



**Kabusu t/a Oloita Butchery v Ndulu & another (Appeal E166 of 2022)  
[2022] KEELRC 13519 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13519 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E166 OF 2022  
SC RUTTO, J  
DECEMBER 9, 2022**

**BETWEEN**

**PETER KABUSU T/A OLOITA BUTCHERY ..... APPLICANT**

**AND**

**MICHAEL MUTUKU NDULU ..... 1<sup>ST</sup> RESPONDENT**

**BERNAD IYIENGO CHASIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion Application dated September 26, 2022, the Applicant herein seeks stay of execution of the Judgment in Milimani CMEL Case No 958 of 2019 pending the hearing and determination of the Appeal.
2. The Application is supported by the affidavit sworn by Mr Peter Kabusu, the Applicant herein. Mr Kabusu avers that he instructed an Advocate to defend him at the trial Court. That the advocate never informed him of the progress of the case and neither was he informed of the hearing. That the Advocate he had instructed further failed to file his defence and documents in Court. That he only learnt that Judgment had been issued when he personally went to Milimani Commercial Court to confirm the status of the matter. That he is dissatisfied with the Judgment as the same is unfair and underserving considering the circumstances. That he now faces risk of having his properties attached in execution of the decree. That the Appeal will be rendered nugatory if the stay is not granted. Mr Kabusu further states that he is willing to furnish reasonable security for the due performance of the decree. That further, it is in the interest of justice that the Application is allowed.
3. In opposing the Application, Mr Lemmy Regau Nyawade swore a Replying Affidavit in which he avers that he is the Advocate on record for the Respondents. He deposed that the Application is an abuse of the court process and is being used to delay justice that is in favour of the Respondents. That the Applicant does not bring out special circumstances or unique requirement to necessitate a stay of



execution as prayed. That further, the Applicant had failed to demonstrate adequately or at all what substantial loss he may face unless a stay of execution issued.

4. Mr Nyawade further contends that the Applicant has not demonstrated in any way, that he has an arguable appeal with any chances of success. He was of the view that the Applicant has not met the threshold for the Court to exercise its discretion in granting the stay of execution. That it will be prejudicial to the Respondents if the said prayers by the Applicant are granted by this Court as the Respondents have been suffering since February 15, 2018 when they were dismissed under circumstances the Court found to be unfair. He urged the Court to dismiss the Application with costs.

### Submissions

5. The Application was canvassed by way of written submissions which I have considered.
6. The Applicant submitted that his property risks being attached and he stands to suffer irreparable loss if stay of execution of the order is not granted. That there was no delay in filing the instant Application. It was further submitted by the Applicant that there was no cause for depositing or furnishing this Court with security as he is ready and willing to compensate the Respondents with the whole decretal amount if the appeal is unsuccessful. In support of his submissions, the Applicant sought to rely on the case of *H Young & Co (EA) Ltd v County Government of Lamu (2021) eKLR*, *James Wangalwa & another v Agnes Naliaka Cheseto (2021) eKLR*, *Mohsen Ali & another v Priscilla Boit & another (2014) eKLR*, *Arun C Sharma v Ashana Raikundlia & Co Advocates & 2 others (2014) eKLR*.
7. On the other hand, the Respondents submitted that for this Court to grant the orders sought, the Applicant must demonstrate or pass the test for grant of stay of execution. Similarly, the Respondents placed reliance on the case of *James Wangalwa & another v Agnes Naliaka Cheseto (2021) eKLR*. With regards to the question of security, it was submitted that the Applicant had failed the test and has misconstrued Order 42 Rule 6 (2) of the *Civil Procedure Rules* which is couched in mandatory terms. That it is therefore not a question of if but how much security the Applicant should deposit. It was further submitted that the same is a legal requirement. The Respondents invited the Court to consider the determination in the case of *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Service Ltd & 4 others (2015) eKLR*.

### Analysis and determination

8. The singular issue for determination is whether the order of stay of execution should be granted pending Appeal. Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* is key to determination of this issue and I will reproduce the same thus:
  - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 to 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 for stay of execution shall be made under subrule (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.”
9. This in essence means that an Applicant seeking stay of execution of a decree or order pending Appeal should satisfy the Court that:
  - a. Substantial loss may result to him unless the order is made;
  - b. The application has been made without unreasonable delay; and
  - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
10. In addition to the foregoing conditions, the Court (Odunga J, as he then was) in the case of *Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR*, held that the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the *Civil Procedure Act* or in the interpretation of any of its provisions.
11. The Learned Judge further cited the case of *Stephen Boro Gitiba v Family Finance Building Society & 3 Others Civil Application No Nai 263 of 2009*, where it was held that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.
12. In addition, it is instructive to note that this Court’s principle objective provided for under section 3 of the *Employment and Labour Relations Court Act*, resonates with the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*. In this regard, the principle objective enjoins the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes.
13. That said, I now move to consider whether the Applicant has satisfied the conditions for grant of stay.

### **Substantial loss**

14. With regards to substantial loss, the Applicant has told the Court that he will suffer irreparable loss if the Application is not granted as he risks having his properties attached in execution of the decree. He further stated that he is willing to furnish reasonable security for the due performance of the decree.
15. On the issue of substantial loss, the Court rendered itself as follows in the case of *Kenya Shell Limited v Kibiru [1986] KLR 410*:

“...If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone 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”.
16. Essentially, the purpose of stay of execution is to preserve the subject matter in dispute. Ultimately, the Court must endeavour to balance the interests of the parties to the suit. While the Respondents are entitled to enjoy the fruits of their Judgment, the Applicant who has already exercised his right of



Appeal, should not be confronted with a situation where he is unable to get a refund of his money in the event the Appeal goes his way.

17. As stated herein, the Applicant is apprehensive that he will suffer substantial loss in the event of execution of the judgment. It is noteworthy that the Respondents have not demonstrated that they have the financial means to refund the decretal sum, should the Appeal succeed.
18. Therefore, the apprehension by the Applicant is real and I am satisfied that he is likely to suffer substantial loss in the event the Application is not granted and his Appeal ultimately succeed.

**Application has been made without unreasonable delay.**

19. Judgment herein was delivered on September 7, 2022, and stay was granted for a period of thirty days. The Applicant lodged the instant Application on September 26, 2022 which was within the period of stay given by the trial court. In the circumstances, it is evident that the Application has been filed timeously.

**Security**

20. With regards to security, the Applicant stated in his Affidavit in support of the motion, that he is willing to furnish security for the performance of the decree. On the part of the Respondents, they aver that the Applicant must deposit the decretal sum plus costs in a joint account between the Advocates as a condition for granting of stay.
21. In the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] eKLR*, the Court reckoned as follows with regards to security:

“Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree.”

22. The total award in question is for the sum of Kshs 717,144.00 and from the time Judgement was delivered, the same became due to the Respondents who were the successful litigants at the trial Court.
23. Therefore, and noting that the Application if allowed, will bar the Respondents from enjoying the fruits of their Judgment pending the determination of the Appeal, it behoves the Applicant to furnish security. This is the very essence of Order 42 Rule 6 (2) (b).
24. Therefore, since the Applicant has adequately satisfied that he will suffer substantial loss in the event the Application is disallowed and in order to balance the interests of both parties, it would be only be fair and just that the Applicant deposits the decretal amount.



## Orders

25. Consequently, the Application is allowed in the following terms: -

- a. That stay of execution against the judgement of the trial Court delivered on September 7, 2022 in Milimani CMEL No 958 of 2019 is hereby granted pending hearing and determination of the Appeal.
- b. That the Applicant do deposit the decretal amount, being Kshs 717,144.00 in a joint interest earning account in the names of the Advocates on record for both parties within 30 days hereof.
- c. That in default of compliance with the deposit of the decretal amount, the orders for stay will be automatically vacated.
- d. Costs shall abide the outcome of the Appeal.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

**Ms Makassy for the Applicant/Appellant**

**Mr Odhiambo for the Respondents**

**Court Assistant Abdimalik Hussein**

## **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 March 15, 2020 and subsequent directions of April 21, 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 had 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.

**STELLA RUTTO**

**JUDGE**

