



**Ouko & 13 others v University of Nairobi (Employment and Labour Relations
Claim 1562 of 2017) [2022] KEELRC 3813 (KLR) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3813 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CLAIM 1562 OF 2017**

AN MWAURE, J

JULY 25, 2022

BETWEEN

JENIPHER ACHIENG OUKO & 13 OTHERS CLAIMANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

RULING

1. The application serving before court is brought by the respondent/applicant under sections 1A, 1B and 3A of the *Civil Procedure Act*, order 42, rule 6 and order 51 rule 1 of the *Civil Procedure Rules*. The application seeks leave to appeal to the Court of Appeal against the judgment and decree issued by the court on February 23, 2022 in the instant cause. The applicant also seeks stay of the said judgment and decree.
2. The application is premised on the grounds on the face of the application that the respondent/applicant being dissatisfied with the said judgment is desirous of commencing an appeal against the judgment herein.
3. The applicant avers is willing to abide by the conditions set by the court for the grant of the orders sought herein and undertakes to lodge the intended appeal expeditiously within such time as the honourable court may order upon requisite leave being granted. The claimants are unlikely to suffer any prejudice that cannot be compensated should the appeal be unsuccessful.
4. The applicant/respondent however states it will suffer irreparable loss and its appeal rendered nugatory should the application not be allowed. The appeal has very high chances of success as shown in the annexed draft Notice of Appeal. The application is supported by the affidavit which reiterates the grounds on the face of the application.
5. The respondent filed a replying affidavit through Jenipher Achieng Ooko to wit that the *Appellate Jurisdiction Act* at section 75 (2) requires that any person wishing to Appeal to the Court of Appeal



ought to lodge a Notice of Appeal within 14 days of the judgment appealed against. The application seeking leave to appeal was filed on April 20, 2022 whilst judgment was delivered on February 23, 2022 which period is inordinate and excessive. The respondent has not shown sufficient and good cause to enable the exercise of the discretion in its favour.

6. That the claimants/decreed-holder will be greatly prejudiced.

Applicant's written submissions

7. The applicant submits that for stay to be granted, the applicant must show sufficient cause, show substantial loss may result unless the order for stay is made, make the application without unreasonable delay, give such security as the court orders and show existence of a just cause sufficient enough to warrant depriving a successful litigant of the fruits of its judgment. The applicant submits that it would suffer substantial loss should stay of execution not be granted as the decretal sum is substantial sum of ksh 5,375,061.49. The applicant says that the respondents would not be in a position to refund this sum should the appeal be successful. The applicant relied on the Court of Appeal Case of *National Industrial Credit Bank Ltd versus Aquinas Francis Wasike* 2006 eKLR to support their contention that the respondent have not shown that they would be able to pay back the decretal sum should the appeal succeed. In the circumstances, the applicant has shown that it will suffer substantial loss.
8. The applicant urged the court to be persuaded by the dictum in *Firoze Nurali Hirji versus Housing Finance Company Ltd & Another* 2015 eKLR for the proposition that the court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful is doubtful. The court has to balance the interests of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interests of the respondent who is seeking to enjoy the fruits of his judgment.
9. The applicant is keen to prosecute the appeal expeditiously. The applicant further submits that it is willing to provide security of costs and that sufficient cause has been shown.
10. The applicant relied, *inter alia*, on *Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission and 7 others* 2014 eKLR for the proposition that the discretion to extend time for filing an appeal is unfettered and depends on the period of delay, the reason for the delay, the arguability of an appeal, the degree of prejudice which could be suffered by the respondent if the extension is granted, the importance of compliance with time limits to the particular litigation or issue; and the effect if any on the administration of justice or public interest involved.
11. The applicant says that on balance or probabilities, the degree of prejudice, if any, likely to be suffered by the respondent as result of the extension of time would be far less than the prejudice that would be suffered by the applicant should the extension not be granted as the questions raised in this appeal have far reaching implications on it, not only financially but also on the policy of this pivotal educational institution in the region.

Respondent's written submissions

12. The respondents submitted that the applicant filed the application for leave to appeal two months after the honourable court's judgment had been delivered which period is outside the statutory time limit of 14 days for appeals going to the Court of Appeal. They say delay is excessive and inordinate.
13. Upon delivery of the judgment, the claimants advocates wrote letters dated February 23, and 15th March 2022 on payment but the said letters did not elicit any courtesy of response from the respondent. Despite the respondent and their advocates being well aware of the judgment of the honourable court



in this matter, the respondent/Applicant simply chose to neither pay the decretal sum nor appeal the honourable court's decision within the time required.

14. The respondent has not cited any reason why it did not prefer the appeal within the time frame required. The respondent further submitted that it is trite law that where a party seeks leave to appeal out of time, sufficient and good cause ought to be shown to enable the honourable court to exercise its discretion. The applicant has not tabled any reason whatsoever why it failed to lodge the Notice of Appeal within the prescribed time as required by the law and as such the indulgence sought before the honourable court is not warranted.
15. The respondent relies upon the Court of Appeal decision in the case of *Alibhai Musajee versus Shariff Mohammed AI Bet* Civil Appeal No 283 of 1998 where the Court said that:-

“Whereas the Civil Procedure Act allows for extension of time for filing appeal, if good and sufficient cause is shown, failure to act does not constitute a good or sufficient cause”.
16. The respondent submits in light of the above authority that it is not sufficient for the applicant to simply state that it is aggrieved by the honourable court's decision and wishes to prefer appeal without justifying why the appeal was not lodged within the requisite time.
17. Furthermore, the respondent/judgment debtor has not exhibited any draft memorandum of appeal for the honourable court to appreciate the grounds upon which the respondent is dissatisfied with the honourable court's judgment and decree. In the circumstances the honourable court has no way of exercising its discretion in the absence of any material on record. The applicant's application lacks merit as it has intentionally omitted to state any plausible reasons for the delay as none exists, and as such the indulgence sought by the court is not warranted.

Analysis & determination

18. I have considered the application for leave to appeal to the Court of Appeal and the stay of execution together with the grounds thereof.

I have also looked at the replying affidavit as well as the respective counsels' submissions in the matter.

19. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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.

“Section 1 A(2) of the *Civil Procedure Act* provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the



overriding objective” while under section 1B some of the aims of the said objectives are;

“The just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”

20. The Court is supported by the finding in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

”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. In view of the decretal sum herein the Court finds it is substantial”

21. In *RWW v EKW* [2019] eKLR, the court considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the respondent.”

22. The court is of the view that the amount involved being substantial, the applicant would indeed suffer substantial loss if they pay the judgment debt as the execution is likely and would suffer irreparable loss should the appeal succeed. There are also doubts raised on the ability of the claimants to refund the amount should the appeal succeed. The respondent is also willing to provide security for due performance of decree.

23. In light of the above factors and in order not to render the intended appeal nugatory and also taking into account the overriding objectives of the court, I find that the applicant has satisfied the requirements for Stay of Execution pending Appeal and is willing to put in security. In the case of *Focin Motorcycles Limited versus Ann Wambui & Another* 2018 eKLR. The Court 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 its judgment. The same is found true in this present case.



24. So, in view of the fact that the applicant has met the threshold of granting the stay, I therefore allow the application dated April 18, 2022 and grant stay of execution of the judgment and decree delivered on February 23, 22 pending the hearing and determination of the intended appeal from Nairobi Employment and Labour Relations Cause no 1562 of 2017.
25. I also grant the applicant leave to appeal to the Court of Appeal against the whole judgment and decree issued by Hon Lady Justice Anne Ngibuini Mwaure on February 23, 22.
26. I further order the decretal sum to be deposited in a joint interest earning account in the names of both the applicant's and Respondent's advocates in a reputable commercial bank within 30 days from today's date.

Costs of this application be in the intended appeal

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 25TH JULY, 2022.

ANNA NGIBUINI MWAURE

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 had 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.

ANNA NGIBUINI MWAURE

JUDGE

