



REPUBLIC OF KENYA



KENYA LAW
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Ihururu Dairy Farmers Co-operative Society Limited v Ndung'u (Appeal E006 of 2021) [2022] KEELRC 3923 (KLR) (16 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3923 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
APPEAL E006 OF 2021
DKN MARETE, J
SEPTEMBER 16, 2022

BETWEEN

IHURURU DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED APPELLANT

AND

JOHN WAIGWA NDUNG'U RESPONDENT

RULING

1. This is an application by way of Notice of Motion dated 14th July, 2021 and comes out as follows;
 - d. That this application be certified urgent and service be dispensed with in the first instance.
 - e. That the court be pleased to order a stay of execution in Nyeri CM ELRC 79 of 2019 pending the hearing and determination of the Applicant's appeal.
 - f. That the costs of this application be provided for.
2. It is in part grounded thus;
 - viii. That the Applicant has appealed against the whole judgment against them delivered on 10th May, 2021 in Nyeri CM ELRC 79 of 2019.
 - ix. The Applicant is likely to suffer irreparable loss if stay of execution is not granted.
 - x. The Applicant is ready to comply with any orders as may be directed by the Honourable Court.
 - xi. The Applicant's appeal has high chances of success.
 - xiii. The Applicant may apply for the execution any time.
3. The Respondent in a Replying Affidavit sworn on July 19, 2021 faults the application for being an abuse of the process of court besides being out of form. This is as follows;



3. That the said Application is fatally and incurably defective, misconceived, scandalous, frivolous, vexatious, and is otherwise an abuse of the process of this Honourable court.
4. That I have been advised by my Advocates on record, which advise I verily believe to be true, that the Applicant has not annexed a certified copy of the Decree in which it is seeking a stay of its execution.
4. The Claimant/Respondent in defence further argues that there is no threat of execution and therefore the application becomes premature *in toto*.
5. Further, a discernment of the draft memorandum of Appeal does not disclose an arguable appeal with a high probability of success as the determination of the learned magistrate was concrete, apt and point on.
6. Other failures of the application come out thus, The applicant has not annexed a copy of the letter requesting for certified copies of the typed proceedings as a demonstration of the desire to appeal. That the orders sought can only issue if the application is made without unreasonable delay. The applicant has not adduced evidence of substantial loss in the event of non-grant. The applicant has not offered any security as is required of the law on stay of execution.
7. The Claimant/Respondent's further case is that the Applicant has failed to demonstrate what substantial or irreparable loss may result to it unless the orders of stay are granted or what prejudice it is likely to suffer or how its appeal may be rendered nugatory.
8. Further, the application is intended to curtail and stall progression in the matter and therefore deny him the fruits of judgment. Again, there is no demonstration, or at all, of his pecuniary status or being a man of straw and this remains a mere statement and allegation. It is conjecture.
9. The Applicant/Respondent in his written submissions dated 8th December, 2021 submits a case of having met the threshold for issue of stay of execution. It is his case that he has demonstrated a case of substantial loss, expediency in making the application and has demonstrated an arguable appeal.
10. He seeks to rely on the authority of *Ahmed Musa Ismail vs Kumba Ole Mtamorua & 4 Others* (2014) eKLR, the court held thus;

“The principles upon which we exercise our jurisdiction under Rule 5 (2) (b) of the *Court of Appeal Rules*, are notorious. See for instance, *Dhiman vs Shah* (2008) KLR 165, *Bob Morgan Systems Limited & Another vs Johns* (2004) 1KLR 194. An applicant must show that he has an arguable appeal and further that unless we grant the orders sought, his appeal be, if successful will be rendered nugatory. An arguable appeal may not raise multiplicity of explorable points, a single one may suffice. That point or points need not be such as must necessarily succeed on full consideration of the appeal. It is enough that it is a point on which there can be a bona fide question to be exploited and answered within the context of an appellate adjudication. The second limb, and both must be established is an indication that stays or injunctions are not automatic. Rather they are granted to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual.”
11. The Respondent written submissions are geared to a dismissal of the application. It is their argument that it fails to meet the threshold for such grant of stay of execution, the substantial loss and security for due performance of the decree.



12. He seeks to rely on the authority of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* (2012) eKLR, where the court held thus;

“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, 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.

13. The Appellant/Applicant’s case is lost on a test of preponderance of evidence. She has not demonstrated a case of the appeal being rendered nugatory as is required of such situations. She has not demonstrated that the Claimant/Respondent is a pauper and therefore not capable of reimbursements, if at all, on the success of the appeal.
14. I agree with the Respondent. No diligence in the prosecution of the appeal is demonstrated by the Applicant. Again, the Applicant has not met the threshold for issue of the orders sought.
15. I am therefore inclined to dismiss the application with orders that each party bears their costs.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022.

D.K. NJAGI MARETE

JUDGE

Appearances

1. Mr. Kioni instructed by Kabira Kioni & Co. Advocates for the Appellant/Applicant
2. Mrs. Magua instructed by Magua & Mbatha Advocates for the Respondent.

