



**Simiyu v Nzoia Sugar Company Ltd (Cause E005 of 2021)
[2022] KEELRC 13382 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13382 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE E005 OF 2021
JW KELI, J
DECEMBER 1, 2022**

BETWEEN

STEPHEN BUKHEBI SIMIYU CLAIMANT

AND

NZOIA SUGAR COMPANY LTD RESPONDENT

RULING

1. The court on the 12th May, 2022 delivered its judgement in the suit in favour of the claimant.
2. The claimant retired voluntarily from the services of the respondent.
3. The award was for deducted and unremitted monies for loans with the National Bank of Kenya Kes 1,412,614/- and Kes 4,350,000 due to Family Bank and unpaid gratuity and final dues payment of Kes 56,836/-.
4. The court found that outstanding loans accruing interest and penalties.
5. During the pendency the hearing the court on the January 26, 2022 ordered the respondent to pay the claimant the admitted amount of Kshs 2,320,832/-. The claimant submits only Kes326,836 was paid leaving a balance of Kes 1,994,040/- unpaid to date.
6. The respondent by notice of motion dated September 27, 2022 brought application under order 9 rule 9, order 51 rule 1 and order 42 rule 6 of the *Civil Procedure Rules* and section 3, 3A and 95 of the *Civil Procedure Act*, articles 159 and 149 of the *Constitution* and all other enabling provisions of the court seeking orders of stay of the judgment delivered on May 12, 2022 and for leave of the firm of Samba, Odeck and Mulama Company Advocates to come on record on behalf of the firm of Messers Risper Arunga & Company Advocates.
7. The court directed that the application be canvassed by way of written submissions and parties complied.



8. The respondent filed replying affidavit on October 11, 2022 sworn on the October 7, 2022 in opposition to the application.
9. The applicant submits that the application for stay of execution ought not to be granted unless conditions of order 42 rule 6 of the court procedure rules are satisfied and relies on decision in *Kiplagat Kotut v Rose Jebor Kingok* (2015) eKLR *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others* (2012) eKLR and *Kenya shell Limited v Benjamin Karuga Kibiru* (1986) KLR 410. The common thread in the foregoing cases is that a stay of execution will not be granted unless the conditions in order 42 rule 6 of the *Civil Procedure Rules* are satisfied and this is one of the provisions of law that their application was anchored on.
10. The applicant submits that purpose of stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.
11. In the instant case notice of appeal was filed on September 28, 2022 out of time and without leave of the court. There is no prayer for extension of time to file the appeal . There is no valid notice of appeal on record as held by Supreme Court in *Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 Others* (2014) eKLR.
12. The court ought to weigh the right of appeal against the right of the successful litigant right to enjoy fruits of their judgement. In the instant case the claimant was a retired employee and the applicant failed to remit deducted loans amounts from his salary to the banks. The court must ensure no prejudice is suffered by the decree holder.
13. The applicant does not address the question of prejudice to the respondent in view of the outstanding loans and unremitted deducted monies from his salary when he was in their employment.
14. To grant or refuse an application for stay of execution pending appeal is discretionary. The court must balance interest of the appellant and those of the respondent.
15. The court agrees with the respondent that the applicant has come to court with dirty hands . On their admission of part of the claim for amount of Kes 2,320,836 the court ordered immediate release of the admitted amounts to the claimant/respondent
16. The claimant submits that only Kes 326,836/- was remitted leaving a balance of Kes 1994,040/-. The applicant now expects the court to believe it is ready and willing to deposit security yet did not comply with the said court order.
17. He who approaches the court of justice and mercy must come with clean hands.
18. The order of stay pending appeal for judgement of court being discretionary, the court declines to exercise the same in favour of the applicant as it will cause great prejudice to the respondent and further the applicant failed to comply with court order to pay the admitted part of the claim.
19. In the final orders, the court grants leave to the firm of Samba Odeck & Mulama Advocates to come on record after delivery of Judgment.
20. The application for stay is declined.
21. Costs to the respondent .
22. It is so ordered.



DATED , SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 1ST DAY OF
DECEMBER, 2022

J. W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Brenda Wesonga

Claimant: Onyando Advocates

Respondent: Mulama Advocate.

