



**Board of Management Highway Secondary School v Mwangi (Civil Appeal 62 of 2022) [2022] KEELRC 13249 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13249 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CIVIL APPEAL 62 OF 2022  
K OCHARO, J  
OCTOBER 31, 2022**

**BETWEEN  
BOARD OF MANAGEMENT HIGHWAY SECONDARY SCHOOL . APPELLANT  
AND  
CHARITY WANGUI MWANGI ..... RESPONDENT**

**RULING**

1. Before me for determination is the Applicant’s Notice of Motion dated February 22, 2022 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 grant a stay of execution of the interlocutory judgment issued by Honourable G.A Mmasi SPM on July 17, 2020 pending the hearing and determination of the intended Appeal
  3. This Honourable court be pleased to grant a temporary stay of execution of the interlocutory judgment issued by the Honourable G.A Mmasi SPM on July 17, 2020 pending the hearing and determination this application inter partes.
  4. The Appellant/Applicant be at liberty to apply for further orders and/or directions as this Honourable Court may deem just to grant.
  5. This Honourable Court be pleased to set aside the interlocutory judgment entered against the Defendant on the July 28, 2020 the ex-parte proceedings and all other consequential orders.
  6. This Honourable court be pleased to lift the warrants of sale of property in execution of decree for money.



7. This Honourable court be pleased to grant leave to the Defendant to file the defence and the matter be set down for hearing upon grant of the orders above.
8. Costs of this application 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 Irungu Nduati the Principal, and Secretary of the Board of Management, of Highway Secondary School.
3. The Applicant asserted that an interlocutory Judgment was entered by Hon. G.A Mmasi SPM on July 28, 2020 in Nairobi CMCC No. 626 of 2018 in favour of the Respondent directing the Applicant to pay the Respondent Kenya Shillings One Million Six Hundred and Eighty one Thousand Three Hundred and forty-Seven (Kshs 1,681,347) as principal amount and Kenya Shillings One Hundred and six Thousand Eight Hundred and Thirty as interest.
4. The applicant states that being dissatisfied with the Judgment he filed the appeal herein, and requested for certified typed copies of proceedings which are yet to be availed.
5. It was contended that the interlocutory judgment entered was irregular. Further that no notice of entry of judgment was ever served on the applicant as required by law, Order 22 Rule 18 of the [Civil Procedure Rules](#).
6. The judgment was founded on an alleged service of summons that was allegedly effected on the July 22, 2019. On this date, the Principal was not in school. The person [ Patrick Maritime] on whom the service was allegedly done is a person unknown to the applicant.
7. The applicant states that on the February 23, 2021 the respondent sent auctioneers who seized the school bus registration numbers KAN XXXU whose auction was slated for March 20, 2021. Later the applicant was served with a proclamation of attachment of movable property dated February 17, 2022.
8. The applicant is apprehensive that should the school bus registration number KAN XXXU be auctioned it will be to the detriment of over a thousand learners.
9. The applicant states that upon realising the existence of the default judgment, it filed an application dated August 28, 2021 seeking to set aside the judgment and for leave to file a response to the Respondent's claim, the learned trial magistrate declined to allow the application, however. This through the ruling dated October 25, 2021. Aggrieved by the ruling, it filed the appeal herein.
10. The applicant states that it is apprehensive that if the sums of the decree are paid out to the Respondent, it shall not be able to recover the same from her as and when the appeal succeeds and the latter is required to refund. The Respondent is impecunious. Therefore, the applicant stands to suffer immense loss in the event the appeal succeeds as the appeal will be rendered an academic exercise and an effort in futility.
11. The Applicant states that it has an arguable appeal with high chances of success. It is ready and willing to abide by the directions of the court.

## **The Response**

12. In response to the application, the Respondent filed a replying affidavit sworn on May 16, 2022. In it, she avers that appellant was served with the statement of claim and summons on the July 22, 2019 therefore its averments that it was not aware of a claim lodged against it is untrue.



13. The affiant states that its after the lapse of 21 days after service that she filed a request for interlocutory judgment and proceeded to have the matter fixed for formal proof and served the notice on the appellant.
14. It was contended that after lapse of 21 days from the date, she requested for an interlocutory judgment as a result of the applicant's default to enter appearance and file a response, the interlocutory judgment was entered and consequently the matter was fixed for formal proof. The applicant was served for the formal proof, the notice thereof was received by its Principal.
15. The affiant states that the application does not satisfy to the requirements of Order 42(6) of the [Civil Procedure rules](#) to qualify for the orders sought, that is proof of substantial; loss, brought without delay and provide security.
16. The ruling that being assailed through the appeal herein was delivered on the October 25, 2021, whereas the instant application was filed on the February 25, 2022. The application only got lodged after the applicant was threatened by execution of the decree, on the February 22, 2022. The application is therefore not in good faith. The Court shouldn't lose sight that the judgment in her favour is now more than four years old, yet she has not reaped any fruits therefrom.
17. She states that she is a person of means, running a successful farming business.
18. She states that she is entitled to the fruits of judgment but urges the court direct that the entire decretal sum be deposited in court or in a joint interest earning account, in the event that it is inclined to allow the applicant's application.
19. The affiant contends that much as the applicant has a right of appeal the same should be balanced with her rights to enjoy the fruits of the judgment.

### **The Rejoinder**

20. In rejoinder, the applicant filed a further affidavit sworn on June 27, 2022 where the affiant maintains that interlocutory judgment entered was improper.
21. The affiant further states that Order 42 rule 8 of the [Civil Procedure](#) provides that no security shall be required from the government or from any public officer sued in respect of an act alleged to be done by him in his official capacity.

### **Applicant's Submissions**

22. The applicant did not file submissions in support of the application.

### **Respondent's submissions**

23. The Respondent submitted that the application does not conform to the requirement of Order 42 Rule 6 of the [Civil Procedure Rules](#) under which it was brought. Order 42 Rule 6 (1) & (2) provides as follows: -
  1. 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 refused 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 an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order of stay 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 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
24. The respondent submitted that the applicant has not established that the execution will create a state of affairs that will irreparably affect or negate the essential core of the applicant as the successful party in the appeal. Further the applicant has not shown that the respondent will not be in a position to refund the money paid and relied in the holding in *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR where Justice Mativo dismissed a similar application holding that the applicant therein had not proved substantial loss.
25. The respondent also submits that the applicant has not offered or proposed any security for the due performance of the decree of the lower court and relies in the holding in *Mwaura Karuga t/a Limit Enterprises vs. Kenya Bus Services Ltd & 4 others* [2015] eKLR, it was said: - “the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security”.
26. The Respondent further submits that there was an unexplained delay in filling this application and the memorandum of appeal as the applicant had an ample time to apply for stay of execution after filling the memorandum of appeal but deliberately failed to do so until he was threatened with attachment on February 22, 2022, four months from delivery of the ruling being appealed against. The respondent relies in the holding in *Machira t/a Machira & Co Advocates v East African Standard* [2002] eKLR court stated: - “As a further consideration of the principle of justice and fairness, the court abhors inexcusable delay in seeking an order for a stay. Such delay is an aspect of injustice and abuse of judicial process. The other party may take further steps in reliance on the belated applicant's inactivity prolonged without good reason.”
27. The respondent submits that the application is misconceived, an abuse of the court process and urges the court to dismiss the application with costs.

### **Analysis and determination**

28. I have carefully considered the application, the response and the submissions presented, and the following issues commend themselves for determination:
  - Whether the application meets the threshold for grant of the order stay of execution pending the appeal.
  - Whether the application meets the threshold for grant of the order for stay pending appeal.
29. 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.

30. 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.

31. 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] KLR 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.”

32. 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 has attached a school bus KAN XXXU which if auctioned will be at the detriment of over a thousand learners of Highway Secondary school. The respondent in her replying affidavit states that she runs a successful farming business and would be in a position to refund the sums paid should the appeal succeed, with a consequence requiring her to refund the sum. Her assertion was however a bare one without any proof.
33. The applicant herein stated that it is willing to abide by any condition that the court may direct while the Respondent proposed to have the decretal sum deposited in court or in a joint interest earning account in the names of both parties.
34. The provisions of Order 42 Rule [6] are in the nature that they leave it to the discretion of the Court to determine to determine the form of security to be given by the applicant in an application for stay pending appeal, dependent on the peculiar circumstances of each case. 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.”
35. The Respondent has not given any material as to her ability to pay the decretal sum in case the appeal succeeds and in light of the applicant's that they shall suffer substantial loss if stay is not granted, I am persuaded that substantial loss has been proved.
36. This Court has considered the fact that the application herein was filed four months after the ruling assailed was delivered, the court has not lost sight of the fact that under the provisions of the *Civil Procedure Rules*, the period between 21<sup>st</sup> December to 6<sup>th</sup> January of the succeeding year, is a period that is excluded from computation of time in situations where the rules or a court order fixes time for doing a thing. In light of this I am unable to agree with the Respondent that the application herein was filed with inordinate delay. Consequently, I am persuaded to allow the application in the terms as hereinafter.
37. As to the security the appellant has indicated that they are willing to abide by the directions as shall be given by the court. The Respondent on the other hand has proposed to have the entire decretal sum deposited in court or in a joint interest earning account in the names of the advocates for both parties.
38. Taking the above into account and in order not to render the intended appeal nugatory I find the applicant has fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the *Civil procedure Rules*.
39. The application is allowed on the following conditions
  - a. The Applicant Appellant shall deposit the entire decretal sum in court within 60 days from the date of the ruling.



- b. Appellant to file and serve the record of Appeal within 30 days from the date of this ruling, in the defaulting execution to issue.
- c. Costs of the application shall be in the cause.

**READ, DELIVERED AND SIGNED THIS 31ST DAY OF OCTOBER 2022.**

.....  
**OCHARO KEBIRA**

**JUDGE**

In presence of

Mr. Were for the Respondent.

No Appearance for the Applicant.

**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**

