



Mwaniki v Vision Afrika Sacco Limited (Employment and Labour Relations Cause 279 of 2018) [2023] KEELRC 3372 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3372 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 279 OF 2018
HS WASILWA, J
DECEMBER 20, 2023**

BETWEEN

THOMAS BABU MWANIKI CLAIMANT

AND

VISION AFRIKA SACCO LIMITED RESPONDENT

RULING

1. This Ruling is in respect of the Respondent/ Applicant's Notice of Motion dated 12th September, 2023, brought pursuant to Order 42 Rule 6(1)& (2) of the Civil Procedure Rules, Section 3 & 20(1) of the *Employment and Labour Relations Court Act* CAP 243B and all other enabling provisions of the law, seeking for the following orders:
 1. Spent.
 2. That pending inter-parties hearing and determination of the respondent's application there be an order for stay of execution of the judgment/decree given on the 29th September, 2022 together with the consequential orders/warrants of attachment arising therefrom.
 3. That the Honorable Court be pleased to grant an order for stay of execution of the judgment / decree of this court given on the 29th September, 2022 together with the consequential orders / warrants of attachment arising therefrom pending the hearing and determination of the respondent's appeal being Nakuru Court of Appeal Civil Appeal No.140 OF 2022 between Vision Afrika Sacco Ltd Vs Thomas Babu Mwaniki.
 4. That the costs of this Application to abide the outcome of the appeal.
2. The Application is supported by the grounds on the face of the Application and the supporting affidavit of Hiram Kariuki Macharia, the CEO of the Respondent's Sacco, sworn on 12th September, 2023.



3. The affiant stated that the Respondent herein has commenced execution of Judgement/Decree given by court on 29th September, 2022.
4. He stated that the judgement of the Court, subject of the Appeal and these stay proceedings had directed the Applicant herein to pay the Respondent 12 months' salary compensation for unfair termination amounting to Kshs. 1,544,400/= plus costs of the suit.
5. Subsequently, the costs of the suit were taxed at Kshs. 240,213/= as per ruling on taxation delivered on 15th August, 2023. Hence the decretal sum plus costs add up to Kshs. 1 784 613.
6. He stated that the execution proceedings were put on motion on 6th September, 2023 when Brosis Auctioneers were sent by the Respondent herein to the Applicant's Nakuru Branch Office to proclaim Applicant's office items, when the Respondent had not served his certificate of costs taxed by the Deputy Registrar on 15th August, 2023.
7. It is averred that the Applicant herein was aggrieved by the judgment /decree of the court given on 29th September, 2022 and has since filed an appeal before the court of appeal on 8th December, 2022 being Nakuru C.O.A Civil Appeal No. E.140 of 2022 (The Appeal).
8. Consequently, it filed and served the Record of Appeal upon the Respondent's Advocate on the 9th December, 2022 and thus they are aware of the pending appeal.
9. He stated that the Respondent has an arguable appeal with high probability of success. Further that the application herein has been filed without unreasonable delay since execution of the court's decree commenced on 6th September, 2023 when the proclamation notice was issued by the auctioneers.
10. He contends that the Applicant is likely to suffer substantial loss and its appeal rendered nugatory if execution of the court's decree is actualized prior to the hearing and determination of the appeal pending before the court of appeal.
11. He also stated that the Respondent herein is a man of straw and if execution is allowed to continue and thereon the decretal amount plus costs of Kshs. 1,784,613/= is paid to him, he may never be able to refund the amount in the event the appeal turns successful and thereon the court's judgment is set-aside or reviewed.
12. On the other hand, that the Respondent is a financial institution which engages in the business of deposit taking, granting of loans to its members and also offers asset financing to its members, thus capable of paying the decretal sum in the unlikely event the Appeal does not succeed.
13. On that basis, the affiant stated that the Applicant is ready and willing to deposit the decretal amount plus costs of Kshs. 1,784,613/= in a joint interest account of advocates and/or to offer a bank guarantee from a reputable bank for purposes of securing the decretal sum pending the hearing and determination of its appeal.
14. That unless the honorable court expeditiously intervenes and issues orders for stay of execution, irreparable harm and loss is likely to occur following attachment and disruption of the Applicant's business and also that the object of the appeal will be defeated.
15. He thus urged this Court to allow the Application as prayed so that a miscarriage of justice does not arise.
16. The Application is opposed by the Respondent, who filed a replying affidavit deposed upon on the 19th September, 2023.



17. The Respondent stated that on 15th August, 2023, the Hon. Deputy Registrar delivered a Ruling on the taxation herein, in presence of both parties advocates, therefore that the Applicant was at all material times aware of the taxed amount.
18. He stated that his advocates were not served with a draft decree for approval, as per Law, before the final copy thereof was extracted and signed.
19. On execution proceedings, the Respondent stated that on 6th September 2023, Brosis Auctioneers indeed commenced execution proceedings, which execution were legally sound, proper and lawful.
20. With regard to the filed Appeal, the Respondent stated that the annexed copy of the Applicant's Memorandum of Appeal does not raise legitimate grounds that deserve appellate judicial intervention. In any event that the mere fact an appeal is arguable does not in itself justify issuance of an order for stay. Also, that approaching Court timeously cannot, in itself, merit issuance of the orders sought.
21. The Respondent contends that the Applicant has not placed before this Court any evidence, or otherwise, to substantiate the alleged loss and/or irreparable harm that it would suffer in the event that the Court's decree is satisfied before the said appeal is heard and determined.
22. He stated that his financial ability or none thereof cannot be a justifiable basis to deny him the fruits of his Judgment. In any case that his financial position cannot warrant the issuance of the orders sought.
23. The Respondent stated that the instant application is meant to delay and deny him the fruits of his judgement and that he stands to suffer great prejudice since the orders sought will not only exacerbate his suffering but also deny him the fruits of the judgement.
24. He stated further that he has not be able to secure another job, due to his age and that it is not foreseeable that he can secure any job in the prevailing job market in Kenya.
25. He stated however that in the unlikely event that this Court is persuaded to grant the sought orders, then half (½) of the decretal amount be released to him and the remaining half(½) be deposited in Court and/ or a joint interest earning account within the shortest time possible.
26. The Respondent also prayed to be awarded costs of this Application and the applicant be ordered to pay the costs of Brosis Auctioneers who have incurred costs in undertaking execution.
27. On 21st September, 2023, this Court directed the parties to canvass the application by written submission, with the Applicant filing on the 18th October, 2023 and the Respondent on 23rd October, 2023.

Applicant's Submissions.

28. The Applicant submitted that even though it has an undoubted right of appeal, there are certain principles which the court ought to consider prior to the granting of an application for stay pending appeal as listed under Order 42 Rule 6 (2) of the Civil Procedure Rules. They are:
 - (i) That the application has been made without unreasonable delay.
 - (ii) That substantial loss may result to the applicant unless the order sought for is made.
 - (iii) That the applicant provides security as may be ordered by court for the due performance of the decree or order.
29. On substantial loss, it was submitted that the Applicant is likely to suffer substantial loss if execution is allowed to take effect before the hearing and determination of its appeal at Nakuru court of appeal



serialized as Nakuru C.O. A Civil Appeal No. E140 of 2022 which was duly filed on 8th December, 2022 and served upon the Respondent's advocates on 9th December 2022. He argued that the loss will occur if execution is allowed to proceed as the Appeal will be rendered nugatory. Further that the Respondent is a man of straws that would not be in a position to refund the decretal amount if the same is released to him and thereafter the Applicant's appeal turns successful.

30. On the proposal by the Respondent to release half of the decretal sum, the Applicant submitted that the argument has no basis in law because the Appeal is against the entire judgment and finding on unfair termination by the trial court, which in the event that half the decretal amount were to be released to the Respondent and thereafter, the court of appeal reviews the judgement or sets aside the judgement in its entirety, there would be no guarantee of how the amount paid out would be recovered. Thus the issue of recovery of money after a successful appeal would turn out to be a legal conundrum.
31. He argued that the Applicant has indicated in its affidavit that the Respondent is a man of straw, a fact which the Respondent ought to have countered and show that he is a man of means and that he would be in a position to repay the decretal if the appeal turns successful. To support this, the Applicant relied on the case of Kenya Orient Insurance Co. Ltd Vs Paul Mathenge Gichuhi & Another [2014] Eklr the High Court while adopting the Court of Appeal holding in ABN_AMBRO BANK -VS— LE MONDE FOODS LTD CIVIL APPLICATION NO. NAIL 15 OF 202 held as follows:

“...so all an Applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and pending appeal was to succeed. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed. Thus evidential burden would be very easy for a Respondent to discharge. he can simply show what asset he has such as land, cash in the bank and so on.”

32. They also cited the Court of Appeal case of National Industrial Credit Bank Ltd Vs Aquinas Francis Wasike & Another [2006] Eklr, where the Court was of the same views and stated that;

“.. This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resourced owned by a respondent or lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

33. Accordingly, that since the Respondent has not indicated his financial worth, the Applicant will suffer financial loss if the decretal sum is released to him. Further that the Respondent is likely to proceed with execution that would disrupt the respondent's business and eventually defeat the appeal, contrary to the essence of stay orders that is aimed at preserving the subject of Appeal as was held in the case of Otieno Vs Ougo & Another No.2 [1987] Klr at page 400 the Court of Appeal held as follows:

“the objects of granting an injunction pending appeal is to safeguard the rights of the Appellant and to prevent the appeal if successful from being nugatory. There were no special circumstances in this case which could cause the court to decide differently from these principles.”



34. On Security, the Applicant submitted that it is ready and willing to deposit the entire decretal amount plus costs of Kshs.1,784,613/= in a joint interest account of advocates and/or to offer a bank guarantee from a reputable bank pending the hearing and determination of its appeal. In this they relied on the case of *Gitahi & Another Vs Warugongo* [1988] KLR where the Court of Appeal on the issue of deposit of Security held as follows:
- “so long as the opposite party can adequately be protected, it is right and proper that security should be given in a way which is the least disadvantageous to the party giving that security. The security may take many forms and a bank guarantee and payment into court are but two of them: so long as it is adequate, then the form of it is a matter which is immaterial. The aim of the court in this case was to make sure in an evenhanded manner that the Appeal would not be prejudiced and that the decretal sum would be available if required. The balance was to be secured by a banker’s guarantee.”
35. The Applicant submitted also that it filed this application within time limits and urged the Court to allow it.
36. On the claim for Auctioneers fees, it was submitted that the issue of auctioneers fees should not be a matter for consideration by this court in an application for stay of execution and that the Auctioneer is at liberty to follow the laid out legal channel of taxation of his costs if indeed he exercised his mandate lawfully.
37. In conclusion, the Applicant submitted that its application has merit as it has met all the requisite conditions for granting of stay pending appeal as envisaged under provisions of the law and urged this Court to allow it as prayed.

Respondent’s Submissions.

38. The Respondent submitted on one issue; whether the application is merited. Accordingly, it was argued that stay of execution ought to be granted, firstly, so as not to render the intended appeal nugatory and secondly that the applicant will thereby suffer substantial loss if the orders sought are not granted. To support this, he relied on the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] Eklr, where the Learned Judges made the following observations with regard to a similar application,

“But this court must look at the matter from the point of view of Rule 5(2) of Court of Appeal Rules, and here the test would be whether the appeal would be rendered nugatory, unless payment of the decretal Sum were stayed. It is not normal in money decrees for the appeal to be rendered nugatory, if payment is made. The affidavit in support has not set out any information to show that the appeal will be nugatory. It is loud in its claim that the appeal will fail. But no reasons are given why the appeal will be rendered nugatory. The court inquired into the respondent’s circumstances, but the information that was forthcoming did not confirm the applicant’s misgivings. It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss, in its various forms is the corner stone of both “jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money. Accordingly, while certain passages in the judgment and ruling gave offence to the applicants, in fact there is no substance to this application, and I would dismiss it with costs...It is not sufficient by merely



stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be in an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted? By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding" On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment. The applicant has not given to court sufficient materials to enable it to exercise its discretion in granting the order of stay."

39. Similarly, the Respondent submitted that the Application herein is predicated upon Order 42 Rule 6(1) of the Civil Procedures Rules and section 3 and 20 of the *Employment and Labour Relations Court Act* Cap 234B. He argued that the applicant alleged that the Appeal will be rendered nugatory if the decretal sum is released to the Respondent on the claim that the Respondent is a man of straw, which grounds is not a basis for granting of orders for stay.

40. On substantial loss, it was submitted that no evidence of substantial loss, as alleged, as been tendered. The applicant has not shown the damages it would suffer if the orders of stay sought are not granted. In fact, that the applicant has not demonstrated an assurance that the filed appeal shall succeed as is required and held in the case of Kenya Shell Limited v Benjamin Karuga Kibiru & another (supra) and the case of James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] eKLR wherein it was held thus;

"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."

41. It was argued further that it is trite that a Court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in a higher Court, which the Applicant has not demonstrated in this case.

42. To further buttress its argument on substantial loss, the Respondent relied on the case of Machira t/a Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63 it was held that:

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".



43. On that basis, the Respondent urged this court to find that the applicant has not given sufficient material and/or reason to enable the court exercise its discretion in granting the orders sought.
44. In support of the need to release half of the decretal sum if the Application is allowed, the respondent relied on the case of *Mutua Mulonzya v Fellowship of Christian Councils Churches in the Great Lakes and Horn of Africa* [2021] eKLR where the Court observed thus: -
- “This Court has an obligation to balance the interest of the parties by granting conditional stay order where substantial loss has been demonstrated. In this case the applicant has not done so. However, since the Respondent has proposed that a half of the decretal sum be paid to him and the other be deposited in an interest earning account to be opened in the joint names of the advocates on record for both parties as a condition for granting the stay order sought, I proceed to do so. However, the stay will lapse automatically if it is verified that there is no appeal filed.”
45. Also cited the case of *Edna Semiti v Intex Construction Limited* [2020] Eklr, where the Court held thus; -
- “In the circumstances I allow the application for stay of execution on condition that the Applicant deposits ½ the decretal sum in an interest earning account held in joint names of Counsels on record within 60 days and releases the remaining to the Claimant within the same period. In default execution to proceed.”
46. Accordingly, the Respondent urged this Court to order for the release of half of the decretal sum if the application is allowed.
47. With regard to Auctioneers fees, it was submitted that Auctioneers are officers of this Honourable Court and they are entitled to fees. It was argued that Auctioneers costs are a by-product and/or ancillary proceedings that arose pursuant to the warrants that were issued to by the Hon. Deputy Registrar of this this Court. Therefore, that this Court is ceased with the requisite jurisdiction to facilitate the just, expeditious, efficient and proportionate resolution of all the disputes herein by finding that Brosis auctioneers are entitled to the fruits of their labour and proceed to award them their fees and direct parties to either agree upon or direct the same to be taxed by the taxing officer as was stated in the case of *Bonface Bandari Chipa v Mwadzombo Jumbale and 3 Others* [2016] eKLR and *David Mutemi Ngumi v Kamili Packers Limited* [2019] eKLR.
48. On costs, the Respondent urged this Court to award him costs basing his arguments on the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh & 4 others* [2014] eKLR.
49. I have considered the averments of the parties herein. It is evident that the applicant herein has already filed an appeal before the Court of Appeal which is still pending determination.
50. To avoid any miscarriage of justice and render the appeal nugatory I allow the application for stay pending hearing and determination of the appeal on condition that the decretal sum be deposited in an interest earning account held in joint names of counsels on record within 90 days.
51. In default execution may proceed.
52. Costs to abide the outcome of the appeal.

RULING DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA



JUDGE

In the presence of:-

Magata for Claimant/Respondent – present

No appearance for Respondent/Applicant

Court Assistant – Fred

