



REPUBLIC OF KENYA



**Abdul t/a Red Sea Food Court v Musyoka (Miscellaneous Application
E191 of 2021) [2022] KEELRC 12914 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12914 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E191 OF 2021
K OCHARO, J
SEPTEMBER 22, 2022**

BETWEEN
AHMED ABDUL T/A RED SEA FOOD COURT APPLICANT
AND
ELIUD NDEMWA MUSYOKA RESPONDENT

RULING

The Application

1. Before me for determination is the Applicant's Notice of Motion dated September 28th September, 2021 seeking orders That:
 - 1) That this matter be certified urgent and be heard *ex-parte* in the first instance.
 - 2) That this Honourable court be pleased to issue a stay of execution of the Judgment delivered on October 16, 2020 by the Senior Principal Magistrate Milimani Commercial Courts plus all consequential execution proceedings pending the hearing and determination of this Application and subsequent Appeal.
 - 3) That this Honourable court be pleased to grant the Applicant leave to lodge an appeal out of time against the Judgment/decision delivered on October 16, 2020 by the Senior Principal Magistrate's court Milimani commercial courts in CMCC No 5731 of 2016.
 - 4) That upon grant of leave to appeal out of time, the Memorandum of Appeal be deemed as duly filed.
 - 5) That this Honourable court be pleased to stay the execution of the Judgment given on October 16, 2020 together with all consequential execution proceedings pending the hearing and determination of the Appeal.



- 6) That this Honorable court be pleased to issue any other or further orders it deems fit and just in the circumstances of this case and in the interests of justice.
- 7) That costs be in the cause.
2. The Application is based on the grounds obtaining on the face of the application, and the supporting affidavit that was sworn by the Applicant on September 28, 2018. The Applicant asserted that the abovementioned matter was last before the learned trial magistrate on April 13, 2021, when it was set down for judgement for June 19, 2019. On that date the judgement was not delivered, the Court then directed that the judgment was to be delivered on notice.
3. Thereafter, no notice for the delivery of the judgment was served on it or his Counsel. He was startled to learn that there existed a judgement in the matter, when a friend at the Pangani Police station sent him an order relating to execution of the decree in the matter, via WhatsApp. The Applicant contends that prior to the said order, there had been no proclamation on him, in execution of the decree.
4. The Applicant stated that immediately he received the communication hereinabove stated from his friend, his Counsel wrote to the court requesting to peruse the court file to confirm whether indeed a judgment had been delivered therein and a decree ensued therefrom. Despite paying for the perusal, his Counsel was not able to access the file as, physical visits were not being allowed, and according to the customer care desk, the file would not be traced.
5. As the Applicant and his Counsel waited for the file to be available for perusal, he filed a notice of motion application dated July 9, 2021, wherein he sought inter alia for an interim stay of execution, which was subsequently granted pending the hearing and determination of the application. It is from the replying affidavit that was filed by the Respondent, that it occurred on Applicant that the decretal sum in the matter was Kshs 257,000.
6. The application was eventually dismissed, through a ruling of September 10, 2021. His Counsel finally received the typed proceedings and judgment on September 20, 2021.
7. The Applicant asserted that if the decretal sum is paid to the Respondent, the latter will not be able to pay it back when his appeal succeeds against the Respondent. The Applicant undertakes to offer any security for the performance of the decree as this Court may require.

The Response

8. In response to the application, the Respondent filed a replying affidavit sworn on February 15, 2022. In it, he avers that before delivery of the judgement, the trial court advised both parties about the date for the delivery of the judgment. That as such, the applicant cannot therefore purport that he was unaware of the same.
9. It was further stated that after delivery of judgement, the Applicant did not settle the decree, consequently his Counsel instructed auctioneers to execute the decree. In the process of executing the decree, Auctioneers encountered threats and intimidation from the Applicant, constraining them to move to court for an order for police assistance in the execution. Further, that it is only after learning that the police had been allowed to be involved to enforce the decree that the applicant moved to court seeking for orders to set-aside the order.
10. The Respondent maintains that the Applicant only moved to this court after the dismissal of the application for setting aside the above stated order. That if indeed the Applicant was serious about appealing against the decree herein, he would have moved to this court in April 2021 when he became aware of the judgement.



11. Following the above, the Respondent avers that the application herein is an afterthought and has only been filed to frustrate him from realizing the fruits of his successful litigation.
12. He concludes that the fact that no evidence has been attached to this court to show how much effort the applicant has made in trying to trace the lower court file shows that the application has been brought in bad faith and should be dismissed accordingly. As a result, he urges the court to dismiss the application.

Applicant's Submissions

13. The applicant submitted that considering the time between discovery of the existence of the judgement to the filing of this application, a period of about 8 days, there cannot be a doubt that the application was filed without delay. He relied on the case of *Thuita Mwangi vs Kenya airways* (2003) eKLR where the Court held;

“it is now settled that the decision whether or not to extend the time for appearing is essentially discretionally. It is also well settled that in general, the matter that this court takes into account whether to grant an extension of time are; the length of the delay; secondly the reason for the delay; thirdly[possibly] the chances of the appeal succeeding if the application is granted; and fourthly, the prejudice to the Respondent if the application is granted.”

14. The applicant further submitted that he has an appeal with high chances of success.
15. While relying on the above case, the Applicant urged the court to exercise its discretion in his favour and grant the prayer for leave to appeal out of time.
16. As for stay of execution of the decree pending the intended appeal, the applicant submitted that the conditions necessary for grant of stay of execution are provided for under Order 42(6) of the *Civil Procedure Rules*. The main conditions to be considered are; substantial loss resulting to the Applicant; security for the performance of the decree; and the appeal being rendered nugatory. The application for stay was filed timeously. The Applicant will suffer irreparable loss if the orders sought are not granted, as the amount that was granted against it by the trial court was exorbitant, considering the injuries that were allegedly sustained by the Respondent.
17. He further argued that the Respondent will not be able to refund the sum of the decree if the same is paid out to him, rendering the appeal nugatory. The Respondent is a man of straw whose whereabouts are unknown. The Applicant asks the Court to consider this factor. He placed reliance on the case of *Barclays Bank of Kenya vs Evans Ondusa Onzere*(2008) eKLR.
18. The applicant further submitted that he is willing to deposit security as part of the conditions for stay and urged the court to exercise its unlimited discretion to allow the application as prayed.

Respondent's submissions

19. The Respondent submitted that the Court has discretion to grant an extension of time to file an appeal. However, the discretion must be exercised judiciously. The conduct of the Applicant must come into focus as a precondition for the grant. The judgement of the lower Court was delivered after a full trial and the date for judgement given in the presence of both Counsel for the parties. The Applicant chose not to attend. He cannot be heard to blame the Court or the Respondent, that the judgement was delivered in his Counsel's absence.
20. The Respondent submitted that if indeed the applicant was dissatisfied with the lower court judgment, he ought to have moved this court seeking for stay of execution and leave to file an appeal out of time,



instead of first attempting to set-aside the order for police assistance. This move by the Applicant is only indicative that he didn't have an issue with the judgement but the manner of the execution of the decree.

21. The Respondent further submitted that the Applicant received the Judgment on November 10, 2020, and filed the application for leave to appeal out of time on January 25, 2021, a period of about two and half months. The delay was inordinate, it needed to be explained by the Applicant but he did not. The Applicant's application meets not the threshold for success, therefore.
22. On the Application for stay of execution pending the intended appeal, it was submitted that the Applicant had a duty to prove that the application was filed without delay. The judgement sought to be appealed against was delivered on October 16, 2020. The current application was filed on September 28, 2021, almost one year after the judgment was delivered.
23. Though the Applicant asserted that he only became aware of the judgement in the month of April 2021, he has not explained to this Court why it took him almost five months to file the current application. This lack of explanation disentitles him of the order for extension of time.
24. The Court should interrogate whether the appeal shall be rendered nugatory if the stay of execution is not granted. The Court should order for provision of security. The Respondent proposes that the Applicant does deposit the entire warrant amounts, Khs 402,695.

Analysis and determination

25. I have carefully considered the application, the response and the submissions presented by the parties, and the following issues commend themselves for determination:
 1. Whether the Applicant has made a case for extension of time.
 2. Whether the order sought by the Applicant for stay of execution pending the intended appeal can be availed to him.

Whether the Applicant has made a case for extension of time to file an appeal.

26. The court's power to grant an order for extension of time for filing an appeal out of time is discretionary. The discretion is unfettered, exercisable depending on the justice of each case. However, it is imperative to note that the discretion must be exercised judiciously, and upon consideration of the now settled judicial principles. The considerations would include; the length of the delay; the reason for the delay; the conduct of the parties; the chances of success of the intended appeal; and whether the extension will prejudice the Respondent.
27. There is no contest that the judgment of the lower court that the Applicant intends to assail by way of an appeal, was delivered on October 16, 2020. However, what is not common cause is whether the parties had knowledge of this date. The Applicant contended that when the matter was last mentioned before the Honourable trial magistrate, she indicated to the parties that the judgment was to be delivered on notice. The notice was never issued. He only came to learn of the judgment when there was an attempt to execute a decree that was said to be flowing from the judgment. The Respondent on the other hand asserted that the date for the judgment was issued in the presence of both counsels. The Applicant's counsel decided not to attend court for picking of the judgment.
28. The tragedy here is that none of the parties herein placed before this court, by design or otherwise, the proceedings of the lower court to enable it discern the accuracy of the positions taken by them. I am of the position that candidness required them to place the proceedings before this court.



29. This Court notes that the application dated July 9, 2021, that was filed in the lower court was supported by a supporting affidavit that was sworn by the Applicant on the even date. In paragraph 2 and 3 thereof, the Applicant was clear, he was not aware that the judgement had been delivered, judgment which was supposed to be delivered on notice. The Respondent filed a replying affidavit that he swore on July 22, 2021, in response to the application.
30. I have carefully considered the replying affidavit, one thing strikes my sight, there was no denial at all of the Applicant's assertions mentioned above. Those assertions were never rebutted, yet they were central in the above stated application. I have equally considered the ruling that was rendered on the application, it does not at all disabuse the Applicant's stated assertions. If indeed the judgment date was known to both parties, nothing would have been easier for the Respondent than to expressly deny the assertions and seek testimony in the record. Nothing would have impeded the court, looking at its record from disabusing the assertions, if indeed they were not true.
31. By reason of the premises, I am persuaded that the judgment was delivered without notification to the Applicant and or his counsel, by the trial court.
32. Having found as I have hereinabove, I am of the view then that good practice required the Respondent to notify the Applicant that the judgment had been delivered and require payment of the decretal amount, before engaging the execution process. This he did not do. It was aimed to ambush. This is a conduct that does not speak favourably of the Respondent. It is a conduct that doesn't come to the aid of his case but goes towards supporting the Applicant's application for leave to appeal out of time.
33. In *Hajar Services Limited v Peter Nyangi Mwita* (2020) eKLR, the court held;
- “.....where a judgment is delivered in the absence of a party without notification and the party becomes aware of the same after the lapse of time prescribed for taking action, that constitutes sufficient ground for extension or enlargement of time to take necessary steps”.
34. Where the law directs that action be taken by a party or any person within a specific time, from the time of an order or judgment, in my view, in interrogating whether or not a delay was present in taking the action, the date when the order or judgment came to the knowledge of the party or person so required to act is a critical factor that cannot be wished away.
35. The Respondent contended that the Applicant knew of the Judgment in the month of April 2021, but didn't file the application herein until after almost five months. A delay that he asserts was unreasonable. I think it would not be fair if this Court were to lose sight of the fact that the Applicant stated in the supplementary affidavit that he received the order dated April 13, 2021, on July 7, 2021. That immediately thereafter, he filed an application which he thought was merited, however which application was dismissed on September 10, 2021. The application herein was filed on September 28, 2021, less than three weeks thereafter.
36. By reason of the premises, I am not persuaded that the Applicant was guilty of laches.

Whether an order of stay pending the intended appeal can be availed to the Applicant.

37. The conditions required of an Applicant to satisfy in order to attract a grant of stay of execution pending appeal are well settled. Order 42 Rule 6 of the Civil Procedure Rules provides:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but the Court appealed from may for sufficient cause, order stay of execution of such decree or order and



whether the Application for such stay shall have been granted or referred by the Court appealed from, the Court to which such appeal is preferred shall be at liberty on Application being made to consider such Application and make such order thereon as may to it seem just and any person aggrieved by the order of stay may apply to the appellate Court to have such orders set aside.

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 the decree or order as may ultimately be binding on him has been given by the Applicant.

38. These principles were enunciated in the case of *Butt v Rent Restriction Tribunal* [1979] E A, where the Court of Appeal did put forth what ought to be considered in determining whether or not to grant stay of execution pending appeal thus: -

- a. The power of the Court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal.
- b. Secondly 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 the appeal court reverse the Judge's discretion.
- c. Thirdly, a Judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion a better remedy may become available to the Applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The Court exercising its powers under order XL1 Rule 4 [2] [b] of the *Civil Procedure Rules*, can order for security upon application by either party or its own motion. Failure to put security of costs as ordered will cause the order of stay of execution to lapse.

39. The Applicant must clearly demonstrate what loss, if any it stands to suffer. This principle was elaborated in *Shell Limited vs Kibiru and another* [1986] KRR 410 Platt J A set out two different circumstances when substantial loss could arise, thus: -

“The appeal is to be taken against a Judgment in which it was held that the present Respondents were entitled to claim damages It is a money decree. An intended appeal does not operate as a stay. The Application of stay made in the High Court failed because the gist of the conditions set out in order XLI Rule 4 [now order 42 Rule 6 [2] of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss in the Applicant either in this matter of the damages awarded which would cause difficulty to the Appellant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs

..... It is usually a good rule to see if order XII Rule 4 of the Civil procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case where an appeal would be rendered nugatory by some other event. Substantial loss



in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without evidence, it is difficult to see why the Respondent's should be kept out of their money.”

40. On the loss that the Applicant could suffer if the orders sought are not granted, the Applicant in his supporting affidavit stated that the Respondent cannot be able to refund the sum of the decree if the same was paid to him, and eventually the intended appeal succeeds requiring to refund. In his replying affidavit, the Respondent didn't deny the allegation or show that he has the capability of refunding the sum, should he be called upon to. The Applicant's contention was therefore not rebutted.
41. The Applicant herein did state that he is willing to offer security or adhere to any condition that this Court may require or impose as a condition for a grant of the stay of execution. It should be pointed here that as regards what security shall suffice pursuant to the provisions of order 42 Rule [6] is at the discretion of the Court to determine. The parties can only propose. In *Afron C Sharma vs Ashana Raikurdalia c/a Rairi Nakalia & Co Advocates & 2 others* 2014 eKLR, the Court stated:

“The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the Judgment Debtor Civil Process is quite different because in Civil Process the Judgment is like a debt hence the Applicants become and are Judgment Debtors. That is why any security given under order 42 Rule 6 of the Civil Procedure Rules acts as security for the 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.”
42. The Applicant has established the requisite condition as regards security. It remains upon this Court to determine its nature, should the Court decide to allow the Application herein conditionally.
43. In conclusion, I am satisfied that the Applicant's application herein is merited and it is hereby allowed in the following terms: -
 - i. That the Applicant is hereby granted leave to file an appeal out of time against the judgment of the Honourable Senior Principal Magistrate in Milimani Commercial Court CMCC No 5731 of 2016.
 - ii. The appeal shall be filed within 10 days from today, and a record of appeal contemporaneously with submissions on the appeal thereafter within 45 days of filing the appeal.
 - iii. The Respondent shall file response submissions within 14 days of service of the Appellant's.
 - iv. The matter shall be mentioned on December 9 to check on compliance and pick a date for judgment.
 - v. There shall be a stay of execution of the decree in the forestated lower court case, pending the hearing and determination of the intended appeal on condition that the decretal sum is deposited in a joint interest earning account in the names of counsel for the parties within 30 days of today.

READ, SIGNED AND DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER, 2022.

Ocharo Kebira

Judge

In presence of



Mr Musau holding brief for Ms Sheila Mugo for the Applicant.

Mr Kamau for the Respondent.

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.

Ocharo Kebira

Judge

