



REPUBLIC OF KENYA



KENYA LAW
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**Marango & 122 others v Kedong Ranch Limited (Petition E009 of 2020)
[2022] KEELRC 4144 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4144 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E009 OF 2020
HS WASILWA, J
SEPTEMBER 29, 2022**

BETWEEN

GEORGE MARANGO & 122 OTHERS PETITIONER

AND

KEDONG RANCH LIMITED RESPONDENT

RULING

1. Before this court for determination is the respondent/ applicant's Notice of motion dated 13th June, 2022, brought pursuant to order 42 rule 6 & order 51 rule 1 of the Civil Procedure Rules 2010, sections 1A, 1B and 3A of the Civil Procedure Act, cap 21 of the Laws of Kenya and all other enabling provisions of the law, seeking the following orders;
 - a) That this application be certified as urgent and be heard *ex-parte* in the first instance.
 - b) That this honourable court be pleased to grant a stay of execution of the judgment delivered on May 31, 2022 by hon Lady Justice H Wasilwa pending the hearing and determination of this application inter-partes.
 - c) That pending the hearing and determination of the intended appeal, the honourable court be pleased to grant a stay of execution of the judgement delivered by hon Lady Justice H Wasilwa dated May 31, 2022.
 - d) The costs of this application be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Dickson Kariuki Wanjohi, the General manager of the respondent, deposed upon on the June 13, 2022 and based on the following;
 - a) By a judgment delivered on May 31, 2022 in the Employment and Labour Relations Court at Nakuru, the Learned Judge, H Wasilwa, entered judgment for the petitioners against the



respondent with the declarations that; A permanent injunction against the respondent do issue from changing the petitioners contract terms to term contracts, the respondent to pay the unpaid house allowance to the petitioners as per the schedule submitted by the petitioners in their submissions which totals to Kshs 3,549,270/- and costs and interests of the suit;

- b) That the petitioners have already extracted a decree from the judgement and intend to proceed with the execution and/or enforcement of the decree any time from now.
 - c) The applicant being aggrieved by the said judgment and the consequential orders intends to appeal to the Court of Appeal against the same and has filed a notice of appeal on the June 8, 2022.
 - d) The applicant has an arguable appeal which shall be rendered nugatory in the event that a stay of execution is not granted.
 - e) The Judgment in favour of the petitioners/respondents herein exposes the applicant to losses approximating Kshs 3,549,270/=. The applicant is apprehensive that in the event that the appeal is successful, it will be unable to recover the said sums and/or will be subjected to another litigious process for recovery of the sums which will take long exposing the applicant to further expenses.
 - f) The applicant is ready and willing to deposit the decretal sum in an interest- earning account in the name of the petitioners and respondent's counsel as security for due performance of the decree, within a specified time as ordered by the court.
 - g) The applicant states that, it has brought this application timeously and without inordinate delay and it's only fair and just that this matter is heard urgently.
3. In response to the application, the petitioners filed grounds of opposition dated June 22, 2022, that came out as follows;
- i. That the application is an afterthought and procured in bad faith with the sheer motive of denying the affected petitioners the fruits of their judgment and decree and that the orders sought herein only aims at perpetuating an ancient and untenable injustice perpetrated by the applicant by resorting to seemingly endless streams of legal maneuvers.
 - ii. That the applicant's application is unmerited, comprises of half-truths, lies and blatant concealment of the facts of the case and intended to perpetrate injustice through endless legal trickery and maneuver.
 - iii. That the applicant is not truthful when he claims in his supporting affidavit and draft memorandum of appeal that the affected petitioners who are the decree holders are housed by the applicant yet he knows very well that they have rented houses outside the ranch.
 - iv. That the applicant has been unable to provide any evidence to prove that he satisfied the four principles that a person seeking stay of execution of the judgments of the honourable court pending appeal must demonstrate.
 - v. That the supporting affidavit to the motion should be struck off since the person who swore the affidavit did so without a resolution or written authority of the Board of Directors.
 - vi. That the applicant has not provided any documentary evidence to show the damages it will suffer if the order for stay of execution pending appeal is not granted.



- vii. That the affected respondents will stand to suffer irreparable damage if the application now before this court is allowed owing to the fact that they have used a lot of resources in obtaining the judgment herein and therefor pray that this honourable court dismiss the application herein with costs.
 - viii. That the applicant has neither demonstrated to this honourable court that there exists arguable appeal with high chances of success nor satisfied the pre-requisite conditions set out in order 42 rule 6 of the *Civil Procedure Rules*, 2010 to enable this court grant stay of execution of decree pending the hearing and determination of the intended appeal.
 - ix. That the applicant shall not in any way, suffer loss and prejudice if the application now before this court is dismissed with costs.
4. In addition to the grounds of opposition, the petitioners filed a replying affidavit sworn on the June 22, 2022 by George Marango, the 1st petitioner herein. The affiant avers that the honourable court delivered a judgment in their favour on May 31, 2022 and the court subsequently issued a decree of the Judgment on June 7, 2022.
 5. He states that, the applicant's motion before this court is an afterthought and procured in bad faith with the sheer motive of denying them the fruits of their and the orders sought herein only aims at perpetuating an ancient and untenable injustice perpetrated by the applicant by resorting to seemingly endless streams of legal manoeuvres. This according to the petitioner is based on the fact that the applicant has been seeking for time from this court to settle the issue out of court only for them to drag the case further by filing this application.
 6. It is contended that the application is unmerited, comprises of half-truths, lies and blatant concealment of the facts of the case and intended to perpetrate injustice through endless legal trickery and manoeuvre.
 7. The affiant denied being housed by the applicant and the memorandum to the extent that it based on allegation that the applicant is housing them is unmerited.
 8. he maintained that the applicant has not satisfied the four principles pre-requisite for grant of stay of execution orders pending appeal. Further, that the application be struck off since the person who swore the affidavit did so without a resolution or written authority of the Board of Directors.
 9. He asserts that, the applicant has not demonstrated any damage that it will incur if the stay orders are not granted. Besides, that the applicant is a very big company with a lot of assets and therefore it shall not in any way, suffer loss and prejudice if its application before this court is dismissed with costs.
 10. The application was canvassed by written submissions with the applicant filing on the July 20, 2022 and the respondent on the July 26, 2022.

Applicant's Submissions.

11. The applicant submitted that as much the overriding objective under the *Civil Procedure Act* provides for just, expedient, proportionate, and affordable resolution of disputes, the stay of execution orders sought herein are for meeting the ends of justice, considering the circumstances of this case.
12. It was submitted that, for orders of stay of execution to be granted, the applicant has to comply with the conditions provided for under order 42 rule 6 of the *Civil Procedure Rules* and relied on the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417.



13. On undue delay, the applicant submitted that judgement in this petitioner was filed on May 31, 2022, a notice of appeal lodged on the June 8, 2022 and this application filed on June 13, 2022, therefore there is no unreasonable delay.
14. On substantial loss, it was submitted that the sum in issue is a colossal amount and the petitioner are men of straws, who if paid the said sum of money will not be in a position to refund them if the appeal succeeds. He argued further that the petitioners have not demonstrated their financial worth by way of bank statements or otherwise, therefore, it is apprehensive that if stay orders is not granted and execution proceedings commence they will suffer loss. To support their argument, they relied on the case of *Abdullabi Said Salat v Ugas Sheikh Mohamed* [2016] eKLR.
15. On security for due performance, it was submitted that the applicant is willing to deposit bank guarantee in a reputable bank. He argued that the purpose of security for costs is to secure the interest of the adverse party and ensure their adequately protected and a bank guarantee is equally a good security that can be realized in less than 5 days. To support its argument, the applicant relied on the case of *Khalsa School and 2 others v Samuel Odhiambo Otieno* [2021] eKLR, where the court held that;

“It is my view that a bank guarantee from a reputable bank is adequate security for the due performance of the decree.”
16. On whether the intended appeal is arguable, the applicant submitted that the issue in the appeal is based on the fact that the applicant had tabled immense evidence before the court to demonstrate that the petitioners were housed by the applicant as such not entitled to house allowance. He argued that, what this court need to satisfy itself with, is not the chances of success but the argueability of the appeal. In this it relied on the case of *Manchar Singh Sagoo and another v Caroline Njeri Mwicigi & 3 others* [2018] eKLR.
17. In the end, the applicant submitted that it has satisfied all the conditions under order 42 rule 6 of the *Civil Procedure Rules*, therefore the application should be allowed.

Respondent’s Submissions.

18. The respondents on the other hand submitted that none of the condition of stay of execution under order 42 rule 6 of the *Civil Procedure Rules*, 2010 has been satisfied by the applicant.
19. On substantial loss, the respondent define what substantial loss is by citing the case of *James Wangalwa & another v Agnes Naliaka Cheseto*[2012] eKLR where the court held 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.”
20. On that basis, the respondents submitted that the fact that a decree holder is not a man of straws does not necessarily justify him from benefiting from the fruits of his judgement. He argued that it a general rule that court ought not deny a successful litigant of the fruits of its judgement save in exceptional



circumstances. In this they relied on the case of *Machira t/a Machira and co advocates v East African Standard* no 2 [2002] KLR 63 where the court held that;

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal. Of course, in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

21. It was further argued that the applicant ought to have proved on reasonable grounds, the allegations that they would not be in a position to refund the decretal sum if they received before the appeal is head and determined. In any event that the applicant has not demonstrated the loss is will incur if the stay is not granted.

22. On security for costs, it was submitted that the applicant has merely indicated his desire to provide bank guarantee as security for costs, without stating the bank the guarantee will emanate from or exhibiting a copy of the same. He argued that as much as the said security has been offered, nothing can stop this court from making orders on alternative security as was held in *Nicholas Stephen Okaka and another v Aggrey Odhiambo*[2022] eKLR. They also relied on the case of *Gianfranco Mmenthi and another v Africa Merchant Assurance Company Limited* [2019] eKLR where the court held that;

“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 degree in order to enjoy the fruits of his judgment in case the appeal fails. Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to *status quo* on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine”

23. In conclusion, it was submitted that the respondents are all employees of the applicant and therefore the allegation that they would not recover the decretal sum if paid is not justified. They thus prayed for the application to be dismissed with costs to them.



24. I have examined the averments and submissions of the parties herein. The applicants have sought stay orders on the ground that they are dissatisfied with the Judgment and decree of this court and have preferred an appeal to the Court of Appeal.
25. Under order 42 rule 6(2) of the CPC stay orders are granted based on satisfying 3 conditions first being no delay, secondly in demonstrating that if the application is not allowed the applicants stand to suffer. Lastly the issue of security for Judgment is important.
26. The applicants have demonstrated that they filed this application without delay.
27. The applicants have also argued that the respondents are men of straw and cannot repay them if the appeal succeeds.
28. This per se is not a good argument given that the respondents are all employees of the applicant and so the applicants are still in a position to recover what they are owed if the appeal succeeds.
29. However, in order to avoid a miscarriage of justice and given the applicant's willingness to deposit security in court, i will allow stay of execution on the condition that the applicants deposits the entire decretal sum in an interest earning account held in joint names of counsels on record within 60 days.
30. In default execution may proceed.

RULING DELIVERED VIRTUALLY THIS 29TH DAY OF SEPTEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Njeri for Applicant respondent – present

Petitioner – present

Court Assistant – Fred

