



**Magoiya v Prudential Life Assurance Limited (Cause 784 of 2019)  
[2022] KEELRC 13144 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13144 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 784 OF 2019  
K OCHARO, J  
OCTOBER 24, 2022**

**BETWEEN**

**ONESMUS KINYUA MAGOIYA ..... CLAIMANT**

**AND**

**PRUDENTIAL LIFE ASSURANCE LIMITED ..... RESPONDENT**

**RULING**

**The Application**

1. Through a notice of motion dated April 4, 2022, expressed to be brought under the provisions of section 12 [3] [viii] of the *Employment and Labour Relations Court Act* 2011, rule 17[1] of the *Employment and Labour Relations Court [Procedure] Rules 2016*, and order 42 rule 6[1] of the *Civil Procedure Rules 2010*, the respondent/applicant seeks:
  - i. That the application be certified urgent and be heard exparte in the first instance.
  - ii. That pending the hearing and determination of this application inter partes, this honourable court be pleased to grant interim orders of stay of execution of the Judgment delivered on March 19, 2022 as regards the following findings: -
    - a. The sum of kshs 500,000 awarded as part of the kshs 6,330,000 computed as 10 months' damages payable to the claimant.
    - b. Bonus pay of kshs 1,399,200; and
    - c. Damages for breach of fair labour practices of kshs 100,00.
  - iii. That pending the hearing and determination of the intended appeal, the honourable court be pleased to grant an order of stay of execution of the judgment delivered on March 15, 2022 as regards the following findings:



- a. The sum of kshs 500,000 awarded as part of the kshs 6,330,000 as 10 months' damages payable to the claimant;
  - b. Bonus pay of kshs 1,399,200; and
  - c. Damages for breach of fair labour practices of kshs 100,000.
- iv. That the costs of and incidental to this application be costs in the cause.
2. The application is premised on the grounds obtaining on the face of the application, and the supporting affidavit sworn on the April 4, 2022, by Evah Ngugi, the respondent's head of risk and compliance.
3. The applicant contends that aggrieved by the judgment of this court delivered on the March 15, 2022, it lodged a notice of appeal on the March 28, 2022 together with a request for typed proceedings. The intended appeal is against part of the said Judgment.
4. The applicant contends that it has a good chance of succeeding on appeal against the part of the judgment of the court that it seeks to assail.
5. The applicant alleges that it will suffer loss of use and benefit of the balance of the decretal amount should the orders sought in the application not be granted.
6. The applicant contends that it has no knowledge of the assets and/or the whereabouts of the claimant to the extent that if the payment is made to him and the intended appeal is successful, with a consequence that he is required to refund the sum, recovery of the same will be impossible.
7. The applicant is ready to give any security for the performance of the decree herein, as this court may deem just and fair to order.

### **The Response**

8. The claimant/respondent opposes the application herein upon the basis of the grounds obtaining on the replying affidavit he swore on the April 13, 2022.
9. The claimant/respondent contends that the application is premature and an abuse of the court process since the costs in this matter are yet to be taxed nor has the decree been drawn. Warrants of execution have not been applied for.
10. According to the claimant/respondent, the respondent's/applicant's intended appeal has no chances of success.
11. The claimant contends that the respondent's/applicant's allegation that he [the claimant] is a person who will not be able to refund the sum of kshs 1,999,200 being the subject of the part of the Judgment herein that is intended to be appealed against, is founded on lose ground as he has assets worth more than kshs 12 [twelve] million which includes a house situate in Syokimau on a quarter an acre worth about 10 [ten] million and motor KCB 34 Y, worth about kshs 2 [two] million. Both of these properties are unencumbered.
12. Should the court allow the plea for stay of execution, it should be conditional upon a deposit of the contested amount in an interest earning account.

### **The Respondent/Applicant's submissions**

13. The respondent/applicant proposes the following issues for determination:



- a. Whether the applicant has an arguable appeal;
  - b. Whether the applicant will suffer substantial loss if a stay of execution is not granted;
  - c. Whether the applicant has expressed its intent to furnish security for the due performance of the Judgment; and
  - d. Whether the application has been brought without unreasonable delay.
14. On the 1<sup>st</sup> proposed issue, the applicant’s counsel submits that the intended appeal raises *bona fide* arguable grounds and/or legitimate points of law, which ought to be canvassed before the Court of Appeal. One of the grounds being whether or not a discretionary allowance should be included in the computation of the sum awardable under section 49[1][c] as this court did. Further, it is not the duty of the court hearing a stay of application to make a final determination on the merits of an appeal. This point is buttressed by the holding in, *Kenya Airports Authority v Mitu-Bell Welfare Society & another* [2014] eKLR.
15. For the purposes of protecting the respondent’s/applicant’s undoubted right of appeal, this court should exercise its discretion in favour of the application herein. The respondent/applicant cited the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 where the court held:
- “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal ..... 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.
16. This court is enjoined to consider whether if it refused to grant the orders sought, the refusal will occasion substantial loss to the applicant and consequently render the appeal nugatory. Counsel submitted that as to what amounts to substantial loss, was elaborated in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR thus:
- “..... substantial loss does not represent any particular mathematical formula, rather, it is a qualitative concept. It refers to any loss, great or small, that is really worth or value as distinguishable from a loss without value.
- ..... the applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the respondent. In other words, he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like in the case here, substantial loss lies in the inability of the respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the respondent cannot pay back.”
17. The claimant has not filed any affidavit before court, of means or otherwise, to demonstrate his ability to repay the sum should the appeal succeed. He has just made allegations that he is propertied without putting forth any documents to prove the ownership of the property or valuation of the same to demonstrate its value.
18. It was further submitted that once the financial ability of the Judgment creditor is called to question, the burden shifts to him of proving such ability immediately. In this submission, reliance was placed on the case *International Laboratory for Research on Animal Diseases v Kinyua* [1990] eKLR.



19. The applicant is willing to provide such security as this court will deem fit. The duty that lies on the applicant as regards the issue of security in an application for stay of execution is to only depone that it is willing to provide security – *Focin Motorcycle Co Limited v Ann Wambui Wangui & another* [2018] eKLR.
20. The application herein was filed timeously and without unreasonable delay. The court delivered Judgment on March 15, 2022 and the application was filed on April 4, 2022, a period of 21 days from the date of the interim stay of execution that was granted herein.

### **Analysis and Determination**

21. The jurisdiction of this honourable court to grant a stay of execution of a decree in a matter pending appeal flows from the provisions of order 42 rule 6. As to whether an application shall attract an order of stay being granted wholly depends on the discretion of the court, discretion which the court must exercise judiciously and within the stipulations of the above stated provisions.
22. Order 42 rule 6 of the *Civil Procedure Rules*, stipulates conditions that an applicant must satisfy in order to attract a favourable exercise of the discretion. The applicant must demonstrate that the application has been filed timeously and without unreasonable delay; unless the order of stay is granted the applicant shall suffer substantial loss; and that he or she has offered security for the due performance of the decree.
23. This court shall consider the application herein through the above stated lens. The applicant has argued that it has an arguable appeal. The provisions of order 42 rule 6 do not make it a requirement for a court faced with an application of stay pending appeal, to consider whether or not the appeal or intended appeal is arguable. Put in another way, it is not required of an applicant under the provision to demonstrate that he has an arguable appeal as one of the conditions to satisfy.
24. In my view the provision is deliberately designed as such, for the single reason that it allows the applications for stay to be made to the court that passed the decree. A court of law passes judgments with the full conviction that the reasoning and the outcome therein are proper and correct. This being so, then what business, and basis, would the court here have to start considering whether or not the applicant has an arguable appeal? Definitely none, logic wouldn't allow it. Consequently, I will ignore the submissions on the 1<sup>st</sup> proposed issue.
25. The claimant/respondent, argued that the application herein is premature as the costs herein have not been taxed and a decree extracted in accordance with the provisions of the Civil Procedure Rules. This contention is clearly in ignorance of a deep reading and apprehension of the provisions of order 42 rule 6. The provision allows an application for stay of execution to be made orally at the delivery of the judgment, implying that extraction of a decree and taxation of party and party costs need not be awaited before an application for stay is made. All that is required to be demonstrated is that the appeal has been filed or that the process towards filing the same has been commenced.
26. The respondent/applicant argues that the application herein was filed timeously. This court keeps view of the fact that what is without reasonable delay depends on the circumstances of each case. I am persuaded by the applicant's argument that the application herein was filed timeously considering the date of delivery of the judgment and the filing of the application.
27. The respondent/applicant contends that it will suffer irreparable loss if the orders sought are not granted. The loss according to it shall be in form of losing value for the money if the same is released to the claimant/respondent. that the claimant's/respondent's means are unknown. Recovering the



money as and when the intended appeal succeeds, and the claimant called upon to refund the same shall be impossible.

28. The respondent/applicant contends that it is enough for an applicant to just depone to the effect that the respondent in an application for stay of execution, has no means to refund the decretal sum should he be called upon to refund the same, and the burden shifts to him to prove otherwise. With due respect I do not agree with this proposition. What the respondent/applicant is contending is that the evidential burden shifts to the respondent, not the burden of proof.
29. The respondent/applicant argued further that the claimant/respondent did not swear an affidavit of means. there is no requirement that an affidavit separate from a replying affidavit be sworn to demonstrate the means of the respondent to an application for stay of execution. I do not agree with the applicant's submissions on this point therefore.
30. There is no contest that the respondent/applicant has already paid the undisputed figures of the Judgment, a figure of more than five million Kenya shillings. It does not state that the amount will go to waste between now and the time the Judgment on the appeal is rendered. Further, from the affidavit in support of the application herein, I am not able to clearly see the loss that it is likely to suffer.
31. The respondent's/applicant's fears can be put to rest by a conditional order of stay, as I will direct hereunder. Further, considering the payment of the sums hereinabove mentioned, the justice of this matter demands that a balancing act be done by this court, and this can be achieved by the conditional order.
32. By reason of the premises:
  - i. The application for stay by the respondent/applicant is hereby allowed, and a stay of execution pending the intended appeal granted conditionally.
  - ii. The disputed sum of kshs 2,139,200, the subject matter of the intended appeal be deposited in a joint interest earning account in the names of counsel for the parties pending the hearing and determination of the intended appeal.
  - iii. The said deposit be made within 30 days of this ruling, in the defaulting execution to issue for the sum.
  - iv. Costs of this application be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER, 2022.**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of:

Mr Thuo for claimant.

Mr Oyoo for the Applicant/Respondent.

**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 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**

