



**Nyaiera v Egerton University (Employment and Labour Relations Petition
18 of 2018) [2022] KEELRC 3775 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3775 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION 18 OF 2018**

**HS WASILWA, J
JUNE 28, 2022**

BETWEEN

JOSHUA ODURU NYAIERA PETITIONER

AND

EGERTON UNIVERSITY RESPONDENT

RULING

1. This ruling is in respect of the respondent/applicant's application dated March 23, 2022 brought pursuant to section 1A, 1B, 3A and section 95 of the *Civil Procedure Act*, order 51 rule 1, order 50 rule 5, order 42 rule 6 of the *Civil Procedure Rules* and all other enabling provisions of law seeking the following orders;
 1. Spent.
 2. That this honourable court be pleased to issue stay of execution of the judgement/decree issued herein on the September 21, 2021 any consequential orders, pending the hearing and determination of this application inter-partes.
 3. That this honourable court be pleased to extend time and grant the respondent leave to lodge appeal out of time against the judgement/decree issued herein on the September 21, 2021.
 4. That there be stay of execution of the judgement /decree issued herein on the September 21, 2021 and any consequential orders, pending the hearing and determination of the intended appeal herein lodged.
 5. That the costs of this application be costs in the intended appeal.
2. The application is supported by the grounds set out therein and in the supporting affidavit of the, Janet Bii, the respondent's legal officer, sworn on the March 23, 2022.



3. The basis upon which the application is made is that judgement was delivered in favour of the petitioner as against the respondent for the sum of Kshs 807,300.
4. The respondent is aggrieved by the entire judgement and had instructed its advocate on record to lodge an appeal on the same however due to inadvertence on the part of the advocate the appeal was not lodged on time and the time within which the appeal ought to be filed has run out necessitating this application for leave to file the appeal.
5. The applicant avers that they are apprehensive that the petitioner will execute the said Judgement and now seek for stay of execution pending their intended Appeal. She added that if stay of execution is not granted then their intended appeal will be rendered nugatory and an academic exercise.
6. It is averred that if the petitioner is paid the decretal sum and the appeal succeeds, they will not be in a position to recover the decretal sum as they do not know the financial worth of the Petitioner.
7. The respondent/applicant indicates its willingness to furnish this court with security of costs as this court may find appropriate to grant.
8. The application was opposed by the respondent/petitioner, who filed a replying affidavit deposed upon by its advocate on record, Mr Maurice Oduor on the April 19, 2022.
9. The petitioner's affiant avers that judgement was indeed delivered on the September 21, 2021 and the bill of costs drawn and served upon the respondent who on all material times was represented by an advocates one Mr Mwangi and the matter was mentioned severally for taxation on January 7, 2021, February 1, 2020, February 21, 2022 and March 15, 2022.
10. It is averred that the advocates for the respondent/ applicant herein even filed submissions in opposition of the bill of costs and during that time the respondent was aware of the running time to appeal if it needed to and never took any action. He stated that the application herein is an afterthought aimed at delaying the petitioner's fruits of judgement.
11. The affiant avers that the respondent has not attached a draft memorandum of appeal for the perusal of this court. Further that the applicant has not demonstrated any ground to warrant issuance of the orders sought.
12. The petitioner urged this court to dismiss the application herein with costs.
13. The application was disposed of by way of written submissions with the applicant filing on the June 15, 2022 and the respondent filing on the May 26, 2022.

Applicant's Submissions.

14. The applicant submitted that section 7 of the *Appellate Jurisdiction Act* empowers the High Court by extension this court, to extend the time for giving notice of intention to appeal. To support this argument the applicant relied on the case of *Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & another* [2000] eKLR where the court cited the case of *Peter Njoroge Mairo vs Francis Gicharu Kariri & another*, Civil Appeal (Application) No 186 of 1999, (unreported), said:

“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of *Edward Allan Robinson & 2 others vs Philip Gikaria*



Muthami, (Civil Application No Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus: ‘section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.’”

15. It was argued that this court as held above is clothed with the requisite jurisdiction to enlarge time for the applicant to file its appeal.
16. The applicant submitted that there are several factors that are considered by this court before extending time, these condition are as listed in the case of *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 other* [2014] eklr. They are;
 - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - iii. Whether the court should exercise discretion to extend time, is a consideration to be made on a case to case basis.
 - iv. Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
 - v. Whether there will be any prejudice suffered by the respondent if the extension is granted.
 - vi. Whether the application has been brought without undue delay and,
 - vii. Whether in certain cases like election petitions, public interest should be a consideration for extending time.
17. The applicant also cited the case of *united Arab Emirates V Abdelghafar & others* [1995] IRLR 243 where Sir Thomas Birgham MR pointed out that;

“The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate ... The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. The leave may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings. Further, an extension of time is an indulgence from the court by a party in default. He is not entitled



to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.”

18. It was submitted that the reason for the delay was inadvertence of the respondent’s advocates who failed to file the appeal as instructed and mistake of counsel should not be visited upon his innocent client. To support this argument, the applicant relied on the case of *Kenya Industrial Estates Limited V Samuel Sang and another* [2008] eklr.
19. On the stay of execution order sought, it was submitted that the grant of stay of execution orders are provided for under order 42 rule 6 of the *Civil Procedure Rules* and is done as a matter of the court discretion. It was submitted that the sum of money in question is a colossal one and if the petitioner is paid the same might never be recovered if the appeal succeeds as such the respondent will suffer immense loss. In this the applicant elide on the case of *Butt V Rent Restriction Tribunal* [1979] eklr.
20. On whether there is delay in filling this application, the applicant submitted that judgment was delivered on September 21, 2021 and this application made on the March 24, 2022 as such the delay is not inordinate. To support this argument, the applicant relied on the case of *Simon Titus Yandi V Directline Assurance Company Limited* [2020] eklr where this court allowed a stay of execution application which was filed 6 months after delivery of judgement.
21. On security for costs, the applicant submitted that it is willing to furnish this court with such security as the court may order. It in conclusion urged this court to allow the Application as prayed in the interest of justice.

Respondent’s Submissions.

22. The respondent submitted that order 42 Rule 6 of the *Civil Procedure Rules*, provides for stay of execution, however that the discretion of this court to order for stay of execution s fetter by three conditions, establishment of sufficient cause, satisfaction of substantial loss and the furnishing of security. This was held in *Patrick Mutua and another V Mutua Nyamai* [2018] eklr.
23. It was argued that the application herein had failed, firstly, to give sufficient reason for the delay in filling this application save for allegation that the advocate ceased of the matter failed to execute the instructions and file the appeal, also that the affidavit in support is supported by the very advocate instead of the petitioner himself.
24. On the substantial loss, it was submitted that the respondent is an institution of higher learning and if the said sum is paid, the applicant will not in any way be drained financial or suffer any financial loss as the said sum is less than an a million, in any case the applicant has not demonstrated the exact loss that it will suffer if the said money is paid. It was argued that the allegation by the applicant that the petitioner is a man of straw cannot be used as an excuse to obtain stay of execution orders. To support this argument, the respondent, relied on the case of *Patrick Mutua and another V Mutua Nyamai* [2018] eklr
25. On the issue of leave to file appeal, it was submitted the applicant has not satisfied any of the conditions listed by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat V Independent and*



Electoral and Boundaries Commissions & 7 other (Supra) and therefore is not deserving to be granted leave to appeal out of time as sought.

26. The respondent urged this court to disallow the application herein in its entirety with costs to him.
27. I have examined the averments of the parties herein. The judgment in this case was delivered on 21/9/21 and this application for stay was filed on March 23, 2022 6 months later. The respondents oppose this application on the ground that there was inordinate delay in filing this application.
28. The applicants attribute the delay to inadvertence on the part of their counsel.
29. Indeed this application is coming late in time. The applicants have not annexed any draft appeal to the application.
30. There is no explanation given as to why they didn't file the appeal after being aware of the judgment 6 months earlier.
31. That being the position, I decline the application for stay and order that execution proceeds.
32. Costs to the respondent.

RULING DELIVERED VIRTUALLY THIS 28TH DAY OF JUNE, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Aoka holding brief for Kisila for Applicants – present

No appearance for Respondent

Court Assistant - Fred

