



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ojuok v Population Services Kenya (Cause 3 of 2019)  
[2022] KEELRC 1211 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1211 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 3 OF 2019**

**JW KELI, J  
MAY 18, 2022**

**BETWEEN**

**DENNIS LEAKEY OJUOK ..... CLAIMANT**

**AND**

**POPULATION SERVICES KENYA ..... RESPONDENT**

**RULING**

1. The Applicant, upon delivery of Judgment against it, approached the court by way of Notice of Motion under Order 51 and Order 42 rule 6 of the [Civil Procedure Rules](#) and dated 8<sup>th</sup> January 2022 seeking the following orders:-
  - a. That the application be certified urgent and the same be heard exparte in the 1<sup>st</sup> instance service thereof being dispensed with in the first instance.
  - b. That this Honorable Court be pleased to grant a temporary order stay of execution of judgment and /or decree in Bungoma ELRC C NO. 3 OF 2019 delivered on the 31<sup>st</sup> January 2022 by Hon Justice J.W.Keli and all consequential orders arising therefrom pending hearing and determination of this application inter partes.
  - c. That this Honorable Court be pleased to grant an order of stay of execution of the judgment and/or decree delivered on the 31<sup>st</sup> January 2022 and all consequential orders therein pending the hearing and determination of the appeal.
  - d. Cost of this application be provided for.
2. Orders (a) and (b) are spent.
3. The Application is based grounds that the judgment was in favour of the Claimant and the Respondent being aggrieved has filed Notice of appeal dated 3<sup>rd</sup> February 2022 against the entire judgment, appeal raises weight and triable issues with high chances of success, the Claimant may commence execution



proceedings if stay is not granted, the Applicant will suffer substantial loss and damage if orders sought are not granted and the appeal will be rendered nugatory, it is interest of justice that the stay be granted, the Applicant is willing by the terms and conditions for allowing the application.

4. The application is supported by the affidavit of Allan Ngunze dated 8<sup>th</sup> February 2022. In paragraph 10 the Deponent avers that the Applicant has already settled the amounts due to the Claimant under order 4 and 5 of the Judgment which are notice pay and severance pay(AN2). The court notes that the payslip was not uploaded into the filing system.
5. The Respondent vide the said affidavit of Allan Ngunze at paragraph 11 avers that the Applicant is willing to offer security in bank guarantee of Kshs. 1,377,288 and /or abide by any terms and conditions as the court may direct as a condition for allowing the application.
6. The Application is opposed by the Claimant/Respondent by his Replying affidavit sworn on the 20<sup>th</sup> February 2022 who says the application is meant to deny him the fruits of the judgment, the respondent will not suffer any loss or prejudice if orders sought are denied, execution of the decree will not render appeal nugatory, he is a man of means and will be able to refund the sums paid should the appeal succeed and annexes evidence of a title deed and payslip.
7. The Application was canvassed by way of written submissions. The Applicant's written submissions are dated 1<sup>st</sup> of March 2022 and received in court on the 2<sup>nd</sup> March 2022. They are drawn by Ngala Awino & Company Advocates. The Respondents/Plaintiff's written submissions are dated 24<sup>th</sup> March 2022 and received in court on the 29<sup>th</sup> March 2022. They are drawn by M/S Hammerton Maloba & Co. Advocates.

## **Determination**

### **On the issue of stay judgment and /or decree of the court pending the filing, hearing and determination of the appeal**

8. Order 42 (6) (2) sets two key conditions for grant of stay pending appeal outcome:-
  - (1)

“That substantial loss may result to the Applicant unless the order is made and application is made without unnecessary delay.
  - (2) Such security as the court order for the due performance of such decree as order as may ultimately be binding on her has been given by the Applicant.’
9. The instant Application was filed on the 11<sup>th</sup> February 2022 the Judgment having been delivered on the 31<sup>st</sup> January 2022. The court finds that the Applicant has approached the court without delay.
10. On whether the Applicant will suffer substantial loss if order of stay is not granted, the Applicant submits that further to the substantial loss the intended appeal will be rendered nugatory. That the documents provided by the Respondent of title deed and payslip are not easily realizable assets which can guarantee immediate settlement. That the decree forms the substratum of the appeal and if execution proceeds the appeal will be rendered nugatory.
11. The Respondent/ Claimant submits that the Respondent does not need to sell property as he has steady income to pay his liabilities when they arise. The Respondent relies on the definition of



substantial loss as stated by Justice Odunga in Victory Construction v BM(A minor suing through next friend one PMM)(2019) eKLR :-

“ the word substantial loss cannot mean the ordinary loss to which every judgment debtor is subjected to when he loses his case and is deprived of his property in consequence..... the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in the appeal. The court has to balance the interest of the applicant who is seeking status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruit of his judgment”.

12. The Respondent to buttress the ordinary principle that the successful party is entitled to the fruits of judgment cites decision of Kimaru J in Century Oil Trading Company Limited v Kenya Shell Limited Nairobi (HCMA NO. 1561 OF 2007 ) who upheld the principle and held the court in exercising its discretion will be guided by adequate and proper evidence of substantial loss.
13. On this ground of substantial loss the Applicant submits the title deed and payslip are not easily realizable assets and can be a strenuous long process of recovery and would not in any way maintain the status quo and their appeal would be rendered nugatory.
14. The court is in agreement with the decision of Justice Odunga(supra) and finds that the court must balance the interest of the parties by taking into consideration the question of possible substantial loss to the Applicant and the right to enjoy fruits of judgment of the Respondent/Claimant. The court adds that it also has to consider the possibility of the appeal being rendered nugatory if the Applicant is successful. The court agrees with the Applicant the payslip and title are not easily realizable security. The court also considers a payslip without letter by employer on terms of engagement is not a reliable security. The contract could as well be coming to an end.
15. On the 2<sup>nd</sup> limb of Order 42 Rule 6 of the Civil Procedure Rules requiring security for performance as a condition for grant of stay, the Applicant relies on the supporting affidavit to the Application of the Allan Ngunze at paragraph 10 and 11 stating the Applicant/ Respondent is willing to provide security by a bank guarantee of Kshs. 1,377,288/- being the only amount due. The Respondent/Claimant submits that the decretal sum is Kshs. 2,179,703/- less Kshs 573,870 being severance pay already paid. It would appear there is no agreement as to whether the 2 month notice pay has been paid with the severance pay as indicated in the judgment. The Court noted that the payslip stated to be under “AN2” is for 1<sup>st</sup> May 2019 to 31<sup>st</sup> may 2019. There is no indication of the notice pay of Kshs. 228,548/- . In its Judgment at Paragraph 51 (f) the court made a finding that the notice pay was not reflected under the terminal dues paid under the letter of redundancy. The court finds that the said payslip annexed does not have the notice pay payment under the judgment.
16. The court of Appeal has settled the principles for stay of execution in the case cited by Justice Ongudi in *MFI Document Solutions Ltd v Paretto Printing Works Limited* (2021)eKLR of *Butt -vs Rent Restriction Tribunal* ( 1982) KLR 417 where the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held that:-
  - “ 1. the power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.



2. The general principle is granting or reusing 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 that appeal court reverse the judge ‘s discretion. (sic)( trial court judgement).
  3. A judge should not refuse a stay if there is a good grounds for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
  4. 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 with cause the order for stay of execution to lapse”.
17. The Decree/Judgement sought to be challenged in the instant application is a monetary decree. Costs and Interest can adequately cover any prejudice the Respondent may suffer if the Application is granted. The Applicant stated it would meet any conditions as to security if the application for stay is granted.
18. The Court applying the binding court of Appeal decision(supra) finds merit in the application. In order to protect the right of the Judgment creditor to enjoy fruits of his judgment and to balance with the need of the appeal not to be rendered nugatory if the appeal is successful, the court orders security for performance of the total due sum of Kshs.1,377,288/- plus notice pay of Kshs. 228,548/- making total sum of Kshs. 1,605,826/-. The Court order Security of performance for the outstanding sum of Kshs. 1,605,826/-.

### **Conclusion**

19. I find merit in the Application dated 1<sup>st</sup> November 2021 and issue the following Orders:-
1. There shall be a stay of execution of the judgment and/or Decree in Bungoma ELRC Cause No. 3 of 2019 Dennis Leakey Ojuok v Population Services Kenya pending the filing, hearing and determination of the intended appeal to the Court of Appeal on condition that Kshs. 1,605,826/- is deposited in a joint, interest earning account, in the names of the two law firms namely; M/S Hammerton Maloba & Company advocates and M/S Ngala Owino & Company being the representatives of the parties in this court within 14 days of this Order.
  2. Failure to comply with the deposit will lead to automatic vacation of the order Nos. 1 above.
  3. Costs to the Respondent/Claimant in any event.

**WRITTEN, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 18<sup>TH</sup> MAY 2022**

**J. W. KELI,  
JUDGE.**

**In the presence of:-**

Court Assistant – Brenda Wesonga

Applicant:- MS Maloba Advocate

Respondent:-MS Ngala Advocate

