



**Mwaura & 12 others v Kenya Power and Lighting Company Limited
(Cause 2575 of 2016) [2022] KEELRC 1276 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1276 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2575 OF 2016
MA ONYANGO, J
JULY 20, 2022**

BETWEEN

**RAPHAEL NJOROGE MWAURA 1ST CLAIMANT
SAMUEL MIGWI THEURI 2ND CLAIMANT
MARY WAENI WAMBUA 3RD CLAIMANT
ANNE ELIZABETH OWUOR 4TH CLAIMANT
CHARLES LWANGA OOKO 5TH CLAIMANT
CHARLES THINWA MATHENGE 6TH CLAIMANT
CLEOPHAS SIMIYU WEKESA 7TH CLAIMANT
FLORENCE KIRIMANIA OBURA 8TH CLAIMANT
GODFREY KIGARIE GATHIGE 9TH CLAIMANT
JAMES NGUGI NJUGUNA 10TH CLAIMANT
JOSHUA KAMAU MWANGI 11TH CLAIMANT
NATHANIEL WAITHAKA WANYAGI 12TH CLAIMANT
SAMUEL NJOROGE NJOGU 13TH CLAIMANT**

AND

KENYA POWER AND LIGHTING COMPANY LIMITED RESPONDENT

RULING

1. Before me, for determination are two (2) notices of motion applications dated May 21, 2021 and May 31, 2021.



2. The notice of motion dated May 21, 2021 seeks the following orders that:
 - a) Spent.
 - b) Spent.
 - c) Spent.
 - d) There be a stay of execution of the judgment and preliminary decree of February 27, 2020 by the Honourable Lady Justice Hellen Wasilwa entered in favour of the claimants against the Respondent and the ruling and final decree of April 30, 2021 by the Honourable Lady Justice Maureen Onyango computing the sums due to the claimants and entering judgment for Kshs.135,298,934.11 pending the hearing and determination of the intended appeal.
 - e) The costs of this application be provided for.
3. The notice of motion dated May 31, 2021 on the other hand seeks the following orders:
 - a) That the Honourable Court be pleased to review the computation of the payments due to the Claimants/Applicants to include the leave payments made earlier which were not in dispute but were erroneously left out of the total sum payable to the Applicants yet deducted from the amount paid.
 - b) That the Honourable Court be pleased to grant the Applicants interest payable on the Judgment sum with effect from the 20th of February, 2020 until payment in full.
 - c) That the Respondents be condemned to pay the costs of this application.
4. The application dated May 21, 2021 by the Respondent is premised on the grounds that on February 27, 2020 Wasilwa J. delivered a judgment determining that the claimants were entitled to a constructive redundancy package of two months' salary for each year worked less what was paid to them being 15 days for each year worked. The court directed that computation of the amount would be done at a later stage. This was done on April 30, 2021 when this Court computed the amount due to the claimants and entered judgment for the claimants for a total of Kshs.135,298,934.11.
5. The Respondent, aggrieved by the judgment of February 27, 2020 and the computation of April 30, 2021 intends to appeal these decisions. The Respondent avers that its appeals have merit and reasonable prospects of success. It is apprehensive that the claimants will take out execution proceedings against the Respondent unless the court grants a stay of execution. That there is a real risk that the appellant will suffer substantial loss and the appellant's appeal will be rendered nugatory unless an order for stay of execution is granted. The Respondent avers that the claimants' means and assets are unknown and the Respondent will have no way of recovering the Kshs.135,298,934.11 from the thirteen claimants if it is successful in the intended appeals.
6. The application was supported by the affidavit of Irene Walala, Legal Officer of the Respondent wherein she reiterated the grounds on the face of the application.
7. The Claimants objected to the application vide a replying affidavit sworn by Raphael Njoroge Mwaura, dated June 7, 2021. The Respondent in the said affidavit appreciates that indeed the Applicant reserves the right of appeal but insists that there must be security for the Judgment sum. He avers that the



Respondent/Applicant is not mindful of the Claimant's status given that they are jobless now and need the judgment sum to cushion their financial needs. He states that they would wish to execute for the recovery of the judgment sum which has been in the Respondent's possession since 2015. That the intended Appeal is not arguable and as such the application should be dismissed.

8. The second application dated May 31, 2021 by the Claimants/Decree Holders is based on the grounds that the Court in error and/or inadvertent mistake included the provision for deduction of leave payment made earlier in the computation. Further that the court in error omitted the award of interest on the award sum. The same grounds are reiterated in the supporting Affidavit of Raphael Njoroge Mwaura in support of the application.
9. The Respondent filed its grounds of opposition dated June 21, 2021 and cited the following grounds:
 - a) There is no self-evident error apparent on the face of the record that justifies this court reviewing the ruling of April 30, 2021.
 - b) The award of interest is discretionary and the failure to award interest is not an error apparent on the face of the record that can be the subject of review.
 - c) Whether deduction of leave days paid earlier should have been factored into the final computation in the ruling of April 30, 2021 is an issue of merit. The application dated May 31, 2021 is challenging the merits of the ruling dated May 31, 2021 and constitutes an attempt by the claimants to appeal the ruling dated May 31, 2021 before the same court. This is an abuse of the court process.
 - d) If the claimants are aggrieved by the ruling of April 30, 2021, then the appropriate recourse for the claimants is to appeal that ruling.
10. The two applications were disposed of together by way of written submissions.

Submissions

11. In support of their application dated May 21, 2021, the Respondent submits that there is sufficient cause to grant a stay of execution. That in *Halai & another v Thornton & Turpin* (1963) Ltd [1990] KLR the Court of Appeal held that the High Court's discretion to order a stay of execution is fettered by three conditions:
 - a. The applicant must establish a sufficient cause;
 - b. The court must be satisfied that substantial loss would ensue from a refusal to grant the stay; and
 - c. The applicant must furnish security.
12. Counsel urges the court to be guided by the holding in *Butt v Rent Restriction Tribunal* [1982] KLR 417 where the Court of Appeal held:
 - a) The discretion to grant or refuse a stay should be exercised in such a way as not to prevent an appeal.
 - b) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.



- c) The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.
13. That the Respondent is aggrieved by the judgment of February 27, 2020 and the computation of April 30, 2021 and intends to appeal these decisions to the Court of Appeal. The appeal has merit and reasonable prospects of success. If a stay of execution is not granted, the claimants will proceed to take out execution proceedings against the Respondent before the appeal is heard and determined.
14. Counsel further submits that the Respondent will suffer substantial loss if a stay of execution is not granted. It is not aware of the assets or means of the claimants and the Respondent is concerned that if payment of a total of Kshs.135,298,934/- is made to the claimants it will be difficult if not impossible to recover the money if the appeal is successful.
15. In *Kenya Commercial Bank Limited v Robert Kimutai Korir* [2018] eKLR the Court of Appeal quoted with approval its decision in *ABN Amro Bank N.V. v Le Monde Foods Limited* [2002] eKLR where it held:
- “...all an applicant in the position of the bank can reasonably be expected to do is, to swear, upon reasonable grounds, that the Respondent will not be in a position to refund the decretal sum if it were paid over to him and the pending appeal were to succeed. In those circumstances, 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 were to succeed. This evidential burden would be very easy for the Respondent to discharge. He can simply show what assets he has - such as land, cash in the bank and so on.”
16. The Claimants in opposition to the application dated May 21, 2021 submit that the Respondents do not deserve a stay order of the judgment or ruling as they have not filed nor served any notice of appeal nor the intended grounds of appeal if at all. They have not offered any security for the judgment sum in Court nor interest earning account as a basis for seeking the stay orders.
17. In support of the Claimants’ notice of motion application dated May 31, 2021 counsel reiterates that the Court erroneously left out the leave payments that were not in dispute but were deducted from the total sum payable to the Claimants. She urges the Court to find merit in their application and review the leave payments in the total sums payable to them by incorporating the leave payments before the deductions from the total sums due.

Determination of the Application dated 21st May 2021

18. I have carefully considered the application and the grounds in support thereof as well as the submissions for and against the application. The issue for determination is whether the Applicant meets the threshold for grant of the orders sought. Section 13 of the *Employment and Labour Relations Court Act* provides that –
- “ 13. Enforcement of court orders A judgement, award, order or decree of the Court shall be enforceable in accordance with the rules made under the Civil Procedure Act.”
19. Order 42 Rule (2) of the *Civil Procedure Rules* provides for stay of execution as follows:



- (2) No order for stay of execution shall be made under subrule (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.
20. The question of whether or not to grant an order for stay of proceedings is a discretionary one. The court has to consider if it will be in the interests of justice to grant the same. The court must balance between the appellant’s right of appeal, which is undoubted, and the duty to ensure that if the appeal is successful, it should not be rendered nugatory by failure to recover the amounts paid to the Respondent. On the other hand, is the right of the successful party to enjoy the fruits of their judgment. The court must therefore strike a fair balance between the two competing interests.
21. The main reason advanced by the applicant in the instant application is that it is apprehensive that if the money is released to the Claimants and they succeed, the appeal shall be rendered nugatory as the Claimants have not proved that they are capable of refunding the said amounts. In response to this allegation, the Respondent in the Replying Affidavit stated as follows:
- “...we wish to state that the applicants are not mindful of our state given that we are jobless now and need the judgment sum in order to cushion our financial need but seem bent to humiliate us further by hanging on our judgment sum.”
22. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR 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.”
23. In the instant application, the Applicant did not sufficiently disclose his basis for believing that the Respondents would not refund the decretal sum. On the other hand, the Claimants did not even attempt to dislodge that contention, speculative as it was. One would have expected them to confirm that they would be in a position to refund the decretal sum should the appeal succeed. They did not.
24. The decretal amount in question is Kshs.135,298,934. Taking all relevant factors into account and in order not to render the intended appeal illusory while at the same time securing the interests of the successful party, I grant a stay of execution of the decree herein on condition that the Applicant deposits the decretal sum in court within 60 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Claimants will be at liberty to execute.

Determination of the Applications dated 31st May 2021

25. The Application dated 31st May 2021, sought two prayers. The first prayer is based on the grounds that the court in error omitted the award of interest on the award sum. Mabeja J. in *Patrick Mwaura Wagatira v Equity Bank Limited & another* [2021] eKLR was faced with a similar application and held as follows:
- “In this case, the record is clear that interest on damages and costs was prayed for in the amended plaint and was submitted on. It was therefore one of the issues the Court had been called upon to make a determination on. It never addressed the issue at all.



The defendants contended that interest was in the Court's discretion and in failing to award the same, the Court had merely exercised that discretion. It is correct that the award of interest is in the discretion of the Court. However, it cannot be in the discretion of the Court not to address a matter or issue that is expressly submitted to it for determination without giving a reason therefore.

...The complaint in the present case is that there was an error on the face of the record as the Court failed to address the issue of interest even after having awarded the damages. The Court holds that, that failure is an error on the face of the record as the Court should have addressed that issue which had been submitted to it for determination.

In this regard, I allow the application and order that the damages awarded in the sum of Kshs.17,365,100/= will attract interest at Court rate from the date of filing suit until payment in full. Costs will also attract interest from the date of judgment. The plaintiff will have the costs of the application.”

[Emphasis mine]

26. Similarly, the Claimants in the instant application prayed for interest on the award. The court never addressed that issue presumably because the awarded sum was yet to be computed. Consequently, guided by the above authority, the applicant is awarded interest on the decretal sum from April 30, 2021 until payment in full.
27. The second prayer seeks a review of the computation of the payments due to the Claimants/Applicants to include the leave payments made earlier which were not in dispute but were erroneously left out of the total sum payable to the Applicants yet deducted from the amount paid.
28. Before making a determination as to whether there was an error by the court in its computation as per the ruling delivered on April 30, 2021 its imperative to state the prayers by Claimants in the main claim. In their statement of claim, the Claimants sought the following reliefs:-
 - a) A declaration that the Claimants were declared redundant as a result of staff organizational restructuring.
 - b) A declaration that the Claimants were discriminated against and underpaid.
 - c) Damages for discrimination
 - d) Compensation for constructive redundancy of staff as per the attached Schedule A.
 - e) Payment of all the lawful terminal dues set up in Schedule A
 - f) Costs of this suit with interest thereon.
29. After hearing the parties, the Court returned the following verdict:

“...Under the Respondent Human Resource Staff Regulation and Procedure, staff who had served for over 16 years as the Claimants herein and who were declared redundant were entitled to a redundancy package of 2 months' salary for each year worked.

The Claimants were paid only 15 months' salary for each year worked.



In view of this fact, I agree with the Claimants that they are entitled to constructive redundancy package of 2 months' salary for each year worked less what was paid to them of 15 days, which is equivalent to 45 days salary for each year worked.

This amount shall be computed at a later stage and adopted as a judgement of this Court.”

30. The computation contained in the ruling delivered on April 30, 2021 was based on the Judgment delivered on February 27, 2020 as highlighted above. Further, it is important to note that the Claimants in their prayers never sought such reliefs. At paragraph 48 and 56 of the judgment the Court observed as follows –

“48. The Claimants contended that they are entitled to their outstanding lawful dues as set out in Schedule A of the Statement of Claim and urged this Honourable Court to allow the same as prayed.

...

56. The Respondent further submitted that the additional claims by the third Claimant amounting to Kshs.1,561,493.00 has not been proved as she failed to avail any evidence to support this assertion. The Respondent contended that the same ought to be dismissed.”

31. Schedule A of claim contained the following claims as outstanding payments:

- i. Balance of severance pay.
- ii. Bonus payment.
- iii. Others.
- iv. Total outstanding payment.

32. No evidence was adduced to the Court in respect of the prayers styled “others”. It is not on record what the amount claimed under “others” covered. I find that the same was not proved and decline to award the same.

33. Flowing from above, the Court makes the following orders in relation to the two applications;

- a) The application dated May 21, 2021 is allowed and stay is hereby granted on condition that the Applicant deposits the decretal in court within 60 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs and the Respondent will be at liberty to execute.
- b) The Claimant is awarded interest on the decretal sum from April 30, 2021, the decretal sum was ascertained until payment in full.
- c) The prayer for inclusion of leave payments fails.

34. By the agreement of parties at the time of delivery of the ruling, the decretal sum shall be deposited in a joint interest earning account in the names of Counsel for the judgment debtor and decree holders.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF JULY 2022

MAUREEN ONYANGO

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 has 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.

MAUREEN ONYANGO

JUDGE

