



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 423 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**PATRICK KIBUI NYINGI.....CLAIMANT/RESPONDENT**

**VERSUS**

**NAIROBI CITY WATER AND**

**SEWERAGE COMPANY.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**NAIROBI CITY COUNTY.....2<sup>ND</sup> RESPONDENT**

**RULING**

Before me for determination is the 1<sup>st</sup> Respondent's Notice of Motion dated 17<sup>th</sup> September, 2020 seeking orders THAT:

1. Spent
2. Pending hearing and determination of this Application, this court do issue an order for stay of execution of the Judgement and Order made on 17<sup>th</sup> July 2020 and any consequential orders emanating from the same
3. This court be pleased to extend the time for filing and serving a notice of Appeal against the Judgement delivered on 17<sup>th</sup> July 2020.
4. Upon grant of prayer 3 above the 1<sup>st</sup> Respondent's Notice of Appeal dated 17<sup>th</sup> September be deemed as duly filed.
5. This court be pleased to stay execution of the Judgement and order of 17<sup>th</sup> July 2020 and any consequential orders emanating from the same, pending hearing and determination of the 1<sup>st</sup> Respondent's intended appeal.
6. Costs of this Application be provided for.

The Application is based on the following grounds:

- a. The judgement in the matter was delivered on 17<sup>th</sup> July 2020 without 1<sup>st</sup> Respondent's knowledge
- b. The 1<sup>st</sup> Respondent learned of the judgement recently on 11<sup>th</sup> September 2020 after its advocates on record found out about the same as reported in the electronic law reports website
- c. Being dissatisfied with part of the judgement, the 1<sup>st</sup> respondent wishes to file an appeal and seeks to have the time for a notice of appeal extended.
- d. A notice of appeal dated 17<sup>th</sup> September 2020 was filed by the 1<sup>st</sup> Respondent which it prays be deemed as duly filed.
- e. This court has jurisdiction to enlarge time under the provisions of Section 95 of the Civil Procedure Act, Order 50 Rule 4 of the Civil Procedure Rules, 2010 and Section 7 of the Appellate Jurisdiction Act.

*f. The Application has been brought without delay, from the time the 1<sup>st</sup> Respondent learned about the judgement.*

The Application is supported by the affidavit of Patrick Maina, the Legal Officer of the 1<sup>st</sup> Respondent, sworn on 17<sup>th</sup> September, 2020 in which he reiterated the grounds set out on the face of the Application.

In response to the Application, the claimant filed a replying affidavit sworn on 12<sup>th</sup> October, 2020. He avers that the respondent's lack of vigilance should not be accepted as it seeks to blame the court for failing to file a notice of appeal in time. He avers that the court should take judicial notice of the fact that the onset of Covid-19 in March 2020 saw the judiciary update its operations online including the delivery of judgments hence advising parties to use the same.

He avers that this court lacks jurisdiction to grant the orders sought. That this Court lacks jurisdiction to extend time to file an appeal out of time as the intended appeal is to the Court of Appeal under Rule 4 of the Court of Appeal rules. He further argues that despite having a right to appeal, the 1<sup>st</sup> Respondent has failed to show any such intention by filing a notice of appeal to the court of appeal. That the 1<sup>st</sup> Respondent has not complied with the requirement of Rule 42(6) of the Civil Procedure Rules for failure to file the Application within a reasonable time and not making provisions for security and that there is no indication that it is likely to suffer any loss in case the application is not granted.

He avers the Application is premature as no execution process has commenced and that as a successful litigant, he has the right to enjoy the fruits of his judgement. He further avers that Section 7 of the Appellate Jurisdiction Act is irrelevant to the Application. He therefore urges the court to dismiss the same with costs.

The matter was disposed of by way of written submissions.

### **1<sup>st</sup> Respondent's submissions**

The Respondent relied on Sections 95 of the Civil Procedure Act and Section 7 of the Appellate Jurisdiction Act, and submitted that this court has jurisdiction to exercise its discretion in granting the prayer for extension/enlargement of time as sought in the application.

The Applicant submitted that the conditions for grant of stay pending appeal are provided for under Order 42 Rule 6 of the Civil Procedure Rules. It submitted that met the conditions by demonstrating that it stands to suffer substantial loss if denied the right to appeal in order to challenge aspects of the judgement it is dissatisfied with. In response to the Claimant's argument that the Application was premature as no execution process had commenced, the respondent submitted that the claimant had filed his Bill of Costs and served them upon Respondent's advocates. This confirmed his intention to commence execution proceedings and that if orders sought are not allowed, the Respondent stands to suffer substantial loss.

It submitted that it had provided a reasonable and satisfactory reason for not having filed the Notice of Appeal and that the Application was filed without undue delay shortly after finding out about the judgment on 11<sup>th</sup> September, 2020. In addition, it was willing and ready to comply with any orders of the court with regard to deposit of security.

For emphasis, it relied on **Big Road Enterprises v DHL Global Forwarding (K) Limited (2017) eKLR** where the court cited the provisions of Order 50 Rule 6 of the Civil Procedure Rules, Section 95 of the Civil Procedure Act and section 7 of the Appellate Jurisdiction Act in allowing the Application for extension of time and also proceeded to grant orders of stay based on the condition that the security it set out be paid by the Applicant.

In conclusion, it urged the court to grant the orders as sought in the Application.

### **Claimant's Submissions**

The claimant submitted that it is not opposed to prayer 3 of the application and urged that leave be granted to the Respondent for filing of a Notice of Appeal out of time.

He maintained that the Respondent has not fulfilled the conditions for stay of execution of decree or order pending appeal as set out under Order 42, Rule 6(2) of the Civil Procedure Rules. He submitted that these conditions are a fetter to the discretion of the court and as such are mandatory considerations for the issuance of such an order. He placed reliance on **Masisi Mwita v Damaris Wanjiku Njeri [2016] eKLR** which upheld the above argument.

On substantial loss, the Claimant submitted the Respondent had not demonstrated the loss it would incur and maintained its position that the mere fact that the process of execution had been put in motion does not in itself amount to substantial loss. He relied on the **Masisi Mwita case (supra)**, where the court cited the case of **James Wangalwa & Another v Agnes Naliaka Cheseto** that execution is a lawful process and therefore, the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the core of the applicant as the successful party in the appeal.

He submitted that he is entitled to realize the fruits of his judgement as ordered by the court in the judgment as the 1<sup>st</sup> Respondent pursues its right of Appeal. That he deserves protection just like the intended appellant. He relied on the **Masisi Mwita case (supra)** which held that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage.

He submitted that the Respondent has not offered to provide security as the court orders for the due performance of such decree as may be ultimately be binding. He relied on **Civil Appeal No. 137 of 2018 Simba Coach Limited v Kiriiyu Merchants Auctioneers** where the court held that in determining the security that should be deposited, courts are guided to make an order that will protect both parties in a suit.

It further relied on **GianFranco Manenthi and Antoneitta Farinato v Africa Merchant Assurance Company Ltd** which upheld this position.

In conclusion, he urged the court to dismiss the Application as it lacks merit. In the alternative, that the Respondent be ordered to pay the Claimant half the decretal sum and deposit the other half in a joint interest earning account in the names the advocates on record as a condition of stay of execution.

### **Analysis and Determination**

I have carefully considered the application, the responses and the evidence presented before me. The issues for determination are:

1. Whether the court should grant stay of execution of the Judgment pending hearing and determination of the intended appeal.
2. Whether the court should extend the time within which to lodge a Notice of Appeal against the magistrate Court's Judgment delivered on 17<sup>th</sup> July 2020.

### **Whether the court should extend the time**

The Supreme Court in **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR** states:

*“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:*

*“the under-lying principles that a Court should consider in exercise of such discretion:*

1. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

I have noted that the Claimant has submitted that he is not opposed to prayer 3 of the application and urged that leave be granted to the Respondent for filing of a Notice of Appeal out of time. Prayer 3 of the application states:

*“That this court be pleased to extend the time for filing and serving a notice of appeal against the Judgement delivered on 17<sup>th</sup> July 2020.”*

**Given that this prayer is unopposed, I hereby extend time for lodging appeal by 30 days, failing which the orders granted herein shall lapse.**

**Whether the court should grant stay of execution of the Judgment pending hearing and determination of the intended appeal.**

**Order 42, Rule 6 of the Civil Procedure Rule states:**

1. **No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 sub rule (1) unless—**

**(b) 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

(c) 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.

**3. Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.**

In **Butt v Rent Restriction Tribunal [1979] eKLR**, the Court of

Appeal held that the power of the court to grant stay of execution is discretionary and the discretion should be exercised in such a way as not to prevent an appeal; that the general principle is that if there is no overwhelming hindrance, a stay must be granted so that an appeal is not rendered nugatory should the court reverse the judge's decision; and that in exercising the discretion whether to grant or refuse an application for stay, the court will consider the special circumstances of a case and its unique requirements.

In the case before me, the Applicant indicates that the reason for delay is that it was unaware that judgement had been delivered. The court had indicated that date of delivery would be 31<sup>st</sup> July 2020 but actual judgement was delivered earlier on 17<sup>th</sup> July 2020. The email exchanged between the client and advocate explained that the courts were closed on 31<sup>st</sup> July 2020 and the court assistant advised them to follow up with the same on 12<sup>th</sup> August 2020; a date where court was still on vacation.

In **Hajar Services Limited v Peter Nyangi Mwita (2020) eKLR**, the court held that in the instance "*where a judgment is delivered in the absence of a party without notification and the party becomes aware of the same after the lapse of time prescribed for taking action, that constitutes sufficient ground for extension or enlargement of time to take necessary steps*". It urged the court to extend the time as it has demonstrated that the delay to file the appeal and the application hereof was not deliberate as it was unaware of the existence of the judgement.

**I find that the Applicant has met the threshold for grant of an order for stay of execution pending appeal. I therefore grant stay of execution pending appeal. This shall however be conditional upon the applicant depositing the entire decretal sum in an interest earning account held by counsel for both parties within 30 days, failure to which the Respondent shall be at liberty to execute.**

**Costs of the application herein shall be paid to the Claimant by the 1<sup>st</sup> Respondent/Applicant in any event.**

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF FEBRUARY 2021**

**MAUREEN ONYANGO**

**JUDGE**

### **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

**MAUREEN ONYANGO**

**JUDGE**