



REPUBLIC OF KENYA



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**West Kenya Sugar Company Limited v Lihungu (Miscellaneous Application
E016 of 2022) [2022] KEELRC 13370 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13370 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E016 OF 2022**

**JW KELI, J
DECEMBER 2, 2022**

BETWEEN
WEST KENYA SUGAR COMPANY LIMITED APPLICANT
AND
LEONARD NGAIRA LIHUNGU RESPONDENT

RULING

1. The applicant, upon delivery of judgment against it in Kakamega CMELRC claim No EO 35 of 2021 Leornard Ngaira Lihungu v West Kenya Sugar Company Limited on June 23, 2022, approached the court by way of notice of motion under article 48 and 50(1) of the Constitution of Kenya, 2010, sections 1A,1B and 95 of the Civil Procedure Act, order 51 rule 1 of the Civil Procedure Rules under certificate of urgency dated October 7, 2022 seeking the following orders:-
 - a. That the application herein be certified urgent, service thereof be dispensed with and the same be heard *ex parte* in the first instance.
 - b. That the honourable court be pleased to extend the time within which the applicant is to file and serve a notice of appeal and record of appeal against the judgment and decree of the honourable J.R Ndururi (PM) dated and delivered on June 23, 2022 in Kakamega ELRC cause No EO35 of 2021 – Leonard Ngaira Lihungu v West Kenya Sugar Company Limited between the applicant and the respondent herein.
 - c. That this honourable court be pleased to order that the notice of appeal dated August 3, 2022 and filed in court on August 4, 2022 be deemed as duly filed.
 - d. That this honourable court be pleased to stay execution of the whole judgement and decree of the Kakamega ELRC cause No EO35 of 2021 - Leonard Ngaira Lihungu v West Kenya Sugar Company Limited pending the hearing and determination of this application.



- e. That this honourable court be pleased to stay of execution of the whole judgment and decree of the Kakamega ELRC cause No E035 of 2021 – Leonard Ngaira Lihungu v West Kenya Sugar Company Limited pending the hearing and determination of the intended appeal.
 - f. That pending the hearing and determination of this application, this honourable court be pleased to order the respondent and in particular the respondents auctioneer Jakacha Auctioneers to immediately and unconditionally release motor vehicle registration No KCP 740Z – Hino together with other accessories as listed on the schedule of movable property removed dated October 7, 2022 , the applicant, ex-parte.
 - g. That the honourable court be pleased to order OCS Kisumu Police Station or Kakamega Police Station, or as the case may be, to provide escort, security and/or any necessary assistance to the applicants their agents and or servants assist in the release of the application’s motor vehicle registration number KCP 740Z – Hino.
 - h. That the honourable court be pleased to grant such further or other orders as it may deem just and expedient in the circumstances of this case.
 - i. That the costs of this do abide the outcome of the intended appeal.
2. The application is based grounds that the applicant is aggrieved by the judgment of the trial court in favour of the claimant dated June 23, 2022. That upon delivery of the judgment the court granted stay of execution for 30 days pending leave to appeal. The applicant filed notice of appeal on the August 4, 2022. The respondent served proclamation notice dated August 10, 2022. The court issued stay which had since expired on the October 6, 2022. The respondent through its auctioneers, Jakacha Auctioneers moved to attach 1 motor vehicle and removed the same on the October 7, 2022. The respondent states that the attached motor vehicle is a tool of trade. (This issue is overtaken by events *vide* orders of the court dated October 11, 2022). The applicant stated that it had deposited the decretal sum at the trial court to fulfill conditions of the stay of execution (annexture SJ-8). That the applicant is willing to abide by any other conditions of the court. The applicant states it has an arguable appeal which stand to be rendered nugatory if the leave is not granted to file appeal out of time. The application is further supported by the affidavit of Sahil Javer Advocate sworn on the October 7, 2022 producing copy of the judgment of the trial court, copy of receipt requesting for typed proceedings, the notice of appeal , draft memorandum of appeal , copy of proclamation notice, copy of court orders, schedule of movable property removed on October 7, 2022 and copy of receipt of deposited decretal sum at the trial court.
3. The application is opposed by the respondent vide replying affidavit of Leonard Ngaira Lihungu(claimant at trial court) sworn on the October 14, 2022. The respondent avers that they obtained a certified copy of the judgment on the June 29, 2022 and sent a copy to the applicant’s law firm by email. That the respondent purposely failed or diligently to apply for certified copy of the judgment within time and only rushed to court on the August 10, 2022 on service of proclamation notice on their client. That the trial court issued stay order of 30 days and no appeal notice was filed within the period. That the application for certified copy of the judgment and typed proceedings was made after expiry of 30 days and upon service of proclamation notice. That the trial court on the October 6, 2022 declined extension of the stay order as there was no proof of appeal having been filed. That the notice of appeal was filed later on the October 11, 2022 hence an afterthought to deny him fruit of his judgment. That the respondent is denying him justice by failing to comply with court timelines. That the delay led to the auctioneers incurring a lot of costs in the execution. That in the circumstances the application is abuse of court process and should be dismissed with costs.



4. The court directed the application be canvassed by way of written submissions. The parties complied.

Determination

Issues for determination

5. The applicant addressed the issue of extension of time to appeal out of time, reasons for the delay, stay of execution, and chances of their appeal succeeding.
6. The respondent addressed the issue of stay order and inordinate delay by the applicant, question of substantial loss, chances of the appeal succeeding and security.
7. The court considers that the issues raised are similar and frames the same as follows for the purposes of the ruling:-
- a. Whether the orders sought for stay of execution pending appeal are merited.
 - b. Whether the leave sought to appeal out of time is merited.
 - c. Whether the orders sought for stay of execution pending appeal are merited.
8. Order 42 (6) (2) of the *Civil Procedure Rules* sets two key conditions for grant of stay pending appeal outcome:-

‘That substantial loss may result to the applicant unless the order is made and application is made without unnecessary delay.

Such security as the court order for the due performance of such decree as order as may ultimately be binding on her has been given by the applicant.’

Will the applicant will suffer substantial loss if stay is not granted?

9. The applicant submits that the intended appeal is on liability and quantum and therefore the applicant will not suffer substantial loss if stay is granted. That the applicant through his auctioneer is likely to attach property of the applicant all valued over the decretal amount. The applicant to buttress its submissions relies on the decision in *Scania East Africa Ltd & 2 others v Patrick Mutisya Kioko* where the court stated:- ‘will the applicants suffer substantial loss if the stay orders sought are not granted? This is a money decree for an amount determined by the trial court of and the intended appeal is on liability and quantum. The applicants may stand to suffer substantial loss if the stay is not granted.’
10. The respondent submits that the applicant has not demonstrated how the respondent, a multi-billionaire in the sugar industry will suffer substantial loss if the stay orders are not granted. The respondent to buttress the foregoing submissions relies on the decision of Justice Odunga in *Justus Kyalo v John Kivungo* (2019)eKLR paragraphs 15-17 to wit: ‘15. The same position was adopted by Kimaru, J in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position



of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

11. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...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 yardstick 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 impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...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 merely 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...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

12. On the first principle, Platt, Ag.JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:-

“It is usually a good rule to see if order XLI 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 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”.



13. The respondent submits that the applicant has not produced documentary evidence that they will suffer any substantial loss if the stay order is not granted.
14. The court is in agreement with the decisions of Justice Odunga(supra) and Justice Kimaru(supra) and finds that the court must balance the interest of the parties by taking into consideration the question of possible substantial loss to the applicant and the right to enjoy fruits of judgment of the respondent/claimant. The court adds that it also has to consider the possibility of the appeal being rendered nugatory if the applicant is successful on appeal. The court is of the opinion that the appeal will be rendered nugatory if the stay is not granted. The appeal being on liability and quantum that is a demonstration of possible loss of money were the appeal to succeed as held in *Scania East Africa Ltd & 2 others v Patrick Mutisya Kioko*

Whether there was inordinate delay in making the application

15. The respondent submits that there has been delay in compliance with the court orders. That the trial court issued stay of 30 days and no appeal was lodged within that time. That there was no compliance with decretal amount deposit within the court timeline hence the applicant is abusing the process of court to deny justice to the applicant. The applicant states that the delay was caused by the delay in the management to make a decision whether to appeal.
16. The court finds that indeed there was non-compliance with the trial court orders on time lines for filing of appeal and deposit. The judgment was delivered in the June 23, 2022. This application was filed on October 11, 2022. The court is satisfied that the delay is not inordinate and is explained.
17. On the 2nd limb of order 42 rule 6 of the *Civil Procedure Rules* requiring security of performance as a condition for grant of stay. The applicant has already deposited the decretal amount in the trial court (SJ-8).
18. The Court of Appeal has settled the principles for stay of execution in the case cited 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”.



19. The decree/judgement sought to be challenged in the instant application is a monetary decree. Costs and interest can adequately cover any prejudice the respondent may suffer if the application is granted. The applicant stated it would meet any conditions as to security if the application for stay is granted.
20. The court applying the binding Court of Appeal decision in *Butt case* (supra) finds merit to grant the order sought for stay of execution. The court finds that the right of the judgment creditor to fruit of judgment and balance with the appeal not to be rendered nugatory if appeal successful are protected as the deposit of the decretal amount has been done at the trial court(SJ-8)

Whether the leave to appeal out of time should be granted to the applicant

21. The applicant submits that it has an arguable appeal with high chance of success related to principle of freedom of contract as pertains collective bargaining agreements. The applicant submits that the court be guided by the Court of Appeal decision in *Mwangi v Kenya Airways* (2003) eKLR where the court listed four issues to consider on extension of time to appeal namely:-
 - i. the length of delay
 - ii. the reasons of the delay
 - iii. the chance of the appeal succeeding if the application is granted
 - iv. the degree of prejudice to the respondent is the application is granted.
22. The respondent submits that the issues raised for appeal were addressed by the trial court and his award was per the CBA.
23. Further the applicant states that the delay to file appeal was caused by its management on decision making as to whether to appeal or not and prays for its notice of appeal lodged without leave to be deemed as filed.
24. The Court of Appeal in CA 71/2016 between *Charles Karanja Kuru v Charles Githinji Muigwa* (supra), was faced with a similar situation. The Court of Appeal went on to state;

“This is the position this court has taken when dealing with applications for extension of time. We have always, and we believe lawfully so, deemed as fully filed applications without leave where leave is sought and subsequently granted. Learned counsel for the appellant submitted that this position as found to be untenable by the Supreme Court which pronounced itself as follows in the *Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014]eKLR (Salat case):

“.....counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the court is that he is acknowledging having file a ‘document’ he calls ‘an appeal’ out of time without leave of the court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires.



By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such ‘an appeal’, is tantamount to moving the court to remedy an illegality. This, court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. no appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court.” (emphasis added).

25. Guided by the Supreme Court decision in Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014]eKLR (Salat case), the court then finds that the application before the court for extension of time within which to lodge appeal is proper. The court finds that the notice of appeal lodged without leave is not properly on record applying the *Salat Case*. Section 79G of the Civil Procedure Act reads:- “ every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having. been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
26. The court considered the steps taken by the applicant to mitigate its delay to file appeal on time being the deposit of decretal amount at the trial court. Considering the steps taken by the applicant and the reasons for the delay which is not inordinate the court, applying the threshold by Court of Appeal in Mwangi v Kenya Airways (2003) eKLR finds in favour of extending the time to file appeal out of time. The notice of appeal is not deemed as filed and ought to be filed afresh.

Conclusion And Disposition

27. Guided by decision of the Court of Appeal in *Butt v Rent Restriction Tribunal* (1982) KLR 417(supra)I find merit in the notice of motion application dated October 7, 2022 and issue the following orders:-
 - 1) The applicant is granted extension of time and leave to file notice of appeal and the record of appeal within 45 days of this order.
 - 2) There shall be a stay of execution of the judgment and/or decree in Kakamega CMELRC cause No E035 of 2021 Leonard Ngaira Lihungu v West Kenya Sugar Company Limited pending the filing, hearing and determination of the intended appeal.
 - 3) Failure to file the notice of appeal, memorandum of appeal and the record of appeal within 45 days of this order will lead to automatic lapse of order No 1 mention on January 18, 2023 to confirm compliance.
 - 4) The applicant to pay the auctioneers’ costs for the aborted execution.
 - 5) Costs of this application to the respondent.
28. It is so ordered.

WRITTEN, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 2ND DECEMBER, 2022.

J. W. KELI,



JUDGE.

In the presence of:-

Court Assistant – Brenda Wesonga

Applicant:-Javer

Respondent:- Leornard Lihungu

