



**University of Nairobi v Mayaka (Appeal E167 of 2021)
[2022] KEELRC 1335 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1335 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E167 OF 2021
AN MWAURE, J
JULY 7, 2022**

BETWEEN

UNIVERSITY OF NAIROBI APPLICANT

AND

LIVINGSTONE M. MAYAKA RESPONDENT

RULING

Introduction

1. The Appellant (University of Nairobi) vide a Notice of Motion and a Certificate of Urgency dated 3rd March 2022 sought the following orders from this Honourable Court:

Ex-Parte

- (i) THAT this application be certified urgent and first heard ex-parte
- (ii) THAT there be a stay of execution of the judgment dated 25th October 2021 together with all consequential orders thereto pending hearing and determination of the Appellant's application inter-partes.

Inter parties

- (iii) THAT there be a stay of execution of the judgment dated 25th October 2021 together with all consequential orders pending hearing and determination of the Appellant's appeal filed herein.
- (iv) THAT the Honourable Court do issue any other orders as it deems fit and just to meet the ends of justice.
- (v) THAT cost of this application be provided for.



2. On the 4th of March 2022 this Honourable Court ordered that there be an interim stay of execution of the Judgment dated 25th October 2021 for 14 days together with all consequential orders thereto pending hearing and determination of the Appellants application inter-partes. Further, the Appellant was ordered to serve upon the Respondents the application dated 3rd March 2022 within 7 days and the Respondent to file a response within 14 days of service. The case was mentioned on the 30th of March 2022 and the parties were ordered to file their written submissions.

The Applicants Case

3. The Applicant avers that the case was first heard by the Chief Magistrates Court (CMEL NO. 590 of 2018) where judgment was entered for the Respondent for the sum of Kshs. 2,047,681.44 on 25th October 2021 being gratuity for 28 years less Kshs. 313, 673.35 together with costs and interests thereon.
4. The Appellant further states that efforts were made to obtain a copy of the judgment to help in filing an appeal but the same could not be availed until 15th December 2021. The Court allowed the appeal to be filed out of time after the Appellants sought leave to do the same.
5. Quoting Order 42 Rule 6 (2) of the Civil Procedure Rules 2010 the Appellant submits that its application for an order of stay of execution was brought without unreasonable delay.
6. It is Respondent's contention that if the order for stay of execution is not granted, the Respondent will proceed to extract a decree and execute the same. The Appellant further states that in the event its appeal succeeds, it will not be able to recover the decretal sum as the Respondent has no means to refund the same or assets for attachment and sell. In the same spirit if the appellant pays to the Respondent half the sum as suggested by the Respondent it would be difficult to recover the same amount in the event of the appeal's success. This will result into loss of public funds, the Respondent avers.
7. The Appellant further submits that it has satisfied the ground of stay of execution and further states that it is willing to deposit security for due performance of the decree and the Respondent shall not suffer any prejudice if the application is allowed.

The Respondent's Case

8. The Respondent (Livingstone M. Mayaka), in his submissions in opposition to the Appellants application dated 3rd March 2022, stated that the only issue for determination is whether the order of stay of execution should be granted.
9. The Respondent avers that an application for stay of execution of a decree or order pending appeal is obliged to satisfy the prerequisite conditions set out in Order 42 Rule 6 (2). The conditions are; proof that substantial loss may result to the applicant unless the order is made, that the application has been made without unreasonable delay and that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.
10. The Respondent submits that his right to fair labour practices will be infringed upon should the orders prayed for be granted. It is his contention that the Court should look at the interests of both parties.
11. On the issue of security for costs the Respondent submits that the fact that the Applicant is a huge institution with financial muscles to flex does not mean it should frustrate the Respondent.



12. Further, the Respondent submits that in the event the Court is minded to grant the application by the Applicant, there should be settlement of half the decreed amount and the remainder deposited in a joint interest earning account in the name of both counsels.

Issues for Determination

13. Having critically considered the submissions and authorities of both counsels in support and in opposition of the application dated 3rd March, 2022 this Honourable Court frames the issues for determination as follows:
- (i) Whether the Applicant will suffer substantial loss in the event the application is not granted.
 - (ii) Whether the applicant should deposit security for due performance of the decree.
 - (iii) Whether the application for stay of execution was filed without undue delay.

(i) Whether the Applicant will suffer substantial loss in the event the application is allowed

14. Order 42 Rule 6 under the title ‘Stay of Execution in Case of Appeal) provides for conditions to be fulfilled before an order for stay of execution is given in case of appeal. Reference is made to Sub Rule 2 (a) which provides thus as:

- (2) 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

15. It is this Court’s view that in making such an application the Applicant must demonstrate how it stands to suffer substantial loss. The applicant has indeed attempted to show that it is not aware of the Respondents means to refund the same or his assets for attachment and sell.

16. The burden of proof of means to pay back the decretal sum in this regard lies on the Respondent subject to Section 112 of the *Evidence Act* CAP 80 of the Law of Kenya. The Respondent has in no way proved to this Court that he has the means to repay the decretal amount even if it is paid half way. Section 112 of the *Evidence Act* states as follows:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

17. The cause of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and another* [2006] eKLR is informative on the matter at hand. Consequentially, this Court relies on the wisdom of the Court of Appeal where it states:

“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 – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

18. In the case of *Lucy Nyamu Kimani v Lawrence Mburu Muthiga* [2006] eKLR the court observed that:

“An applicant demonstrates substantial loss by showing that the respondent is not a person of means and payment in decretal sum prior to appeal would put the same beyond reach of the applicant.”



19. The Honourable Court finds that the Applicant may suffer irreparable substantial loss in the event its application is not allowed.

(ii) Whether the Applicant should deposit security for due performance of the decree

20. It is noteworthy that the Appellant has submitted that it is willing to deposit security for due performance of the decree. In light of the foregoing, the Appellant's application cannot be said to have been made in bad faith.

21. In *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates* the Court pronounced itself as follows:

“.....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.”

22. It is the Court which determines security upon ordering stay to ensure due performance of the obligation of the appellant as to costs and to satisfy the decree. On this matter this court agrees with the Applicant's authority *Focin Motorcycle Co. Limited v Ann Wambui and another* [2018] eKLR. where the Court rightly pronounced itself as hereunder:

“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 for stay.”

23. As to whether this application was filed without delay the Court finds that from 25th October 2021 when judgment was delivered to 17th February when Appeal was filed the same is not excessively late considering by 3rd March 2021 the Applicant filed this application.

24. As to whether this application is res judicata the Ruling of Lady Justice M. Mbaru did not refer to the prayer of stay for execution. It is not like she addressed it but rejected the prayer. Rather she addressed the prayer for appeal out of time. I do not find this application is re judicata.

25. In view of the foregoing, the Court is satisfied that the application has met the threshold of granting the order of stay. I therefore allow the application and order that there be stay of execution pending the hearing and determination of the appeal. The Applicant will provide security by depositing the decretal sum in an interest earning account in the joint names of the advocates on record for the Appellant and Respondent. This amount be deposited within 30 days from the date hereon.

Costs in the application be in the cause.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 7TH DAY OF 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 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE

