



**Henry & 4 others v County Government of Vihiga (Cause 76 of 2021)
[2022] KEELRC 13371 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13371 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 76 OF 2021
JW KELI, J
DECEMBER 2, 2022**

BETWEEN

**NDOLI HYNES HENRY 1ST CLAIMANT
DIANAH ANDEMO ATINGO 2ND CLAIMANT
ELIZABETH ANYANGO AJWANG 3RD CLAIMANT
ERASTUS MIDAMBO NGASE 4TH CLAIMANT
SHARON ILLAH AKINYI 5TH CLAIMANT**

AND

COUNTY GOVERNMENT OF VIHIGA RESPONDENT

RULING

1. The applicant *vide* notice of motion application dated August 31, 2022 sought the following reliefs:-
 - a. That there be stay of proceedings and execution of orders herein pending hearing and determination of the appeal.
 - b. That the costs of this application be borne by the respondent
2. The application is premised on the grounds that the court on July 28, 2022 delivered a ruling dismissing their notice of preliminary objection. That they lodged notice of appeal dated August 1, 2022 served on the respondents.
3. That they have requested for typed proceedings and are yet to receive the same. That it is in the interest of Justice that the application be allowed. The application was further supported by the affidavit of James Mukabi, the county solicitor of the respondent.
4. The respondent filed grounds of opposition in response to the application to wit:-



- a. Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo handling Services Ltd (1974) EA 75* at 76 C and E.
 - b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo (1967) EA 116 of 1238* [*Shabir Din v Ram Parkash Anand \(1955\) 22 EACA 48*](#)
 - c. Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah 1968) EA 93*.
5. The court directed application be canvassed by way of written submissions. Only the respondent filed.

Determination

The applicable law.

6. The applicant brought application under order 63 of the [*Civil Procedure Rules*](#) which provides that to prevent ends of justice being defeated the court may, if it so prescribed (e) make such other interlocutory orders as may appear to the court to be just and convenient . Order 42 rule 6 provides that no appeal shall operate as a stay of proceedings or order appealed from except in so far as the court appealed from may order. There are conditions to be met by the applicant under order 46 (2) of the [*Civil Procedure Rules*](#) being possibility of substantial loss that may be suffered by the applicant and that the application is brought without unreasonable delay. The court may order such security of costs for the due performance of the decree or order.
7. In the instant application only 1st limb of order 46 of the [*Civil Procedure Rules*](#) was applicable being satisfaction there will be substantial loss if stay is not granted and that application is filed without unreasonable delay.
8. The respondent submit that the affidavit of Mr Mukabi advocate sworn on August 31, 2022 is fatally defective being on sworn on contentious matters by counsel and not by the client.
9. That under order 19 rule 3 of the [*Civil Procedure Rules*](#) affidavits are generally confined to facts the deponent can prove and as such the affidavit of Mr Mukabi advocate for the applicant should be struck out as held in [*Copana Limited v Panaafrica Insurance Co Ltd \(2015\) eKLR*](#) and [*East African Foundry Works \(K\) Ltd v Kenya Commercial Bank Ltd \(2022 \) eKLR*](#).
10. The court examined the said affidavit of James Mukabi advocate sworn on the August 31, 2018 and found that there was no contentious issues which were outside the knowledge of the deponent as the affidavit was on the instant court proceedings. Mr Mukabi had been handling the dispute so the issues he had deponed on were within his knowledge. The court finds the said affidavit valid.
11. On the merit of the grant of order of stay of proceedings, the respondent submits that the law on stay of proceedings is set out in *Mbogo & Another v Shah (1968) EA 93* and [*Pithon Maina v Mugiria*](#)



[\(1982 & 1988\) 1 KAR 177](#) and according to the said decision a court will not set aside judgment and/or proceedings where the applicant is a person who has deliberately sought to obstruct or delay the course of justice and court considered what happened before and after the judgement.

12. That this suit was consolidated with Bungoma ELRC Cause No 85 of 2021, Nahashon Odhiambo & Eunice Lenya v County Government of Vihiga Bungoma ELRC Cause No 89 of 2021, Kennedy Elly Osialo v County Government of Vihiga and Bungoma ELRC petition No E003 of 2022 and Linet Maximilah Inndiazi & 23 Others v County Government of Vihiga.
13. That the dismissal is in the nature of negative order and is incapable of execution. It is also noteworthy that this court dismissed the respondent's notice of preliminary objection in related suits. It is submitted that the dismissal was a negative order which cannot be stayed. [In Registered Trustees, Kenya Railways Staff & Others \(Civil appeal \(application \) E383 of 2021\) \(2022\) KECA 491 \(KLR \) \(18\) February 2022\(Ruling \)](#) the Court of appeal stated the law as follows:-

“We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, the position taken by this court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. Re reiterate the sentiments of the predecessor of this court in its decision in [Western College of Arts and applied Sciences v Oranga & Others 9 1976 -80\) 1 KLR](#) where the court stated in respect of stay of execution as follows:-

“ But what is there to be executed under the judgement, the subject of their intended appeal”. The High court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In [Wilson v Church](#), the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High court has not ordered any parties to do any thing, or to refrain from doing any thing, or to pay any sum. There is nothing arising out of the High court judgment for this court in and application for stay, it is so ordered.”

Decision.

14. The court in its ruling delivered on July 28, 2022 found the preliminary objection against the suit by the applicant was prematurely raised and dismissed it with costs in the cause.
15. The instant application seeks for stay of proceedings and execution of orders pending hearing and determination of intended appeal. The court having ordered costs in the cause there is nothing to execute against under the said order.
16. The instant suit is pending hearing. An application for stay of proceedings pending hearing and determination of appeal against an interlocutory ruling can be granted. The court is guided by decision in Mbogo v Shah (*supra*) that what happened before and after judgement be considered and in [Butt v Rent Restriction Tribunal \(1982\) KLR 417](#) where Court of Appeal held that the general principle in granting or refusing stay is if there is no 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. The decision was cited with approval by Justice Ongudi in [MFI Document Solutions Ltd v Paretto Printing Works Limited \(2021\)eKLR of Butt v Rent Restriction Tribunal \(1982\) KLR 417](#) where the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held that:-

- “ 1. the power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.



2. The general principle is 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. (sic)(trial court judgement).
 3. A judge should not refuse a stay if there is a good grounds for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
 4. The court in exercising its powers under order XLI rule 4 (2) (b) of the *Civil Procedure Rules* can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse”.
17. The court upholds with approval to apply in the instant application the decision in Butt v Rent Restriction Tribunal (1982) KLR 417 (*supra*).
 18. In the instant case, the court further considered the impugned ruling was on jurisdiction. In the event the Court of appeal overturns the decision then the entire proceedings of the court will be rendered nullity as without jurisdiction the court acts in vain. See Nyarangi J in *Owners of Motor Vessel “Lilian S’v Caltex Oil (Kenya) Ltd. (1989 KLR* . That would be a waste of scarce judicial time and resources. The suit as indicated by the respondent is consolidated with Bungoma LERC 85 of 2021, 89 of 2021 and E003 of 2022 hence the impact of the intended appeal affects many parties.
 19. The court finds whereas it dismissed the application for being brought prematurely, the court in Kisumu ELRC cause No 113 of 2019 (now Bungoma ELRC cause No 32 of 2021 following a similar Preliminary objection) found it had jurisdiction constitutional violation have been invoked.
 20. In the instant case the preliminary objection was held premature. In my final decision in disposition of this case I find the case cited in Mbogo v Shah not relevant as there is no judgment in the instant suit. The case is yet to be heard on merit. I find decision of Court of Appeal in Butt Case (*supra*) applicable where the Court of Appeal guided on general position being to stay proceedings not to render intended appeal nugatory and further guided by the Supreme Court advice for pusne judges to respect hierarchy of courts by staying cases when appeal is pending before higher courts in Supreme Court Petition No 4 of 2019 *Law Society of Kenya v Attorney General & another (2019)e KLR*.
 21. For the foregoing reasons I exercise my judicial discretion and allow the application dated August 31, 2022 in the following terms:-
 - a. That there be stay of proceedings in this suit Bungoma ELRC Cause No 76 of 2021 pending final hearing and determination of intended appeal.
 - b. That typed proceedings in the suit be prepared and certified in 21 days.
 - c. Costs of this application to the respondent.
 - d. Ruling to apply and abide in:-

BULLETS

* BUNGOMA ELR CAUSE No 85 OF 2021

NAHASHON ODHIAMBO & EUNICE LENYA -VS COUNTY GOVERNMENT OF VIHIGA



* BUNGOMA ELR CAUSE No 89 OF 2021

KENNEDY ELLY OSIOLO -VS COUNTY GOVERNMENT OF VIHIGA

* BUNGOMA PETITION No E003 OF 2022

LINET MAXIMILAH NDIAZI

JOYCE ADHIAMBO & 22 OTHERS

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF DECEMBER, 2022.

JW KELI,

JUDGE

In the presence of:-

Court Assistant: Brenda Wesonga

Claimant / respondent : Mr Munyori

respondent/applicant : Absent

