



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. E076 OF 2021

(Before Hon. Justice Dr. Jacob Gakeri)

KELLEN WANGARI GITONGA.....APPELLANT

VERSUS

JUDITH MAJUMA MATIMBO.....RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Kagoni E. M.,

Principal Magistrate delivered on 6th July 2021 at the Milimani

Chief Magistrate's Court at Nairobi in CMEL Case No. 273 of 2020

– Judith Majuma Matimbo v Kellen Wangari Gitonga)

RULING

1. By a notice of motion dated 15th December 2021 and filed on 15th December 2021, the Appellant/Applicant moved the Court under a certificate of urgency seeking orders that –

- i. This Application be certified as extremely urgent and service of the same be dispensed with in the first instance.
- ii. This Honourable Court be pleased to grant an Order for stay of execution of the Judgement and Decree of the Lower Court in Milimani CMELR No. 273 of 2020 pending the hearing and determination of this Application.
- iii. This Honourable Court be pleased to grant an Order for stay of execution of the Judgement and Decree of the Lower Court in Milimani CMELR No. 273 of 2020 pending the hearing and determination of this Appeal.
- iv. The costs of this Application be costs in the cause.

2. The application is expressed under Order 42 Rule 6 of the Civil Procedure Rules 2010, Section 3A and 63(e) of the Civil Procedure Act and Order 51 Rule 1 of the Civil procedure Rules, 2010 and is premised on the grounds that –

- a. The Applicant is dissatisfied and aggrieved by the Judgement and resultant Order of the Lower Court has preferred an Appeal against the same to this Honourable Court.
- b. The suit relates to termination of employment of the Respondent by the Appellant/Applicant and relates to payment of terminal dues.
- c. The Respondent was awarded the sum of Kshs.407,635.80 by the Lower Court.
- d. The decretal amount is colossal and if the Respondent proceed to execute the Decree in the matter hereof, the Appellant/Applicant stand to suffer substantial and irreparable loss and the Appeal shall be rendered nugatory.
- e. The Respondent has no known source of income or employment engagement and her place of abode is also unknown to the

Appellant/Applicant and if the decretal sum or any part thereof is paid to her there are no prospects of refund in the event of a successful Appeal.

f. The appeal raises weighty and triable issues for the determination by this Court and the substratum of the appeal should be preserved.

g. The Respondent has duly extracted the Decree in the Lower Court and has intimated taking out execution proceedings against the Appellant/Applicant.

h. The Application hereof has been brought with quick dispatch.

i. The Appellant/Applicant is willing to furnish security for the due performance of the Decree in the Lower Court.

j. It is just to grant the stay pending the hearing and determination of the appeal.

3. The application is underpinned on the supporting affidavit by Kelen Wangari Gitonga dated 9th December 2021 which echoes the grounds above.

4. The matter came up for directions on 16th December 2021 and Court certified the application urgent but ordered service and response within 14 days of service. No interim orders were granted.

5. Inter partes hearing was slated for 18th January 2022.

6. The Appellant/Applicant's Counsel submitted that since the application had not been responded to, prayer no. 3 of the notice of motion be granted.

7. Counsel for the Respondent, Mr. Mokaya stated that he was served on 20th December, 2021 during the Court's vacation and attempts to have the same mapped in the portal had fallen through though the response was ready. Counsel requested for seven (7) days to file the response.

8. Counsel for the Appellant/Applicant told the Court that this matter was filed under certificate of urgency and there had been inordinate delay of about one (1) month and since the Respondent had already proclaimed the Appellant's goods for purposes of execution of the decree, it was imperative that prayer no. 2 of the notice of motion be granted pending the hearing and determination of the application so as not to render the appeal nugatory. He also sought directions on how to dispose of the application and suggested written submissions.

9. Mr. Mokaya requested for seven days to file a response but protested that the Appellant/Applicant had taken too long after the judgment and opposed the application.

10. The Court granted the Respondent's Counsel leave to file a response and both parties were to file submission and a ruling date was fixed.

11. In the replying affidavit, dated 25th January 2022, the Respondent deposes that the application by the Appellant/Applicant was a delaying tactic to ensure that the Respondent did not enjoy the fruits of the Lower Court's judgment having terminated her services illegally and opposes the orders sought in the notice of motion application.

12. It is deposed that judgment was rendered on 6th July 2021 and a 30 days' stay of execution given by the lower court. In addition, demands for payment dated 11th August 2021 and 3rd December 2021 were unresponded to and the application has been brought late in the day almost five months after the judgment was rendered.

13. That the Respondent has already appointed an auctioneer Nextgen for purpose of execution of the decree and a notice of proclamation had been issued. It is further deposed that the Appellant/Applicant has not made a persuasive or *prima facie* case to warrant the order for stay of execution.

14. It is the Respondent's submission that she has already incurred expenses in the process of execution and the Appellant/Applicant should make good the same and it had not been demonstrated that the Respondent cannot reimburse the decretal sum should the appeal succeed or how the decretal sum will cripple the Appellant/Applicant operations or suffer irreparable loss.

15. It is also deposed that the Appellant/Applicant has not offered any security for the due performance of its obligations or undertake to deposit the decretal sum in a joint interest account and settle the auctioneers' fees.

16. The Respondent prays for dismissal of the application with costs.

Appellant's/Applicant's Submissions

17. The Appellant/Applicant relies on the decision in **Antoine Ndiaye v African Virtual University [2015] eKLR** to submit that the prerequisites for the grant of stay of execution pending appeal are now settled under Order 42 Rule 6 of the Civil Procedure Rules. In the case above Gikonyo J. states that:

“Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the Civil Procedure Rules, that:

- a. The application is brought without undue delay;
- b. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c. 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.

18. As regards undue delay, it is submitted that the application was filed with quick dispatch, four months after filing of the appeal and the Appellant/Applicant applied for typed copies of proceedings on 27th July 2021 and is awaiting the same to file the record of appeal. That the application was filed without undue delay.

19. On substantial loss, it is submitted that attachment of her goods is imminent and the decretal sum is colossal and if the Respondent executes the decree, the Appellant/Applicant stands to suffer substantial and irreparable loss due to her current inability to settle the decretal sum and the appeal shall be rendered nugatory. That she will have lost her goods if the appeal succeeds.

20. The sentiments of Gikonyo J. are relied upon to reinforce the submission.

21. It is contended that the Respondent has no known source of income or employment engagement and her residence is unknown to the Appellant/Applicant and if the decretal sum is paid to her, the prospects of recovery are nil.

22. The Appellant/Applicant further relies on the decision in **Directline Assurance Company Limited v Mary Chepkemei Cheruiyot & another [2020] eKLR** on substantial loss.

23. It is also submitted that the appeal raises weighty triable issues and had a high probability of success and in the circumstances, justice would dictate that execution of decree be stayed.

24. As regards security, the Appellant/Applicant states that she is willing to furnish security for the due performance of the decree in the form of a suitable bank guarantee for due settlement of the decretal sum.

25. The Court is urged to stay execution of the decree pending the hearing and determination of the appeal.

Respondent's Submissions

26. The Respondent submits that the Applicant has not demonstrated how substantial loss may result if the award of Kshs.407,638.80 is paid. That the willingness to furnish security contradicts the assertion that substantial loss will ensue pushing her case further.

27. The Respondent submits that the application is intended to delay payment of the decretal sum. That the Appellant/Applicant had the opportunity to settle the matter at the Labour Office but failed to do so.

28. It is submitted that the Respondent is currently engaged in retail trading in beef sausages at Tigoni Shopping Centre and hails from Kabianga Village Mois Bridge Trans Nzoia County where she inherited five hectares.

29. It is submitted that the application before the Court was filed very late in the day and the inordinate delay has not been justified. That the Appellant/Applicant slept on her rights and the application same was not merited.

30. The sentiments of Medi J. in **Directline Assurance Company Limited v Mary Chepkemei Cheruiyot & another (supra)** are relied upon to buttress the submission. The decision in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR** is also relied upon to underscore the need to balance the propositions that a successful litigant should not be deprived the fruits of judgment in his favour without just cause and the execution would render the appeal nugatory.

31. In light of the inordinate delay in filing the application, the Respondent submits that the Court should interrogate whether the appeal raises triable issues.

32. Finally, the Respondent submits that if the Court holds in favour of the Applicant it should order the Applicant to deposit the decretal sum into a joint interest account and the auctioneer's fees to be assessed by the auctioneers.

Analysis and Determination

33. The singular issue for determination is whether the application for stay of execution pending appeal is merited.

34. The application by the Appellant/Applicant for stay of execution pending appeal is brought under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provides that –

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

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.

35. In **Kenya Shell Limited v Benjamin Karuga Kibiru & another (supra)** the Court stated that:

“In consideration an application for a stay, the court doing so must address its collective mind to the question of whether to refuse it would, render the appeal nugatory.

In applications for stay, the Court should balance two parallel propositions first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

In this case, the refusal of a stay of execution would not render the appeal nugatory as the case involved a money decree capable of being repaid.”

36. In the words of Platt Ag. J.A.

“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.”

37. According to the Judge –

“There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts.”

38. I will now proceed to analyse the extent to which the Appellant/Applicant satisfies the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010.

39. As regards substantial loss to the Appellant/Applicant, it is deponed that the decretal sum is colossal and if the decree is executed, the Appellant stands to suffer substantial and irreparable loss owing to her financial inability to settle the same and the appeal shall be rendered nugatory.

40. It is also deponed that the Respondent had no known source of income or employment engagement and her place of abode was unknown which render prospects of reimbursement minimal. This was captured in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR**

“This Court has said before and it would bear repeating that while the legal duty is on the 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 resources 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.”

41. The Appellant/Applicant has expressed reasonable apprehension of the Respondent’s inability to reimburse the decretal sum if the appeal is successful. The Respondent has not demonstrated the wherewithal to reimburse the decretal sum.

42. Relatedly, the proclamation of attachment on record dated 16th January 2022, shows that the items proclaimed are exclusively domestic including sheep and goats valued at Kshs.27,000/-.

43. The fact that the Respondent has disclosed her current occupation, upcountry residence and her inheritance does not appear to have assuaged the Applicant’s apprehension.

44. In the circumstances, the Court is satisfied that the decretal sum is substantial and in the absence of demonstrable financial ability of the Respondent to repay the decretal sum if paid and the appeal were successful, the Appellant/Applicant would not recover the sum rendering the appeal nugatory.

45. As regards security, the appellant/Applicant has indicated her willingness to furnish security for the due performance of the decree of the lower court in the form of bank guarantee.

46. Contrary to the Respondent's submissions, willingness to provide security in such a case does not necessarily mean ability to pay as security takes various forms such as bank guarantee or insurance bond among others.

47. In **Nduhiu Gitahi & another v Anna Wambui Warugongo [1988] 2 KAR 621** the Court of Appeal expressed itself as follows:-

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. 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. In an application for stay pending appeal the court is faced with a situation where judgment has been given. It is subject to appeal. It may be affirmed, or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates...”

48. The Court is persuaded that the Appellant/Applicant's offer to provide security is a bonafide gesture to bind itself to satisfy the decree of the lower court.

49. The Court is not amenable to the Respondent's invitation to consider the merits of the appeal as they are less relevant at this stage.

50. Finally, as to whether the application was filed without undue delay, the Appellant/Applicant submits “*the instant application was filed only four months after filing of the appeal hereof.*”

There was thus no undue delay.”

51. The Respondent on other hand depones that the application was brought late in the day to scuttle and frustrate the Respondent's enjoyment of the fruits of judgement more than five months after the judgment was delivered and a 30 days' stay of execution granted by the Trial Court.

52. Intriguingly, the Appellant/Applicant makes no attempt to explain the inordinate and unjustifiable delay, in the filing of the application.

53. It is the finding of the Court that the application herein was filed too late in the context of Order 42 Rule 6 of the Civil Procedure Rules, 2010. The situation is aggravated by the fact that the Appellant/Applicant makes no effort to explain the inordinate delay and cleverly uses the appeal to camouflage inaction. To consider an unexplained delay of four months not undue as the Appellant/Applicant would wish the Court to believe is to overstretch imagination.

54. The foregoing finding notwithstanding, the Court is persuaded that since the Appellant/Applicant has demonstrated the other requirements of Order 42 Rule 6 of the Civil Procedure Rules, and the power of the Court to grant stay of execution of a decree pending appeal is discretionary, the Court is predisposed to find the application is merited.

55. The Court hereby grants prayer no. 3 of the notice of motion dated 9th December 2021 on conditions that: -

i. The Appellant/Applicant within 45 days of today's date, deposits half of the decretal sum in a joint interest earning account with the names of the Advocates for the Appellant/Applicant and Respondent.

ii. The Appellant/Applicant provides security for the balance within 45 days.

iii. Failure to meet the two conditions (i) and (ii) above, the Respondent shall have liberty to execute the decree.

iv. Costs of this application shall be in the appeal.

56. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF FEBRUARY, 2022

DR. JACOB GAKERI

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 Civil 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.

DR. JACOB GAKERI

JUDGE