



REPUBLIC OF KENYA



Thiga v Unga Limited (Cause 2311 of 2016) [2022] KEELRC 1170 (KLR) (6 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 1170 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2311 OF 2016
MA ONYANGO, J
MAY 6, 2022**

BETWEEN

ERIC GICHURU THIGA CLAIMANT

AND

UNGA LIMITED RESPONDENT

RULING

1. The application before me for determination is dated 8th October 2021 by the Respondent/Judgement Debtor (the Applicant) and seeks stay of execution of the judgment herein delivered on 10th September 2021 pending the hearing and determine of an intended appeal.
2. In the grounds on the face of the application and in the supporting affidavit of Betsy Jerotich Counsel for the Applicant, it is stated that Counsel, who was present during the delivery of the judgment which was delivered virtually, experienced a technical hitch and was not able to seek stay of execution pending appeal at the time of delivery of the judgment.
3. Counsel deposes that by the time she logged back into the Court portal, the Counsel for the Claimant had logged out and the Court declined to grant stay *ex parte*, instead advising the Counsel for the Applicant to file a formal application.
4. Counsel states that her attempts to get Counsel for the Claimant to accede to a mutual stay were unsuccessful hence the filing of the instant application.
5. Counsel further deposes that the Applicant will suffer irreparable loss should the orders of stay of execution not be granted, and that the appeal, if in favour of the Applicant, would be rendered nugatory.
6. Counsel deposes that the appeal has been filed timeously.



7. The Claimant the decree holder and the Respondent in the application (hereinafter referred to as the Respondent) opposes the application through the replying affidavit of Eric Gichuru Thiga, the Claimant/Decree Holder.
8. In the replying affidavit it is deposed that the application is gratuitous, baseless, unmerited and does not satisfy the conditions for grant of the orders sought. That there is no demonstrated substantial loss that may result should the orders of stay not be granted, that there is unreasonable delay in bringing the application and there is no security for the performance of the decree that is ultimately binding on the Applicant or any offer of the same.
9. It is deposed that although the Applicant was aware that there was say granted on the date of judgment and in spite of the advice by the Judge that the Applicant files a formal application, none was filed until the decree holder demanded payment by letter dated 7th October 2021.
10. It is further deposed that there is no appeal as no notice of appeal has been filed yet the Court of Appeal Rules require that the notice of appeal be filed within fourteen (14) days and any notice filed outside the timelines would be incompetent.

Submissions

11. In the written submissions in support of the application, the Applicant relies on Order 42 Rule 6(2) of the *Civil Procedure Act* and the decision in *Jairus Momanyi Buranda & another v Ojwang Emmanuel Ochieng* [2021] eKLR where the Court rendered itself thus:

“Flowing from Order 42 Rule 6(2) and the above decision, the Applicant has to establish that: -

1. He will suffer substantial loss if stay is not granted;
2. That the application has been filed without unreasonable delay;
3. The Applicant is willing to furnish security for the due performance of the decree;
4. That the applicant has an arguable appeal.

12. The Applicant also relies on the case of *Meteine Ole Kilelu & 19 others v Moses K. Nailole* [2009] eKLR where the Court of Appeal opined thus:

“Where the decree appealed against is a money decree, the applicant has to show either that once the execution is done after our refusal of the application, the applicant may never get back that money even if his appeal succeeds or that the decretal amount is so large vis a vis his status, or business that the execution would in itself ruin his business or threaten his very existence”.

13. The Applicant further relies on the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another* [2006] eKLR where the Court held as follows:

“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 resources owned by a respondent or lack of them. Once an applicant expresses 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."

14. The Applicant also relies on the decision of the Court of Appeal in the case of *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 others* [2013] eKLR thus:

"... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated."

15. The Applicant submits that the Claimant/Decree Holder did not demonstrate he can refund the decretal sum if the judgment is successful, that there is no unreasonable delay and that it has an arguable appeal.

16. For the Claimant/Decree Holder it is submitted that the Applicant has not fulfilled the conditions for grant of the orders sought being –

- a. Notice of Appeal has not been filed, almost five months after the judgment was delivered;
- b. The Applicant has failed to demonstrate that substantial loss may result to it unless the order is made;
- c. The application ought to have been made without unreasonable delay; and
- d. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has not been given or proposed.

17. The Claimant/Decree Holder places reliance on the case of *Prilscot Company Limited v Monica Hebo* [2015] eKLR where Sergio J. while relying on the case of *Halai & Anor v Thornton Turpin (1963) Ltd* (1990) KLR 365) opined that:

"Order 42 Rule 6 (2) of the *Civil Procedure Rules* lay down the conditions which must be satisfied by an applicant to grant the orders for stay of execution pending an appeal. The applicant must establish that; he/she stands to suffer substantial loss if the orders are not granted; the application must be filed timeously and the applicant must offer security for due performance of the decree or order."

18. It is further the Claimant/Decree Holder's submission that the Applicant has failed to demonstrate that substantial loss may result to it unless the orders sought are granted. That this being a monetary judgment, payment of the money cannot qualify as substantial loss, as the money can be refunded. That the Respondent is a man of means well capable of refunding the same. That in the alternative the Applicant ought to have stipulated that it is willing to provide security as the court may order for the due performance of the decree.

19. The Claimant/Decree Holder places further reliance on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, where the Court stated as follows:

"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. The Claimant/Decree Holder further relied on [*Joseph Gachie T/A Joska Metal Works v Simon Ndeti Muema*](#) [2012] eKLR, where Odunga J. stated that;

“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that status quo should remain as it were before judgement and that would be denying a successful litigant of the fruits of judgment which should not be done if the applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the order of stay.”

21. The Claimant/Decree Holder submits that the Applicant should bear the costs on full indemnity basis. He relies on Section 27 of the [*Civil Procedure Act*](#) and [*Halsbury's Laws of England*](#) (4th Ed.) Vol. 37, at page 552 and submits that “costs follow the event”.

Analysis and Determination

22. The success or failure of this application turns on Order 42 Rule 6 of the [*Civil Procedure Rules*](#) which provides –

[Order 42, rule 6.] Stay in case of appeal.

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.
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.



23. In the first place, there is no appeal as notice of appeal has not been filed. By the time the application herein was filed the time for filing of notice of appeal had already lapsed and there is no prayer for leave to file the notice of appeal out of time.
24. The fact that there is no notice of appeal, together with the fact that the Applicant waited for 28 days before filing the instant application, having been advised by the Court at the time of delivery of judgment to do so and only filed after the Respondent demanded payment, is demonstration that there was inordinate delay in the circumstances of this case.
25. The foregoing notwithstanding, there is no offer of security in the application or in the affidavit in support thereof, or even in the submissions of the Applicant.
26. The bottom line is that there is no appeal that has been filed against the judgment and decree of this Court that would warrant the grant of orders of stay of execution pending appeal.
27. The application is thus incompetent and unmerited, and is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6 TH DAY OF MAY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE

