st April and 30th June, 2021. Finally, the federation elections were to be held before 30th August 2021.
6. In compliance of the Registrar's notice, the applicant instructed its branches, vide a letter dated 20th November 2020, to hold branch elections in compliance with union's constitution. The applicant's Nyeri branch issued a notice of Branch General meeting on 10th January 2021 at Kiriti Stadium, Mukurweini. One of the agendas was election of branch officials to hold office for five years. Interested candidates were advised to apply for clearance to the General Secretary directly.
7. The petitioner applied for clearance to vie for the position of Branch Secretary. He paid the required fees of Kshs 100,000 and prepared all the required documents. However, he was not cleared in time to compete for the position. He was aggrieved and brought this suit. After hearing all the parties, I rendered judgement on 13th April 2023 in which I nullified the election of the respondent's Nyeri Branch Secretary and ordered for a repeat election for the position within 90 days of the judgment. I also made an order for deregistration of the returns for the election of the Branch Secretary. I also awarded costs to the petitioner.
8. The applicant was aggrieved and filed a Notice Appeal on 25th April 2023 challenging the whole judgment. It also requested for typed proceedings and decree on the same day. Thereafter the instant motion was filed but no interim stay orders were granted.

Applicant's Submission

9. The applicant's submitted that stay is a discretionary order where the court is required to balance the interests of both parties. It submitted that there is an appeal on record which will be rendered nugatory if stay is not granted. It also submitted that it has satisfied all the requirements for granting of stay. For emphasis, it relied on Order 42, Rule 6 of the Civil Procedure Rules, and cited the case of Butt V Rent Restrictions Tribunal 1982 KLR 417, RWW v EKW (2019) eKLR, Visbram Ravji Halai v Thornton & Turpin [1990] KLR 365 and ENA investment Limited v Bernard Ochau Mose & 2 others [2022] eKLR.
10. It further submitted that the petitioner will not be prejudiced by the stay order because it is willing to abide by any conditions including security that the court will order.



Petitioner's Submission

11. The petitioner submitted that the application is based on misconception that the Court awarded him KShs 100,000. He further submitted that the Applicant has only attached a draft memorandum of Appeal but failed to file a Notice of Appeal. Therefore, he contended that the Court's jurisdiction has not been properly invoked. They also submitted that the Applicants has not demonstrated the form of security they were willing to deposit.
12. He further submitted that the Application is not incompetent as it was brought under Order 22 Rule 25 as opposed to the required Order 42 Rule 6 and as a result the same be dismissed. He fortified his submissions by citing the case of *Carter Sons Ltd v Deposit Protection Fund Board & 2 others* CA No 291 of 1997 at page 4 and [Rose Moturi Mwene v I.E.B.C & 3 Others](#) [2018] eKLR.

Issues for determination

13. Having considered the motion, affidavits and submissions the only issue that falls for determination is whether the stay of execution should be granted pending appeal. Stay is a discretionary relief and it is only available upon the applicant meeting the threshold set out under order 42 rule 6 of the [Civil Procedure Rules](#) which provides 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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”
14. Arising from the above provision, an applicant for stay must satisfy the court on the following: -
 - a. Existence of a pending appeal or a valid notice of appeal.
 - b. The application for stay was made without unreasonable delay.
 - c. Substantial loss may be suffered by the applicant if stay is denied.
 - d. The applicant is willing to offer security as condition for the stay.

Existence of an Appeal

15. The petitioner submitted that there is no evidence to prove that the applicant has filed notice of appeal. The applicant did not respond to that allegation. However, there is notice of appeal on record which was filed within the 14 days required by Rule 77 of the [Court of Appeal Rules](#). Consequently, I am



satisfied that valid notice of appeal exists which was filed in this court on 25th April 2023 and received by the Court of Appeal on 27th April 2023.

Unreasonable delay

16. The judgment herein was delivered on 13th April 2023 and the application for stay was made on 25th May 2023. The period taken to file the application about one month which in my view does not amount to an unreasonable delay. Besides the costs of the suit had not been determined to open the way for execution.
17. I gather support from *Eldoret Grains Limited v. National Cereals Produce Board* [2014] eKLR where Fred Ochieng J held that: -

“In my considered view, the period to be taken into account when determining whether or not there had been inordinate delay is the period from when the Defendant became aware of the Ruling on taxation.

The reason for that is that although the Judgment was delivered on 8th May, 2012, execution could not issue immediately thereafter. Execution of a decree can only proceed after the Bill of costs had been taxed or after the Decree-Holder has obtained the leave of the court to proceed with execution prior to taxation.

Therefore, had the Defendant sought an order for stay of execution prior to the issuance of Certificate of Taxation, it could have been premature. In the circumstances, there is no inordinate delay by the Defendant, in seeking the order of stay of execution.”

Substantial loss

18. In the case of *Butt v Rent Restrictions Tribunal* 1982 KLR 417 where the Court held that:
- a. “The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, 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 the appeal court reverse the judge’s discretion.
 - c. Thirdly, 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.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.”
19. Again, in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, Court held that:

“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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

20. Applying the above precedents to the instant motion, it is clear that the substantial loss at stake is the applicant’s right to be heard in the intended appeal. If the stay is withheld, and the impugned decree executed, the substratum of the appeal will be destroyed. The appeal will become a moot case because should the appeal succeed, the same will not reverse the fresh election ordered by the court.
21. The petitioner is apprehensive that the term of office will lapse before the intended appeal is determined. The said term will end on 9th January 2025. That is an equally serious concern but unlike elections of political leaders in general elections where the time for concluding election disputes is limited by the law, the same position does not obtain trade union elections.
22. Having considered all the arguments by the two sides, I am satisfied that denying a party the right to be heard on his appeal amounts to a substantial loss which in effect renders his appeal nugatory. Accordingly, an order of stay of execution is deserving in this case.

Security

23. The purpose of security is to protect the right of the decree-holder to access his judgment debt promptly if the appeal fails. It also protects the appellant from total loss of the decretal sum or difficulty in recovering the same if the appeal succeeds. I gather support from the case of *Arun C Sharma v. Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* (2014) eKLR where Gikonyo J held that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor. Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants.”

24. The Applicants herein contended that this Court had awarded the Respondent Kshs 100,000/= which averment the Respondent has denied. It is true that I never awarded the petitioner Kshs 100,000. The only monetary award at stake now is costs of the suit which have not yet been determined. The applicant deposed that it is willing to offer security if ordered by the court.
25. The petitioner has already filed a party and party Bill of Costs totaling to Kshs 2,109,025. That excludes the costs for the intended appeal. Consequently, I am satisfied that an order depositing of security is warranted. This will balance the interest between the applicant who craves to be heard on its appeal and the petitioner who is being dragged into an appeal which may not even be determined before 9th January 2025 when the term of office for the current union official will lapse. A security for costs of Kshs 300,000 is reasonable in the circumstances of this case.

Conclusion

26. I have found that the applicant has filed a notice of appeal. I have further found that declining to grant stay will occasion substantial loss because once fresh elections are held in execution of the impugned



decree the appeal will become a moot case. I have also found that the best way to balance the competing interests is to order the applicant to deposit security for costs. Consequently, I allow the application to the extent that stay of execution of the decree passed on 13th April 2023 is granted on the following conditions:

- a. The applicant shall within 21 days of this ruling, deposit Kshs 300,000.00 as security for costs of this suit, in this court or a bank account jointly opened between the advocates on record for the two sides.
- b. The applicant files a record of appeal in the Court of Appeal within 60 days of today.
- c. In default of any of the above two condition, the stay order shall lapse automatically.

DATED, SIGNED AND DELIVERED AT NYERI THIS 3RD DAY OF NOVEMBER, 2023.

ONESMUS N MAKAU

JUDGE

ORDER

THIS RULING HAS BEEN DELIVERED TO THE PARTIES VIA TEAMS VIDEO CONFERENCING WITH THEIR CONSENT, HAVING WAIVED COMPLIANCE WITH RULE 28 (3) OF THE ELRC PROCEDURE RULES WHICH REQUIRES THAT ALL JUDGMENTS AND RULINGS SHALL BE DATED, SIGNED AND DELIVERED IN THE OPEN COURT.

ONESMUS N MAKAU

JUDGE

