



Rotich v New Kenya Co-operative Creameries Ltd (Cause 4, 5, 6 & 8 of 2020 (Consolidated)) [2022] KEELRC 4083 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 4083 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 4, 5, 6 & 8 OF 2020 (CONSOLIDATED)
ON MAKAU, J
SEPTEMBER 22, 2022**

BETWEEN

JERUSHA CHEPWOGEN ROTICH CLAIMANT

AND

NEW KENYA CO-OPERATIVE CREAMERIES LTD RESPONDENT

RULING

1. On April 28, 2022, I entered judgment for the claimant in all the 4 suits consolidated in this ruling. The judgment debtor (herein called the applicant) was dissatisfied and filed notice of appeal on May 6, 2022 challenging the whole judgment. On June 21, 2022 it filed the notice of motions dated June 17, 2022 under section 3A of the Civil Procedure Act, order 22 rule 22, order 51 rule 1 of Civil Procedure Rules and all other enabling provisions of the law seeking:-
 - a. That the application be certified as urgent, deserving priority *ex parte* hearing in the first instance.
 - b. That there be an order of stay of execution of the judgment delivered by Hon Justice Onesmus Makau on April 28, 2022 pending hearing and determination of this application inter partes.
 - c. That there be an order of stay of execution of the judgment delivered by Hon Justice Onesmus Makau on April 28, 2002 pending hearing and determination of the application.
2. The application is premised on the grounds set out on the body of the motion and the supporting affidavit sworn on even date by the applicant's legal officer Ms Linda Yegon.
3. In brief the applicant's case is that it has filed notice of appeal in all the consolidated files to challenge the judgment of this court; that it however apprehensive that after costs are determined, the claimant will execute the impugned judgments; that it is equitable that the application be allowed; that the



- claimants stands to suffer no prejudice if the application is allowed and that if execution is not stayed, the proceedings will be rendered nugatory.
4. The claimants have each filed a replying affidavit in their respective file but they are all contain similar averments. In brief the claimants contend that the application for stay is fatally defective, unmerited, bad in law, poorly pleaded and an abuse of the court process; that the application has also not met the threshold for granting stay of execution under order 42 rule 6 of the *Civil Procedure Rules*; that no effort has been made to commence an appeal against the impugned judgment; that execution of the judgment is a lawful exercise; that; that the applicant has not demonstrated what prejudice it will suffer if execution proceeds; and that the claimants stands to suffer prejudice if stay is granted since the fruits of their judgment are long overdue.
 5. The applications were canvassed by written submissions. The applicant submitted that it has demonstrated sufficient cause to warrant granting of stay order 22 rule 22 of the *Civil Procedure Rules*. For emphasis it cited the Court of Appeal decision in *Butt v Rent Restriction Tribunal* (1982) KLR 417 where the court held that stay of execution should be granted where there are good grounds in order to prevent an appeal from becoming nugatory.
 6. The applicant further submitted that it has expressed its apprehension that claimants will not be able to refund the decretal sum if paid and thereafter the appeal succeeds. It relied on section 112 of the *Evidence Act* and *Kenya Pipeline Company Limited v Duncan Nderitu Ndegwa & Another* (2015) eKLR which cited Court of Appeal decision in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (2006) eKLR to emphasis that the evidential burden of proof of capacity to repay is on the claimants herein. In the end it urged the court to allow the application, otherwise, it will be difficult to recover the decretal sum if the appeal succeeds.
 7. The claimants, on the other hand submit that the application is not merited because it does not meet the threshold set out under order 42 rule 6 (2) of the *Civil Procedure Rules* including prove of substantial loss; the application has been made without unreasonable delay and that the applicant is willing to offer security as may be directed by the court.
 8. The claimant submit further that the applicant has not demonstrated clearly what loss it stands to suffer if stay is denied; and that the allegation that it is solely financed by farmers does not hold any water. They relied on the case of *James Wangahwa & Another v Agnes Naliaka Cheseto* where Gikonyo J held that execution per se does not amount to substantial loss and therefore the applicant must establish other factors which show that execution will render an appeal nugatory.
 9. The claimants further relied on the case of *Visbram Ravji Halai v Thornton Turpin* (1990) eKLR where the Court of Appeal held that the High Court's jurisdiction under order 41 rule 6 (now order 42 rule 6) of the *Civil Procedure Rules* is fettered by three conditions established under a sufficient cause, satisfaction of substantial loss and furnishing of security.
 10. They further relied on the case of *Equity Bank Ltd v Taiga Adams Company Ltd* (2006) eKLR and *Kenya Shell Ltd v Kibiru* (1986) eKLR where the court emphasis that the applicant must satisfy that substantial loss will be occasioned before stay order can be granted.
 11. The Claimants further submitted that the applicant has not shown that it has an arguable appeal. For emphasis, it relied on the case of *Rono Cheruiyot & 15 Others v SBI International Holdings (Ag) Ltd* (2020) eKLR.
 12. Further, the claimants submit that the applicant has not furnished sufficient security for due performance of the decree or demonstrated any effort to comply with the judgment of the court. For emphasis, they relied on the case of *Gianfranco Manthi v Africa Merchant Assurance Company Ltd*.



(2019) eKLR where the court observed that the application for stay must show and meet the condition of payment of security for due performance of the decree.

13. Finally, the claimants urged the court to dismiss the application with costs because the judgment by the court is regular, and also because the prayers sought can only operate up to the time the ruling herein is delivered.
14. In a brief rejoinder the applicant contends that the affidavit seeks stay pending appeal and urged the court to grant the same since it has filed a notice of appeal.

Issues for Determination

15. I have carefully considered the application, affidavits and submissions filed. The issues for determination are: -
 - a. Whether the application is fatally defective, bad in law and an abuse of the court process.
 - b. Whether the application has merits and should be allowed as prayed.
Whether the application is defective, bad in law and abuse of the court process.
16. The application before the court seeks stay of execution of the judgment entered on April 28, 2022 pending inter partes hearing and determination of the application. The application is brought primarily under order 22 rule 22, which states as follows: -

“The court to which a decree has been sent for execution shall upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”
17. Having considered the above rule of procedure, it is clear that an application for stay under the rule is not to be made to the trial court but another court to which the decree has been sent for execution. The stay to be granted thereunder is also supposed to be on interim basis pending a substantive application for stay by the judgment debtor before the trial court or the appellate court.
18. The applicant herein has not stated that it seeks stay pending filing of substantive application for stay before the Court of Appeal. The application is also made to the trial court as opposed to a court to which the decree has been sent for execution. It follows therefore in my view that the application is not in accord with the deliberate procedural requirements of order 22 rule 22 (1) of the *Civil Procedure Rules*.
19. In the circumstances, I am satisfied that the application is improperly before this court and is otherwise an abuse of the process of the court. I also must add that since the stay order sought was to operate until the determination of the application, it is obvious that it cannot issue now as it has been overtaken by events.
20. In conclusion, I dismiss the application with costs for the said procedural lapse.

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

ONESMUS N MAKAU



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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

