



**Takoy v Kenya National Highways Authority (Petition E089 of 2021)
[2022] KEELRC 1268 (KLR) (20 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1268 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E089 OF 2021**

MA ONYANGO, J

JULY 20, 2022

**IN THE MATTER OF: ARTICLES 19, 20, 22(1), 23,
43 & 47 OF THE CONSTITUTION OF KENYA,**

2010

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS & FREEDOMS
UNDER ARTICLES 19, 20, 22(1), 23, 43 & 47 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

ABDINOOR SHEIKH TAKOY PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT

JUDGMENT

1. Before me is the Petitioner's Notice of Motion dated 21st February 2022 filed under Certificate of Urgency on 25th February 2022 (the Application) in which he seeks the following orders: -
 - i. Spent
 - ii. That the service of this Notice of Motion dispensed with owing to the urgency of the matter.
 - iii. That this Honourable Court be pleased to grant a stay of execution of its Judgment and the orders therein dated 18th February 2022 pending the hearing and determination of this application.
 - iv. That this Honourable Court be pleased to grant a stay of execution of its Judgment and the Orders therein dated 18 February 2022 pending hearing and determination of the intended appeal against the Judgment of this Honourable Court.



- v. That costs of the Application be in the cause.
2. The Application is premised on the grounds that the Applicant is aggrieved by this Court's Judgment of 18 February 2022. That the Judgment in effect retired the Petitioner/Applicant from serving the Respondent in his capacity as an engineer and that he intends to appeal against the said Judgment.
3. On 25 February 2022, Mbaru J. issued orders in the following terms: -
- i. That the application dated 21st February 2022 is hereby certified urgent.
 - ii. That in the interim and to allow for service, stay of execution of the Judgment delivered on 18th February, 2022 is hereby allowed.
 - iii. That serve (*sic*) the Claimant who shall reply within 14 days.
 - iv. That hearing (*sic*) on 10th March 2022 before the Trial Court/Duty Judge.
4. The Respondent filed a Preliminary Objection dated 8 March 2022 on the singular ground that the Application is an abuse of the Court process as the Judgment as sought to be stayed is a negative order incapable of execution.
5. Pursuant to this Court's directions of 18 March 2020, the Court directed that the Preliminary Objection be deemed a response to the Petitioner's Application.
6. Order 42 Rule 6 of the [Civil Procedure Rules](#) 2010 contains the relevant provisions for grant of stay of execution which are applicable to this Court. It provides 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
 - b. that the application has been made without unreasonable delay; and
 - c. 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.
7. In the case of [Global Tours & Travel Limited v Five Continents Travel Limited](#) [2015] eKLR the Court held: -
- “... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”



8. In the case of *Elena Doudoladova Korir v Kenyatta University* [2014] eKLR Nzioki Wa Makau J. had this to say: -

“The application must meet criteria set out in precedents and the criteria is best captured in the case of Halal & another –vs- Thornton & Turpin Ltd where the Court of Appeal (Gicheru J. A. Chesoni & Cockar Ag JA) held that:

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely: - sufficient cause, Substantial loss would ensue from a refusal to grant stay; the Applicant must furnish security; the application must be made without unreasonable delay.”

9. From the foregoing, it is clear that the Court has wide discretion in granting stay of execution, but such discretion is to be exercised judiciously, after considering the specific circumstances of the particular matter.

10. In this case, the Court’s Judgment dismissed the Petition. There were no other orders issued. The question thus becomes whether there is any order capable of being stayed.

11. In the case of *Co-operative Bank Limited v Banking Insurance & Finance Union Kenya* - Nairobi Application No. 133 of 2017 the Court held that: -

“An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with...the Court has identified negative orders as orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order.”

12. The Court of Appeal in the case of *Kaushik Panchamatia & 3 others v Prime Bank Limited & Another* [2020] eKLR rendered itself as follows: -

“... We are guided by the decision in the case of Western College of arts and Applied Sciences vs. Oranga & Others [1976] KLR 63, the court whilst considering whether an order of stay can be granted in respect of a negative order and which we fully adopt stated inter alia as follows: -

“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”

13. This Court in its judgement did not order any of the parties to do anything or to refrain from doing anything or to pay any sums of money, not even costs. There is nothing arising out of the judgment for this Court to stay.

14. In view of the foregoing, I dismiss the Petitioner’s application with no order as to costs.

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, the 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 the 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

