



**Lean Energy Solutions Ltd v Muororo (Cause E034 of 2022)  
[2022] KEELRC 13027 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13027 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E034 OF 2022  
JK GAKERI, J  
OCTOBER 31, 2022**

**BETWEEN**

**LEAN ENERGY SOLUTIONS LTD ..... APPELLANT**

**AND**

**MICHAEL MUORORO ..... RESPONDENT**

**RULING**

1. Before the court for determination is a notice of motion application by the respondent dated May 31, 2022 seeking orders that;
  - i. Spent.
  - ii. Execution of the Judgement in Milimani CMELRC No 486 of 2019 Michael Maina Muororo v Lean Energy Solutions Ltd dated February 18, 2022 be stayed pending the hearing and determination of this application.
  - iii. Execution of judgement in Milimani CMELRC No 486 of 2019 Michael Maina Muororo v Lean Energy Solutions Ltd dated February 18, 2022 be stayed pending the hearing and determination of the appeal.
  - iv. The court be pleased to extend time for the applicant to file a Memorandum of Appeal.
  - v. Costs of this application be provided for.
2. The application is expressed under section 95 and sections 3A of the *Civil Procedure Act*, Rule 41 of the *Court of Appeal Rules, 2010* and Order 50 Rule 6 of the *Civil Procedure Rules*.
3. The application is based on the grounds outlined therein and the Supporting Affidavit sworn by Dinesh Tembhekar who depones that judgement was entered on February 18, 2022 in favour of the claimant who was awarded.



- a. Part of November salary Kshs.64,000/=
  - b. Two month's salary in lieu of notice Kshs.160,000/=
  - c. 12 months compensation Kshs.960,000/=
  - d. Unpaid leave days Kshs.37,333/=
  - e. Costs of the suit and interest.
4. That at the time, J.K. Kibicho who represented the respondent/applicant did not forward a copy of the judgement with their letter dated February 21, 2022.
  5. The Affiant states that the applicant subsequently appointed Waiyaki Associate & Advocates and gave instructions to file an appeal against the decision. The engagement agreement is dated March 11, 2022.
  6. That the firm of Waiyaki Associates & Advocates only filed a notice of appeal.
  7. The affiant states that the claimant instructed an auctioneer named Bemac Auctioneers to proclaim against the goods of the applicant. The proclamation cites Kshs.1,433,259.77 and was due to expire on June 4, 2022.
  8. That a copy of the decree was not served upon the applicant to ascertain the amount awarded by the court.
  9. The affiant further states that its counsel on record in dereliction of his duties failed to apply for a stay of execution pending appeal.
  10. The affiant states that the applicant has been ready and willing to proceed with the appeal and hired an alternative counsel.
  11. That if the stay of execution is not granted, the intended appeal will be rendered nugatory.
  12. It is the affiant's evidence that the applicant should not be punished for the mistakes of its previous advocates.
  13. That the respondent is a pauper and has no means and the decretal sum paid would be irrecoverable in the event the appeal is successful.
  14. The affiant states that the firm of Waiyaki associates & advocates failed to file a memorandum of appeal.
  15. The affiant states that the applicant has an arguable appeal with a high probability of success in that
    - i. The court found that the claimant's termination from employment was lawful but awarded gratuity and notice pay.
    - ii. The court did not consider the claimant's contribution in making the award for compensation.
    - iii. The compensation was excessive.
    - iv. The court did not take into consideration the evidence on leave taken.
  16. That the applicant stands to suffer irreparable harm and damage if the order for stay of execution is not granted.
  17. That the applicant is ready to abide by any conditions the court may grant in relation to deposit of the decretal sum in a fixed deposit account by the parties to underline its readiness to prosecute the appeal.



18. That the applicant was unaware that its previous counsel neither sought stay nor filed a memorandum of appeal.
19. That the respondent stands to suffer no prejudice if the application is allowed and the application has been made without unreasonable delay and it would be in the interest of justice that the prayers sought be granted.

### **Applicant's submissions**

20. The applicant identifies two main issues for determination namely;
  - i. Whether the court can exercise its discretion in extension of time to file a memorandum of appeal.
  - ii. Whether the applicant has a case to warrant grant of stay orders.
21. As regards extension of time to file a memorandum of appeal, reliance is made on Rule 8 of the [\*Employment and Labour Relations Court \(Procedure\) Rules, 2016\*](#) and the decision in [\*Mwangi V Kenya Airways Ltd\*](#) (2003) eKLR to urge that the court should consider the length of the delay, reason and the degree of prejudice to be suffered if the extension is not granted.
22. Further reliance is made on the decision in [\*Charles Karanja Kiiru v Charles Githinji Muigwa\*](#) (2017) eKLR on the facts to be taken into consideration.
23. The provisions of section 79G of the [\*Civil Procedure Act\*](#) and section 59 of the [\*Interpretation and General Provisions Act\*](#) are relied upon to demonstrate the period within which an appeal must be filed and when it may be filed respectively as is Order 50 Rule 5 of the [\*Civil Procedure Rules\*](#) on enlargement of time.
24. The decisions in [\*Ruth Muthoni Wangai v Boniface Mwangi Wangai & another\*](#) (2015) eKLR and [\*Stanley Kiboro Mwangi and 2 others v Kanyamwi Trading Co. Ltd\*](#) (2015) eKLR are relied upon in support of the submission the applicant had demonstrated intention to appeal by filing a notice.
25. As regards mistakes of previous counsels, reliance is made on the decision in [\*Gideon Mose Onchwati V Kenya Oil Co. Ltd & another\*](#) (2017) eKLR which cited [\*Shah V Mbogo\*](#) to urge that a litigant ought not to bear the consequences of the advocate's default unless privy to the default or results from failure of the litigant.
26. The court is urged to rely on section 12 of the [\*Employment and Labour Relations Court Act\*](#) and Rule 25(4) of the [\*Employment and Labour Relations Court \(Procedure\) Rules, 2016\*](#) that the court shall not be bound by technicalities in the dispensation of justice.
27. As to whether the applicant has made a case for grant of stay orders, reliance is made on the provisions of sections 49 and 50 of the [\*Employment Act, 2007\*](#) to urge that the Learned Magistrate acted on wrong principles in awarding compensation and other awards.
28. On arguability of the appeal, reliance is made on the decisions in [\*Joseph Gitabi Gachau and another v Pioneer Holdings \(A\) Ltd and 2 others\*](#) (2009) eKLR and [\*Kenya Airways Ltd V Aviation and Allied Workers Union Kenya\*](#) (2020) eKLR to urge that the appeal need not be destined for success to be arguable but must not be frivolous or idle.
29. It is submitted that the applicant intended appeal is arguable.
30. As regards substantial loss, the decisions in [\*Stanley Karanja Wainaina & another V Ridon Anyangu Mutubwa\*](#) (2016) eKLR and [\*International Laboratory for Research on Animal Diseases v Kinyua\*](#)



(1990) KLR 403 are relied upon to demonstrate the burden of proof that the respondent is a person is means. It is urged that the respondent has not demonstrated ability to refund the decretal sum if the appeal were successful.

31. As to whether the appeal would be rendered nugatory if the stay is not granted, reliance is made on the decision in *Butt v Rent Restriction Tribunal* (1979) eKLR.
32. As regards security, it is urged that the applicant is willing to furnish the same.
33. On delay, it is urged that previous counsels did not act with haste or as instructed to lodge the appeal within the prescribed duration.

#### **respondent's submissions**

34. The respondent contends that although in pray 3, the applicant seeks a stay of execution pending the hearing and determination of the Appal, there is no competent appeal on record as no Memorandum of Appeal was filed within 30 days as provided by law. That parties are bound by their pleadings and a stay order cannot issue.
35. It is further submitted that the applicant has not demonstrated by evidence that it shall suffer substantial loss or damage if execution proceeds.
36. It is urged that the mere fact the respondent is not a man of means is not a sufficient ground to grant stay orders. That it is the applicant's duty to prove the allegation.
37. The respondent further submits that the applicant has failed to discharge its obligation to warrant the orders sought. That poverty is not a ground on which to deny the respondent his right to enjoy the fruits of the trial court's judgement. That the intended appeal has no chance of success.
38. The court is urged to dismiss the Notice of Motion application dated May 31, 2022 with costs.
39. Reliance is made on the decision in *Andrew Okoko V Johnis Waweru Ngatia & another* (2018) eKLR to underline the guiding principles in the exercise of discretion to grant stay of execution pending appeal.
40. Substantial reliance is made on the sentiments of the court.
41. Further reliance is made on the decision in *Nicholas Mutuku Mwasuna V Patricia Mueni Kilonzo* (2022) eKLR on the principles applicable in determining whether the appeal will be rendered nugatory, including the burden of proof.
42. The decision in *Joseph Odide Walome V David Mbadi Akello* (2022) eKLR is relied upon to urge that the grant of extension of time is not a right but an equitable remedy and thus may be discretionary awarded to the deserving party.
43. Similarly, the sentiments of the court in *Evans Mungasia Annob V Sierra Flora Ltd* (2022) eKLR are relied upon to demonstrate how a party should act after judgement is delivered against it.
44. Finally, the decision in *Congress Rental South Africa V Kenyatta International Conference Centre; Co-operative Bank Ltd & another (Garnishee)* (2019) eKLR is relied upon to demonstrate the essence of substantial loss in an application for stay of execution.

#### **Analysis and determination**

45. After careful consideration of the application, affidavits on record and submissions by counsel, the issues for determination are;



- i. Whether the application for stay of execution is merited.
  - ii. Whether the application for extension to file a memorandum of appeal is merited.
46. As to whether the application for stay is merited, the applicant urges that discretion should be exercised in its favour while the respondent submits that applicant has not discharged the burden of proof for discretion to be exercised in its favour.
47. It is trite law that the exercise of court's jurisdiction for the grant of stay of execution pending appeal is the exercise of judicial discretion. In *Andrew Okoko V Johnis Waweru Ngatia & another* (Supra) the court expressed itself as follows;

“The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 Rule 6(2) of the *Civil Procedure Rules* which provide as follows;

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 such decree or order as may ultimately be binding on him has been given by the applicant . . . The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yard stick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not imparted from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruit of his judgment . . . For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss . . .

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

48. The court is guided by these sentiments.
49. I will now proceed to apply the foregoing provisions and principles of law to the facts of the instant case.

### **Substantial loss**

50. The applicant's salient concern is that it stands to suffer substantial loss if the order sought is not granted as will be impossible to recoup the decretal sum if the appeal is unsuccessful.



51. The applicant asserts that the respondent is a pauper and the decretal sum will be irrecoverable.
52. In *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* Civil application No 238 of 2005, the Court of Appeal expressed itself as follows;
- “This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”
53. Similar sentiments were made in *International Laboratory for Research on Animal Diseases v Kinyua* (Supra).
54. Strangely, the respondent did not controvert the assertion that he was not a man of means. The assertion remains uncontroverted.
55. The court is guided by the sentiments of C Medi J in *Charles Irungu v Elizabeth Kalunda Wakano* (2021) eKLR where the court stated as follows;
- “The court is of the view that given the substantial amounts in the decree and in the absence of proof of the respondents financial means, it may well be that if the decretal sum is paid out, the applicant may be unable to recover the sums in the event of the appeal succeeding thereby rendering the appeal nugatory. As stated in the Shells case, substantial loss is what must be prevented.”
56. For the foregoing reasons, the court is persuaded that the applicant has on a balance of probability established that it stands to suffer substantial loss if the stay order is not granted.
57. As to whether the intended appeal will be rendered nugatory, the applicant’s argument is that it is apprehensive of the threat of execution which is hanging over its head a kin to the proverbial sword of domacles. That if a stay is not granted, the appeal shall become nugatory.
58. In *Silverstein v Chesoni* (2002) 1 KLR 867, the court held as follows;
- “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 a loss would render the appeal nugatory.
59. In *Reliance Bank Ltd v Norlake Investments Ltd* (Supra), Court of Appeal stated as follows;
- “What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.”
60. Similar sentiments were made in *Shell Ltd v Kibiru & another* Civil Appeal No 97 of 1986.



61. Finally, in *Butt v Rent Restriction Tribunal* (Supra), the court stated as follows;
- “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 that appeal court reverse the judge’s discretion.”
62. The applicant’s fear appear well founded and thus the need to preserve the status quo so as not to render the intended appeal nugatory.
63. The foregoing issue is closely related to whether or not the appeal is arguable.
64. It is trite law that arguability of the appeal does not necessarily mean that the appeal will succeed.
65. In *Stanley Kang’ethe Kinyanjui v Tony Keter and 5 others*, the court stated as follows;
- (vi) “On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of the appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd* Civil application No 345 of 2004.
- (vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & another v Pioneer Holdings (A) Ltd & 2 others* (Supra).”
66. Cautious not to delve into the merits of the intended appeal, the draft Memorandum of Appeal annexed to the Notice of Motion application appears to raise arguable issues.
67. The court is persuaded that the Claimant’s application meets the threshold on arguability of the appeal.
68. As regards furnishing of security as required by Order 42 Rule 6(2) of the *Civil Procedure Rules, 2010*, the applicant states that it is ready and willing to provide security as determined by the court for due performance of the decree. This is a signification of good faith on the part of the respondent.
69. In *Schmaderer v Ngene* (2021) eKLR, the court stated as follows;
- “The offer of security by the applicant is a bonafides, that the stay application is not a mere exercise to deny the respondent the fruits of its judgement. The offer for security therefore satisfies a ground for stay. This is as was held in the case of *Focin Motorcycle Co Ltd v Ann Wambui Wangui & another* (2018) eKLR.”
70. Finally, as regards the timing of the application, it is not in dispute that the judgement sought to be appealed against was rendered on February 18, 2022 and the respondent’s counsel updated the respondent vide letter dated February 21, 2022. Counsel advised that a copy of the judgement would be provided in a weeks time but that does not appear to have happened as on March 11, 2022. The respondent engaged another counsel to act on its behalf and the Notice of Motion application herein was filed by another counsel.
71. For unexplained reasons, the respondent changed its counsel two times in less than 3<sup>1</sup>/<sub>2</sub> months.
72. Be that as it may, the salient issue is whether the applicant has lodged the application without unreasonable delay.
73. The question of reasonable or unreasonable delay is one of fact and depends on the circumstances of each case.



74. This question was dealt with in *Jaber Mohsen Ali & another v Priscillah Boit & another* (2014) eKLR where the court stated as follows;
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter . . .”
75. In the instant case, the application herein was made about 2 months after expiration of the 30 day stay of execution as confirmed by counsel’s letter dated February 21, 2022. Within the same period, the applicant had engaged two firms of lawyers to represent it.
76. The applicant faults the firm of JK Kibicho, then on record, for not forwarding a copy of the judgement to it.
77. Puzzlingly, the law firm withdrew its representation of the applicant by letter dated March 7, 2022 because of the applicant’s complaints about the advocates handling of matters.
78. The law firm declined to file the appeal as advised via email dated February 23, 2022.
79. More significantly, the applicant also faults the firm of Waiyaki & Associates Advocates for dereliction of duty by refusing to file the appeal as advised.
80. Instructively, the firm was engaged by agreement dated March 11, 2022.
81. It is unclear why the firm of Waiyaki & Associates Advocates did not file the appeal as instructed by the applicant as deposed in the Supporting Affidavit.
82. The applicant lays the blame squarely on the law firm.
83. The unexplained inaction by the law firm partly explains the delay in filing of the appeal.
84. For the above stated reasons, the court is satisfied and finds that the application herein was filed without unreasonably delay.
85. As regards extension of time to file the Memorandum of Appeal, the starting point is a recapitulation of the relevant law.
86. Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides as follows;
1. Where any written law provides for an appeal to the court, an appellant shall file a Memorandum of Appeal with the court within the time specified for that appeal under the written law.
  2. Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.
87. Section 59 of the *Interpretation and General Provisions Act*, provides that;
- Where in a written law a time is prescribed for doing an act, or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.
88. Order 50 Rule 5 of the *Civil Procedure Rules* confer upon the court jurisdiction to enlarge time where it is fixed by law, on such terms as the justice of the case may require.



89. These provisions leave no doubt that the power of the court to enlarge time is discretionary. This position finds support in *Joseph Odide Walome v David Mbadi Akello* (Supra), where the court held as follows;

“Commencing with the issue of whether the prayer for extension of time is merited, it is trite that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court. That discretion, however, must be exercised judiciously.”

90. Applying the foregoing principles to the facts of the instant case, the court is satisfied that weighing the scales of justice, the applicants application for extension of time is merited.

91. Consequently, the Notice of Motion application dated May 31, 2022 is hereby allowed on the following terms;

- a. Execution of the Judgement in Milimani CMELRC No 486 of 2019 Michael Maina Muororo V Lean Energy Solutions Ltd dated February 18, 2022 is hereby stayed pending the hearing and determination of the appeal.
- b. The time to file the appeal is extended and the appeal shall be filed within 45 days of the date hereof.
- c. The applicant to deposit the full decretal sum in a joint interest earning account in the name of both advocates within 45 days from the date hereof.
- d. In default of the orders above, the stay order granted shall lapse unless otherwise enlarged by the court.
- e. Costs shall be in the cause.

92. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF OCTOBER 2022**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 *Civil 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.

**DR. JACOB GAKERI**

**JUDGE**



