



**Biiy v Kenya National Union of Nurses (Cause 13 of 2020)
[2022] KEELRC 3864 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3864 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 13 OF 2020
ON MAKAU, J
JULY 27, 2022**

BETWEEN

JOHN K BIIY CLAIMANT

AND

KENYA NATIONAL UNION OF NURSES RESPONDENT

RULING

1. The Respondent (herein after called the Applicant) brought the Notice of Motion dated 13th May, 2022 under the inherent jurisdiction of this Honourable Court and the principle of the overriding objectives, section 3 of the *employment and Labour Relations Court Act*, Order 42 Rule 6 of the *Civil Procedure Rules* and all other enabling provision of law, seeking the following the orders:
 1. That this application be certified urgent as to be hear on priority basis and service thereof, on the Respondent, be dispensed with at the first instance.
 2. That pending hearing and determination of this Application, this Honourable court be pleased to grant an interim stay of all execution proceedings of the judgment delivered on 22nd April, 2022 by Hon. Justice Onesmus M. Makau.
 3. That pending the hearing and determination of the Applicant's intended Appeal to the court of appeal, this Honourable Court be pleased to grant stay of execution of order against the judgment delivered on the 22nd April, 2022 by Hon Justice OnesmusM. Makau.
 4. That the cost of, incidental to this Application, abide the intended Appeal.
2. The application is supported by the Affidavit of Seth Ambusini Panyako sworn on 13th May, 2022 and is premised on the following grounds:



- a. That, by judgement delivered on 22nd April, 2022, this Court awarded Kshs 2,340,000 to the claimant as against the Applicant herein, which the Respondent being dissatisfied with, has filed notice of Appeal dated 25th April, 2022.
 - b. That execution proceedings have commence and the claimant/Respondent herein shall at any moment execute the said decretal sum.
 - c. That the sum to be executed is quite colossal and the Applicant is apprehensive that if stay Orders are denied and execution commenced, they might not recover the decretal sum rendering their appeal nugatory.
 - d. He avers that the claimant, in the bid to execute for the decretal sum, has failed to factor the Kshs.10,159,670 he owes the Applicant in respect of the Orders of Lady Justice Maureen Onyango in Nairobi ELRC Cause No, 50 of 2018; Kenya National Union of Nurses v John Biiy and others, where the Court found that the claimant herein, together with other criminally and fraudulently diverted Union funds amounting to Kshs 9,686,463.15 with respect to account number 0073205xxxxxxx held at ECO Bank, together with costs taxed at 473,207 on 12th May, 2022,all adding up to Kshs. 10,159,670.
 - e. That the application herein has been filed in a timely manner.
 - f. On security for cost, the Applicant states that, the Kshs 2,340,000, being part of the Kshs 10,159,670, the claimant owes it be used as security to secure its right of appeal.
 - g. It is also stated that the claimant does not have a known physically address and he is infact on the run to avoidthe criminal investigations by director of criminal prosecution under DCI/1B/SEC/2/1/11/VOL.1V/176 over the fraudulent activities on the Union Accounts. Further that there is another claim by the Union being ELRC Cause number 387 of 2018 *Kenya National Union of Nurses V NIC Bank; John KipyegonBiiy and others* were the Union is demanding payment of over 8 Million shillings fraudulent acquired by the claimant in cahoots with others.
 - h. It is also stated that the Appeal is arguable with very high chances of success.
3. In response to the Application, the Claimant filed his Replying Affidavit on 27th June, 2022 stating that the Applicant has failed to meet the threshold for issuance of stay of execution Orders as envisaged under Order 42 Rule 6 of the *civil Procedure Rules*. He contended that the Applicant has not demonstrated any loss it would suffer if stay order are decline, and the reasons given are based on mere assumptions.He denied being a man of straws and urged that the Applicant ought to prove its case and not throw the burden to him.
 4. He states that the judgement in Nairobi ELRC 50 of 2018 did not find as stated by the Applicant and infact he does not owe the Applicant any money as alleged. He avers that he is not aware of any taxation proceedings against him as such the claim of set off is denied.
 5. He also avers that the taxation of the Bill of costs in this claim is yet to be determined and he has not sought leave of court to execute the decree before taxation of costs. Therefore he contends that execution proceedings have not commenced to warrant the staysought. Finally, he denied that he is facing investigation for purposes of Criminal Prosecution.
 6. In a rejoinder, the Applicant filed a further Affidavit dated 23rd June, 2022, reiterating the averments in its supporting affidavit and maintaining that the claimant is a man of straws and if he was not he should have tendered evidence to the contrary.



7. It is the Applicant's case that by filling the Bill of costs and prosecuting it, the claimant has set in motion the wheels of execution, which will clamp on them any time before the Appeal is heard and determined which will have an effect of rendering their Appeal nugatory.
8. The applicant has denied that it is trying to enforce judgement of a different suit in this case but just highlighting the special circumstances that they want the court to consider in granting unconditional stay on their application.
9. The claimant filed a further affidavit dated 29th June, 2022, which he reiterated the contents of its replying affidavit and in addition stated that the certificate of costs annexed to the Applicant's further affidavit is not addressed to him neither does it reflect the amount, if any, he owes the Applicant. Further, the Applicant tried to execute the decree in Nairobi ELRC cause number 50 of 2018, by an application of 27th August, 2020, which Court declined.

Applicant's Submissions.

10. The Applicant submitted that for stay of execution to be granted the applicant must meet the threshold in Order 42, Rule 6 that is; substantial loss must result to the applicant unless an order is made, that the application has been filed without unreasonable delay and that the applicant is willing to deposit security for due performance of the decree.
11. On the first issue, it was argued that the amount in question is a colossal one that if paid to the claimant it might not be recovered if the Appeal succeeds. It was argued that the claimant is a man of straws with no known physical location, assets and income therefore, he will be unable to pay eventually when the Appeal succeeds.
12. Further that Judgement in Nairobi ELRC Cause 50 of 2018, was entered against him to a tune of Kshs 10, 159,670 which despite demand has not been paid to date, coupled up with the fact that the claimant is under investigation on the fraudulent activities of the Union. The failure to pay the decretal sum in ELRC cause number 50 of 2018 is therefore an indication that the claimant is man of straw and if the decretal sum is paid to him, it will be impossible to recover the same if the Appeal succeeds.
13. For emphasis the Applicant relied on the case of *Sarah N. Sakwa v Elizabeth Wamwanyi t/a Namukhosi Ltd & another* [2017] eKLR where the Court relied on *James Wangalwa & Another v Agnes Naliaka Cheseto* (2013) eKLR, where Gikonyo, J stated that:

“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. This is what substantial loss would entail...”

...

The right of appeal is a constitutional right that actualize the right to access to justice, protection and benefit of the law, whose essential substance, encapsulates that the appeal should not be rendered nugatory for anything that renders the appeal nugatory impinges on the very right of appeal.”

14. The Applicant also relied on the case of *Directline Assurance Company Limited v Michael Njima Muchiri & another* [2020] eKLR, where the court opined that;

“While it is true that every person is entitled to enjoy the fruits of his or her lawful judgment, it is trite law that upon an applicant raising issue with the financial capabilities of a respondent



to refund a decretal sum, the evidential burden then shifts to the respondent to show the means/resources he or she has.”

15. As regards the second requirement, it was argued that the Judgement was delivered on 22nd April, 2022, while this Application was filed on 13th May, 2022, less than a month thereafter. Therefore it was submitted that the same was filed without undue delay.
16. On security for cost, the Applicant prayed for the Court to grant unconditional stay Order on the basis that it has depleted its funds, owing to the action by the claimant and raising the said funds would be an uphill task. Further, the applicant submitted that it is in the process of executing a decree in ELRC case number 50 of 2018 against the same claimant who owes it money and considering the unique circumstances brought about in this case, this Court to order for unconditional stay Order.
17. For emphasis the Applicant relied on *Stanley Mugweru Muchir & 2 others v John Mutbike Muchira* [2020] eKLR where the Court, when faced with a similar application held that:

“The applicants in their supporting affidavit have stated that the sum of Ksh. 2,100,000/ = which they have been asked to deposit as security for costs is too high and beyond their means being peasant farmers. They have also stated that they are unable to meet the terms due to the country’s economic depression owing to Covid-19 pandemic. As observed by the Superior Court in the cited case of *Butt v Rent Restriction Tribunal (supra)*, this Court is bound to consider the unique circumstance which this country and the world at large are going through due to the Covid-19 pandemic while considering whether to grant an application for stay of execution pending appeal and the terms, if any...In the upshot, I find the Notice of Motion dated 14th September 2020 merited and the same is allowed as prayed. Consequently, I hereby grant unconditional order of stay of execution of the orders given by the trial Court on 29th May 2020 in Wanguru PMCC No. 101 of 2011 and all other consequential orders pending the hearing and determination of the intended appeal. The costs of the application shall abide the appeal.”
18. They also relied on the case of *Bernard Mbalu Nzyuko v Joseph Mwangi Kimani & another* [2021] eKLR, where the Court held that; -

“The respondent has not controverted the appellants’ assertion that he has no financial ability to refund the decretal sum if the appeal succeeds. I am convinced that if the order for stay is denied the appellants will suffer substantial loss. Consequently, an order for stay is granted pending appeal.”
19. In conclusion the Applicant urged this Court to allow the Application as prayed and stated that it willing to abide by any orders the Court may deem fit to grant.

Respondent’s Submissions

20. The respondent submitted on two issue, whether the application is merited and who should bear costs. On the first issue, it was submitted that that Order 42 Rule 6 of the *Civil Procedure Rules* gives the conditions to be satisfied before an Order for stay of execution is granted. He argued that the Applicant has failed to demonstrate the loss it will suffer if stay is denied. For emphasis it relied on the case of *Machira t/a Machira and company advocates v East African Standard (No.2)* [2002] KLR 63 and the



case of *Equity Bank Limited v Taiga Adams Company Limited* [2006] eKLR where the Court held that;

“In the application before me, the applicant has not shown or established the substantial loss that would ensue if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the Respondent – that is execution is carried out – in the event the appeal succeeds, the Respondent would not be in a position to pay- reimburse – as he/it is a person of no means. Here, no such allegation is made, much less established, by the appellant/applicant.”

21. Similarly, it was argued that the applicant has failed to demonstrate substantive loss and as such the Application herein ought to be decline and execution allowed to proceed till its logical conclusion.
22. On security, it was argued that the Applicant has not furnished this Court with security which is a condition precedent before stay Orders are granted. For emphasis he relied on the case of *Gianfranco Mantbi and another v Africa Merchants Assurance Company Limited* [2019] eKLR where the Court held that; -

“Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.”

23. On costs, it was argued that the same follow the event and having failed to satisfy the conditions prerequisite to granting of stay Orders, the Application herein ought to be dismissed with costs.

Analysis and determination.

24. I have considered the material presented by the parties herein. The main issue for determination is whether the Respondent has fulfilled the requirements for the grant of an order of stay pending appeal.
25. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules*, which Rules provides that;

“No order for stay of execution shall be made under sub rule (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.”
26. In *Butt v Rent Restriction Tribunal* [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and it should be exercised in such a way as not to prevent an appeal or render it nugatory. The court in exercising the said should consider the special circumstances of the case and its unique requirements.



27. With the foregoing background I will now consider the Conditions prerequisite to granting of stay Orders as set out by order 42 rule 6 of the [Civil Procedure Rules](#).

Undue delay.

28. On the first condition on undue delay, it is not in doubt that the Application herein was filed timeously because the Judgement was delivered on 22nd April, 2022 and the Application was filed in Court on 13th May, 2022, about three weeks later.

Substantial loss.

29. The Applicant argued that they would suffer substantial loss should the application be denied. It was their submissions that the sum in issue is a colossal one and the Claimant is a man of straw who is not in a position to refund the decretal sum if the appeal succeeds hence it would suffer substantial loss. Further that the claimant owes the Applicant sum of over 10 Million Shilling as ordered in Nairobi ELRC Cause number 50 of 2018. The Claimant on his part argued that the applicant has failed to demonstrate with particularity what loss it would suffer if stay is denied.

30. In the case of [National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another](#) (2006) eKLR the Court of Appeal stated that:

“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 Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear 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”.

31. The above principle was further stated in [ABNAmro Bank v Lemond Foods Limited](#) Civil Application No.15 of 2002 where the Court of Appeal held that:

“The legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in bank and so on.”

32. Guided by the above binding precedents, it is my firm position the Applicant has a legal burden of proving that the claimant herein is a man of straw. The said burden is discharged by alleging that the claimant has no known means of repaying the decretal sum should the appeal succeed. In this case, the applicant has alleged as much and therefore the evidential burden of proof has shifted to the claimant to prove he has the means of refunding the decretal sum if the appeal succeeds after execution of the impugned decree.

33. The claimantclaimant denied being a man of straws but failed to tender any evidence in support thereof. He has not shown that he owns any assets or whether he is has any income generating occupation which will enable him refund the decretal sum if the appeal succeeds after execution of the impugned decree.



34. Having failed to tender any evidence in support of his financial worth or ability, I am of the opinion that the claimant might not be in a position to refund the decretal sum if the Appeal succeeds.

Security.

35. The Applicant did not tender any security for the due performance of the decree but urged the Court to grant unconditional stay because it is experiencing financial challenges due to Covid-19 aftermath, and also because the claimant owes it more than Kshs. 10 million in another court decree. However, at the tail end of their submissions, the Applicant urged that they are willing to abide by any conditions this Court will order. The Claimant on the other hand opposed granting unconditional stay and argued that security on enforcement of decree is mandatory.
36. Gikonyo J in the case of *Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* (2014) eKLR held that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor. Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

37. As much as I agree with the Applicant that Court at times grant unconditional Stay Order, the same ought to be based on the unique and special circumstances of the case. The Applicant had argued that they do not have such a colossal sum because their coffers are depleted due to Covid-19 effects. They however have failed to tender any evidence in support of this claim making it impossible for the Court to ascertain. Consequently, in order to balance the applicant's right of being heard on its intended appeal and the need to secure claimant's right to immediately access his decretal sum if the appeal fails, security is merited in this case as a condition for stay.

Conclusion.

38. For the reasons that the Applicant has demonstrated that it stands to suffer substantial loss if stay is withheld, that the application was made without unreasonable delay and that the applicant is willing to deposit security for the payment of the decree if ordered to do so, I grant stay of execution of the impugned judgment/decreet on condition that the Applicant deposits the decretal sum in a joint interest earning bank account in the name of the advocates for the parties. The said conditions shall be met within 30 days from the date of this ruling and if the parties cannot agree on the bank, the applicant will be at liberty to deposit the money in Court before the said time lapses.
39. The costs of the application shall abide by the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 27TH DAY OF JULY, 2022.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered



to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

