



**Mwathi v Kewal Contractors Limited & another (Appeal 70 of 2018)
[2022] KEELRC 12884 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12884 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 70 OF 2018
K OCHARO, J
OCTOBER 6, 2022**

BETWEEN

PETER GICHURU MWATHI CLAIMANT

AND

KEWAL CONTRACTORS LIMITED 1ST RESPONDENT

KENYATTA UNIVERSITY 2ND RESPONDENT

RULING

1. By a notice of motion application dated May 19, 2022, the 2nd respondent/applicant seeks the following orders:
 - a. That this application be certified as urgent and be heard *ex parte* in the first instance.
 - b. That this honourable court be pleased to order a temporary stay of the judgment delivered herein pending the determination of this application interpartes.
 - c. That this honourable court be pleased to order stay of execution of the judgment delivered herein pending the hearing and determination of the intended appeal to be lodged by the applicant.
 - d. Costs of this application be provided for in any event.
2. The application is anchored on the grounds obtaining on the face of the application, and the supporting affidavit sworn by professor Paul Okemo, the Deputy Vice-Chancellor in charge of administration in the applicant's institution.
3. The appellant/respondent opposes the application upon the premises obtaining on his replying affidavit sworn on the May 27, 2022.



4. Outstanding for determination in the application is limb [3] and [4] of the application. This court directed that the application be canvassed by way of written submissions, which submissions have been filed.

The Application

5. The applicant states that dissatisfied with the judgment of this court of April 21, 2022, it filed a notice of appeal on the April 26, 2022. That it subsequently applied for certified proceedings and decree from this court to enable it prepare a record of appeal.
6. The applicant contends that it has an arguable appeal which appeal will be rendered nugatory if the orders sought in this application are not granted.
7. The applicant asserts that the application herein has been brought timeously, and that it will abide by any conditions that this court may deem just and fit to attach to the order of stay.
8. The application should be allowed and the applicant be afforded an opportunity to be heard in appeal for the ends of justice to be met.

The Appellant's Response

9. The appellant contended that matter herein has been in the corridors of justice since the year 2012, instituted after an accident that occurred in the year 2009, accident that reduced him to a beggar.
10. The respondent states that the intended appeal is one without merit and only intended to impede, and delay, him from realising the fruits of his Judgment.
11. That this court did give the claimant a stay of 30 days when the judgment was delivered, and to grant the stay of execution sought in the instant application shall be an affront on the doctrine of *res judicata*.
12. The appellant/respondent contends that this court having rendered itself on the appeal from the lower court has no jurisdiction to entertain and deliver itself on the respondent's/applicant's application.
13. The appellant states that should this court decide to grant the 2nd respondent's/applicant's application, then the same should be on condition that:
 - a. The 2nd respondent/applicant be ordered to pay to him half of the decretal amount, Kshs 7,440,899.50 pending the hearing and determination of the appeal.
 - b. That the 2nd respondent/applicant deposits the rest of the amount in a joint interest earning account in the name of both counsel on record pending the hearing and determination of the intended appeal.

The 2nd Respondent's/Applicant's Submissions

14. The 2nd respondent/applicant submitted that order 42, rule 6 of the [Civil Procedure Rules](#) provide for the conditions necessary for a grant of a stay of execution pending appeal. In the instant application and considering the provision, three issues emerge for determination, namely:
 - a. Was this application filed without delay? Is the application meritorious?
 - b. Will the applicant suffer any irreparable loss if the orders sought are not granted?



Determination

15. From the material placed before this court, I distil one broad issue for determination; whether the applicant has met the prerequisite for a grant of stay of execution pending appeal.
16. 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.
17. 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.



18. 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] KRR 410 Platt J A which 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 to 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 jurisdiction for granting stay. That is what has to be prevented. Therefore, without evidence, it is difficult to see why the respondents should be kept out of their money.”

19. On the loss that the applicant could suffer if the orders sought are not granted, the applicant in its supporting affidavit stated: -

[5]. That I am advised by our advocates on record, advice I verily believe to be true and correct that the 2nd respondent/applicant has an arguable appeal which will be rendered nugatory if this honourable court does not grant stay of execution

It is not enough for the applicant to allege that it will suffer substantial loss if the order of stay pending appeal is not granted, he or she should proceed further and demonstrate what the substantial loss will be, and the reason why it is thought that there could be the loss. Considering the above stated content of the supporting affidavit, and even the affidavit itself in its totality and the grounds on the face of the applicant’s application, the evidence of substantial loss is missing. The applicant has just made general statements. Consequently, I find that the applicant has not demonstrated the substantial loss it will suffer, if the stay of execution is not granted.

20. I have considered the circumstances of this application, the date of the judgment herein, the fact that there was an oral application for stay of execution that was granted for 30 days to enable the applicant’s counsel communicate the outcome of this matter, and take instructions on the judgment, and the date of filing of the instant application and conclude that the application was filed timeously.
21. The applicant herein did state that it is willing to offer security or adhere to any condition that this court may require or impose as a condition for a grant of the stay of execution. It should be pointed here that as regards what security shall suffice pursuant to the provisions of order 42 rule [6] is at the discretion of the court to determine. The parties can only propose. In *Arun C Sharma vs. Ashana Raikurdalia c/a Rairundalia & 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.”

22. The applicant has established the requisite condition as regards security. It remains upon this court to determine its nature, should the court decide to allow the application herein conditionally.
23. Hereinabove this court has found that the applicant has not satisfied the condition on substantial loss. However, I am unable to dismiss the application, having not lost sight of the fact that the right of appeal must be balanced against an equally weighty right of the judgment creditor to enjoy the fruits of his judgment see *Mohammed Salim t/a Choice Butchery vs. Nasserpuria Memon Jamat* [2013] eKLR.
24. Too, the court cannot lose sight of the fact that each application calls for consideration of its unique circumstances [see *Butt vs. Rent Restriction Tribunal*, [supra]. The judgment creditor herein stated that due to the accident, he was turned literally to a beggar even for basic commodities. Considering this disclosure which must be weighed against his right to enjoy the fruits of his judgment a balanced order is required.
25. By reason of the foregoing premises, I allow the applicant’s application in the following terms: -
 - a. The 2nd respondent/applicant shall pay Kshs 2,500,000 [two million five hundred thousand, to the appellant within 30 days of the date of this ruling.
 - b. The balance of the decretal sum be deposited in an interest earning account to be opened in the joint names of counsel for the parties within 60 days of this ruling.
 - c. In the defaulting in any of the above stated orders – [a] and [b], execution to proceed.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF OCTOBER 2022.

OCHARO KEBIRA

JUDGE

In Presence of:

Ms. Kabuchi for Applicant/2nd Respondent.

Mr. Keya for Appellant/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 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

