



REPUBLIC OF KENYA



**Timsales Limited v Otieno (Appeal 110 of 2021)
[2022] KEELRC 1114 (KLR) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1114 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 110 OF 2021
NZIOKI WA MAKAU, J
JUNE 20, 2022**

BETWEEN

TIMSALES LIMITED APPLICANT

AND

JACKSON ONDERI OTIENO RESPONDENT

RULING

1. The Application before me is the one seeking orders for stay of execution of the Judgment of the Magistrate's Court (Hon. Gicheha) delivered on 30th June 2021 wherein the Respondent was awarded Kshs. 200,000/- in general damages and costs for the suit. The Application is premised on grounds on the face of it and the affidavit in support. It is asserted that the Judgment was delivered despite the fact that the suit was a Work Injury Claim and that the Magistrate Courts lack the jurisdiction to hear and determine Work Injury Claims. The Appellant submits that it stands to suffer irreparable damage. The Appellant identifies the issues for determination as:-
 - i) Whether the Applicant would suffer substantial loss;
 - ii) Whether the application was made without unreasonable delay; and
 - iii) Whether the Applicant has provided security
 - iv) Whether there is an arguable appeal.
2. Firstly, the law on the grant of stay of execution under Oder 42 Rule 6 of the *Civil Procedure Rules 2010* was settled in the case of *Charles Kariuki Njuri v Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased))* [2020] eKLR the court held that the purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. The Appellant submits similarly in the case of



James Wangalwa & another v Agnes Naliaka Misc Application No 42 of 2011 [2012] eKLR Gikonyo J. stated that:

“...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.”

The Applicant/Appellant therefore urged the court to make an order for stay execution pending hearing of the Appeal, failure to which the Respondent shall without a doubt proceed to auction the Applicant's goods to the great loss and suffering of the Applicant/Appellant.

3. The Appellant submits that the Court in the case of *National Water Conservation & Pipeline Corporation v Ngatunyi Enterprises Limited* [2016] eKLR, settled that, for money decrees substantial loss existed if decree is executed and the Respondent fails to return the funds in case of a successful appeal.

“In money decrees, substantial loss lies in the Respondent's inability to refund the decretal amount in the event the appeal succeeds”.

4. Similarly, to determine substantial loss, the court in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR the court observed inter alia that,

“The application for stay made before the High Court must demonstrate substantial loss as a fundamental ground to be proved by the applicant. These has to be beneficial of substantial loss to the present, earlier in the matter of paying of the damages awarded which would cause difficulty to the application itself, or because it would lose its money, if payment was made since the respondents would be unable to pay the money”

The Appellant submits that it has reason to believe that the Respondent will not refund the decretal sum in the likely event the Appeal succeeds and it thus submits that it faces imminent danger of losing its goods to the sum of Kshs 200,000/- to the Respondent upon execution of the decree if stay of execution pending hearing of the substratum of the Appeal is not granted. The Appellant submits that the court should grant the Applicant the stay orders to protect it against execution and to preserve the substratum of the suit.

5. As to whether the application was made without unreasonable delay, the Appellant submits that Judgment in this matter was delivered by Hon. Gicheha on June 30, 2021 without notice to and in the absence of the Appellant. The Applicant/Appellant submits it only became aware that judgement was delivered on the July 28, 2021 upon receipt of the Respondent's letter dated July 26, 2021 demanding for the decretal sum and costs. The Appellant/Applicant submits that without delay, it quickly filed the Application for stay of the judgment and lodged a memorandum of Appeal both dated August 3, 2021 on the within four (4) working days from the date it became aware of the judgement. The Appellant submits that in the case of *MMW v JWW & 2 others* [2021] eKLR, the learned judge in determining whether an application for stay had been filed in good time, ruled as follows; “The judgment herein was delivered on October 28, 2019. The applicant filed his Memorandum of Appeal on November 14, 2019 (about 3 weeks after the judgement date) and the application herein for stay on November 15, 2019. I am of the opinion that the application has been filed timeously.” The Appellant submits that as such, four days is not unreasonable delay and that the Applicant filed the application in good time.



6. As to whether the Applicant has provided security, it submits that in regard to security, the court in the case of *Absalom Dova v Tarbo Transporters* [2012] eKLR in allowing a similar application stated that:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

The Appellant submits this was similarly the courts position in *Focin Motorcycle C. Ltd v Ann Wambui Wangui* [2018] eKLR where it was held that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground of stay.”

7. The Appellant submits that it is willing and ready to deposit security in a joint interest earning account for the due performance of the orders as may ultimately be binding on the Appellant. As to whether there is an arguable appeal, it submits that the appeal is arguable since judgment of the Honourable Court was delivered despite the fact that the suit was a Work Injury Claim and the Magistrates Courts lack the jurisdiction to hear and determine Work Injury claims. The Appellant submits that it is trite law that jurisdiction is everything and without it, the court cannot purport to usurp power that it does not have. As such, this appeal is arguable. It was submitted therefore that the court should have taken cognizance of the fact that the work injury claim was wrongly before the Magistrates court and the court ought to have downed its tools for lack of jurisdiction. The Appellant thus submits that the Court should issue the orders sought pending hearing and determination of the Appellant/Applicant's Appeal.

8. Respondent's Submissions

The Respondent submits that Appellant/Applicant filed both the application herein and the appeal, 34 days after the date of delivery of judgment and that this was outside the legally stipulated time especially having received due notice of delivery of the judgement from the Honourable Court. The Respondent submits that the Applicant knowingly slept on its rights of timely appeal in this matter and has proceeded on to file this Application for stay of Execution without seeking leave of Court to do so out of time and should hence not be granted any stay of execution of judgment. It is the Respondent's submission that however if this Honourable Court is inclined to grant the Applicant's prayer for stay of execution, it should order the Applicant to deposit the entire decretal amount of Kshs. 305,609/- in a Joint Fixed Interest Earning Account in a reputable commercial bank in the joint names of the law firms representing the parties in this matter. That this is because the Respondent has not enjoyed the fruits of the said judgement from June 30, 2021 when judgment was delivered in the matter and considering the Applicant is willing to submit to this Court's orders regarding the same.

9. In an application for stay pending appeal as in this case, the Court considers various factors. Paramount in this consideration is that the court should be satisfied that substantial loss may result to the applicant



unless the order is made and that the application has been made without unreasonable delay. Secondly, there should be 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.

10. The Appellant/Applicant is said not to have made the motion without undue delay having moved the Court some 34 days after the said determination, subject of the intended appeal. This period is not of itself what would be considered inordinate delay. Indeed, there have been instances where a shorter period is considered inordinate but this instance does not show itself to be inordinate. However, the Applicant has not made a suitable application for grant of the extension of time to file an appeal out of time. This should have formed the cornerstone of the Applicant's notice of motion to court with the stay being the secondary issue or put another way, there should have been a contemporaneous request for the extension of time and the stay pending appeal. One cannot obtain stay in vacuo. The Applicant having failed to fulfil the conditions for grant of extension of time to file an appeal out of time fails in the intended stay pending the appeal as it follows there is nothing to hinge the stay orders on. Application dismissed albeit with no order as to costs. The decree of the Learned Trial Magistrate may be executed as there is no impediment to it.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

