



REPUBLIC OF KENYA



**Muriu v Hygrotech East Africa Ltd (Cause 21 of 2020)
[2022] KEELRC 12811 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12811 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 21 OF 2020
DN NDERITU, J
SEPTEMBER 22, 2022**

BETWEEN

DANIEL MBURU MURIU CLAIMANT

AND

HYGROTECH EAST AFRICA LTD RESPONDENT

RULING

I. INTRODUCTION

1. In a notice of motion (the application) dated January 18, 2022 brought under Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules* and sections 1A, 1B, 3A and section 63(e) of the *Civil Procedure Act*, and all other enabling provisions of the law, the respondent (applicant) prays for:-
 1. That, this honourable court be pleased to certify this application as urgent and service thereof be dispensed with in the first instance.
 2. That, this honourable court be pleased to order a temporary stay of execution of the judgment and decree of this court pending hearing and determination of this application inter partes.
 3. That, this honourable court be pleased to order a stay of execution of the judgment and decree herein pending a hearing and determination of applicant's appeal against the judgment.
 4. That, the costs be provided by the respondent in any event.
2. The application is based on the grounds on the face of the application, the supporting affidavit of Caleb Yego sworn on January 18, 2022 and a further affidavit by the same deponent sworn on April 8, 2022.
3. The claimant responded to the application by way of a replying affidavit that he swore on February 2, 2022.



4. On March 28, 2022 this court directed that the application be heard by a way of written submissions after a prolonged period of negotiations between counsel for the parties failed to yield an out of court settlement. The applicant's counsel filed his written submissions on April 21, 2022 and counsel for the claimant filed on May 20, 2022.
5. The gist of the application (no interim orders have been granted so far), is that the applicant is seeking an order to stay execution of the judgment and decree in this matter pending the hearing and determination of an intended appeal.

II. Issues For Determination

6. This court has gone through the pleadings filed by the parties and the written submissions by counsel and there is only one issue that commends itself to this court for determination. And that issue is whether this court may issue a stay of execution of the judgment and decree in this matter pending the hearing and determination of the intended appeal. The other auxiliary issue is on who is to meet the costs of this application.

III. Applicant's Case

7. On December 30, 2021 this court delivered a judgment in favour of the claimant in the sum of Kshs 925,000/= plus costs.
8. On December 3, 2021 the applicant filed a notice of appeal and applied for certified copies of the proceedings as per the documents on record in the court file. There is a copy of the typed proceedings in the court file as well.
9. However, there is no evidence that costs have been taxed and there is no decree drawn on record.
10. In paragraphs 7 to 11 of the supporting affidavit the applicant states that the award of Kshs 925,000/= in the judgment is substantial and colossal and that if execution is to be carried out the applicant shall suffer substantial loss considering that it has been experiencing financial strains due to the covid-19 pandemic.
11. The applicant alleges that the intended appeal has a good chance of success and that the same may be rendered an academic exercise if the stay sought for is not granted. The applicant has offered to abide by whatever condition that this court may impose in granting the stay.
12. In the further affidavit, the applicant has attached financial statements to emphasize that it has been operating at a loss since 2019.

IV. Claimant's Case

13. The claimant is vehemently opposed to the application as per the replying affidavit filed. He states that there is no explanation as to what substantial loss the applicant would suffer if the stay is not granted and also alleges that the application was filed after undue delay which delay has not been explained. He views the application as a ploy by the applicant to deny him the fruits of the judgment that was lawfully rendered by this court.
14. The claimant laments that he has been experiencing and continues to suffer untold financial hardship and embarrassment as a result of the unlawful termination by the applicant as he has not been able to secure another job ever since. He prays that the application be dismissed with costs for lack of merits.



V. Submissions By Counsel For The Applicant

15. In page 1 of his written submission counsel for the applicant alludes to an alleged supporting and further affidavit allegedly sworn by Caleb Linda Njenga. This court has perused the court file again and again and locates no such affidavits by the said deponent. The affidavits on record for the applicant are those sworn by Caleb Yegon mentioned in an earlier part of this ruling.
16. Counsel for the applicant has relied on *Butt v Rent Restrictions Tribunal* to illustrate this court's discretion in an application for stay of execution. Counsel has also cited *RWW v EKW* (2019) eKLR on the need of the court to preserve the subject matter not to render an appeal nugatory. He has also relied on *Absalom Dova v Tarbo Transporters* (2013)eKLR on the need of the court not to place either party at a disadvantage arguing that since the claimant is unemployed he may not be able to refund the decretal sum plus costs in case the appeal is successful.
17. The applicant's counsel argues that the application has been brought in good faith and that the applicant is ready to abide by any conditions set including provision of security. He has cited *Focin Motor Cycle Co Ltd v Ann Wambui Wangui & Another* (2018) eKLR in support of this preposition.
18. On the basis of the foregoing counsel for the applicant prays that this application be allowed as prayed.

VI. Submissions By Courts For The Claimant

19. Counsel for the claimant submits that the application was filed about 60 days after the judgment was delivered with the sole purpose of denying the claimant the fruits of the said judgment. Counsel has cited *Macharia t/a Machira & Co Advocates v East Africa Standard (No 2)* (2002) eKLR 63 on the need of this court to protect the claimant to enable him enjoy the fruits of the judgment. He has also relied on *Joseph Gachie t/a Joska Metal Works v Simon Ndeti Muema*(2012) eKLR to drive home the point that the applicant has not demonstrated what substantial loss it would suffer if the stay is not granted.
20. Counsel argues that a legal obligation to settle a decree does not equate to substantial loss. He states that the Applicant has neither offered to deposit the decretal sum in court nor made proposals on settlement.
21. Further, counsel argues that the entire application as brought to court does not meet the conditions set out in Order 42 of the *Civil Procedure Rules* of grant for stay of execution and hence prays that the said application be dismissed with costs.

VII. Determination

22. As noted in an earlier part of this ruling, there is only one issue for determination in this application and that is whether a stay of execution may be issued pending the hearing and determination of an intended appeal by the applicant.
23. For the record, there is no evidence that an appeal has been filed. Although Order 42 rule 6(4) provides that "for purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been filed" there is no evidence by the applicant that any further steps have been taken, beyond filing of the notice, to institute and prosecute the alleged appeal. What has been exhibited by the applicant is a notice of appeal which by itself is not adequate evidence that indeed an appeal has been filed in the Court of Appeal under the rules of that court.
24. While it is not within the province of this court to determine the likelihood of the intended appeal to succeed or otherwise, there is no draft memorandum of appeal exhibited to inform this court that



indeed the applicant is serious on its intentions to institute and prosecute an appeal and that indeed there exists good grounds for such intended appeal.

25. Further, costs in this matter have not been taxed and there is no decree drawn so far. It has not been demonstrated that there is indeed a real threat or likelihood of execution for the decretal sum due, owing, and payable.

26. The law is plainly clear on conditions upon which a stay of execution may be granted pending the hearing and determination of an appeal. Order 46 rule 6(2) provides as follows:-

“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.”

27. Substantial loss must be distinguished from the usual obligation of a judgment debtor to satisfy a lawful decree. That obligation to settle a decree is not a loss as it is a legal obligation based on an order of the court. To a large extent, substantial loss would occur where a successful appellant is unable to recover monies paid in execution of a monetary decree or an execution that substantially alters the nature of a property in dispute to the foundation through, for example, demolition – See the reasoning and holding of Kimaru J (as he then was) in *Century Oil Trading Company Ltd v Kenya Shell Limited* and H Omondi J (as she then was) in *ANM v VN* Eldoret HC Civil Suit No 22 of 2015 (OS).

28. In Bungoma HC Civil Misc Application NO 42 of 2011 – *James Wamalwa & Another v Agnes Naliaka* the Judge had this to say about substantial loss-

“The application 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 a successful party in the appeal. This is what substantial loss would entail.”

Similar sentiments were raised by Gikonyo J in *Wilfred Nyawira Maina v Peterson Onyiego Gichana* (2015) eKLR.

29. This court takes the considered view that the applicant has not demonstrated that denial for stay of execution of the judgment would occasion the applicant substantial loss. This weighed against the right of the claimant to enjoy the benefits and fruits of the lawful judgment passed by this court tilts in favour of denial for the stay of execution.

30. While judgment was delivered on November 30, 2021 the application for stay of execution was filed on January 25, 2022 after a period of over 60 days had expired. There is no explanation offered for this delay.

31. No efforts have been made by the applicant towards settlement of the judgment. No proposals have been made on how the applicant intends to settle the judgment. Mind you there is no order for stay of execution to this day yet the applicant has demonstrated no efforts made towards settlement of the award in the judgment.

32. It is the considered view and opinion of this court that this application has been made in bad faith with the sole purpose of delaying settlement of the award.



33. Article 159 of the Constitution, sections 1A, 1B, and 3A of the Civil Procedure Act, and section 32 of the Employment and Labour Relations Court Act obligate this court to dispense justice to all and sundry. Justice cuts both ways and the law applies equally to all regardless of status. Inasmuch as the applicant is entitled to pursue the intended appeal to logical conclusion, the claimant is entitled to enjoy the fruits of the judgment that was delivered in his favour.

VIII. Orders

34. For all the reasons stated above, and considering the entire circumstances of this matter, including the reasons stated in the judgment that informed this court to arrive at the decision made therein, this application is found to lack merits at all and the same is hereby dismissed with costs to the claimant.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2022.

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DAVID NDERITU

JUDGE

