



**Kenya Engineering Workers Union v Farm Engineering Industries Ltd  
(Cause 32 of 2019) [2022] KEELRC 1442 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1442 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 32 OF 2019  
S RADIDO, J  
JUNE 22, 2022**

**BETWEEN  
KENYA ENGINEERING WORKERS UNION ..... CLAIMANT  
AND  
FARM ENGINEERING INDUSTRIES LTD ..... RESPONDENT**

**RULING**

1. In a judgment delivered on 3 February 2021, the Court ordered Farm Engineering Industries Ltd (the Respondent) to sign a collective bargaining agreement with Kenya Engineering Workers Union (the Union) within 30-days. The agreement was to incorporate a 12% general wage increment effective 1 August 2017.
2. The Respondent was aggrieved with the judgment, and it filed a Motion dated 23 March 2021 seeking orders:
  - (1) ...
  - (2) ...
  - (3) ...
  - (4) That this Honourable Court be pleased to stay execution of the judgment delivered on 3<sup>rd</sup> February 2021 and the resultant decree pending the hearing and determination of the applicant's Appeal against the said judgment and order.
  - (5) That the costs of this application be in the cause.
3. The Court gave initial directions on the Motion on 12 April 2021, including that the hearing date for the application be taken in the registry.



4. However, because of a contempt application filed by the Union on 1 July 2021, the instant Motion could not be determined any earlier.
5. On 21 July 2021, the Deputy Registrar directed that the Motion be heard on 1 November 2021.
6. The grounds in support of the Motion were; that the Respondent was not aware that the Cause was coming for judgment on 3 February 2021 because the Cause had not been set down for hearing; that a Notice of Appeal against the judgment has been lodged with the Court of Appeal; that implementation of the judgment would significantly prejudice the Respondent considering its financial position; that the Respondent had an arguable appeal with high chances of success and that the application had been brought without inordinate delay.
7. The General Secretary of the Union filed a replying affidavit in opposition to the Motion on 28 April 2021 in which it was deposed that the judgment date was taken by consent of the parties after the Court had given directions on the filing of submissions; that the Notice of Appeal was filed outside the prescribed timeline without any leave; that the salary increment subject of the decree related to pre-COVID19 and, therefore, the economic situation attendant upon the COVID19 pandemic did not arise and that the Central Planning and Monitoring Unit had recommended a higher percentage general increment (than awarded by the Court).
8. The Court gave further directions on the instant application on 25 April 2022. On the same day, the parties informed the Court that they had signed a collective bargaining agreement.
9. The Respondent filed its submissions on 7 June 2022 (should have been filed and served by 13 May 2022), and the Union should have filed its submissions by 22 June 2022). It is unclear if the Respondent alerted the Union on the timelines for filing and exchanging submissions.
10. The Court has considered the record, Motion, affidavit and submissions on record.
11. The Respondent is seeking an order of stay of execution pending the hearing and determination of an Appeal against the judgment of this Court delivered on 3 February 2021.
12. The Respondent lodged a Notice of Appeal with the Court on 16 February 2021, well within the prescribed time. The Motion seeking stay was filed on 6 April 2021.
13. The Court does not find the interval as amounting to inordinate delay.
14. Consequently, the Respondent had to only convince the Court that it would be occasioned substantial loss if the order of stay were not granted and that it was ready to provide security for the due performance of the decree.
15. The question of substantial loss has been the subject of numerous decisions.
16. In *Kenya Shell Ltd v Kibiru & Ar* (1986) KLR, 410, the Court of Appeal stated:  
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 cornerstone of both jurisdictions for granting 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.” (Emphasis added).
17. Another member of the Court stated:  
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 judgement. 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 judgement.

18. In the instant application, the Respondent asserted that its net profit had decreased to Kshs 475,918/- in 2018 and that due to the economic hardships occasioned by the COVID-19 pandemic, it would be impossible for it to meet the terms of the collective bargaining agreement and that in any event, if the salary arrears were paid, the members of the Claimant would not be in a position to refund the same if the Appeal were to succeed.
19. The decree the Respondent intends to Appeal against was in respect to wages due to its employees from 1 August 2017 to 31 July 2019, now past.
20. The Court granted the Respondent an opportunity to put its case forward when it directed it to file its submissions on 12 December 2020. The Respondent snubbed the opportunity to place before the Court the assertions it is now making with regard to its financial position.
21. The Respondent also snubbed two opportunities allowed it by the Court to file a Response to the Claim out of time.
22. The Respondent is, therefore, essentially placing before the Court through the present application, the arguments and case it should have brought to the Court before the judgment.
23. Nevertheless, in the Court's view, the employment scene is ordinarily fluid and staying the decree herein which directed the Respondent to pay its employees' arrears of wages arising from a collective bargaining agreement as awarded by the Court for a period now 3 years past would cause more substantial loss to the employees and not the employer.
24. In terms of offering security for the due performance of the decree, the Respondent did not disclose whether it was ready to offer such a security.
25. Addressing the ingredient of such security, the Court of Appeal held in *Ndubiu Gitabi and Ar v Anna Wambui Warugongo* (1988) 2 KAR 621:

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...



26. Considering the nature of the decree sought to be appealed, the Court declines to grant an order of stay of execution pending appeal.
27. Before concluding a few words on another assertion by the Respondent.
28. The Respondent contended that the Court rendered judgment before the Cause had been certified ready for hearing.
29. Nothing can be further from the truth. On 17 September 2019, the Court dispensed with an application on file and directed the Respondent to file and serve all its documents in readiness for the hearing within 21-days.
30. The Court also directed the Central Planning and Monitoring Unit to file a report within set timelines.
31. The Respondent did not comply with the timelines, and it was granted 21 more days on 16 December 2019. The Response was never filed within the additional 21-days.
32. On 12 November 2020, the Court gave explicit directions on the hearing and determination of the Cause including reserving a judgment to 3 February 2021. An advocate, Mr Omwenga represented the Respondent during the session.
33. As the Court noted in the judgment, the conduct of the Respondent in assisting the Court expeditiously and proportionately determine the Cause was less than honourable.
34. The Court finds the Motion dated 23 March 2021 without merit, and it is dismissed with costs to the Union.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 22ND DAY OF JUNE 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

For Union Mr. Makale, Industrial Relations Officer

For Respondent M.M. Gitonga Advocates LLP

Court Assistant Chrispo Aura

