



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISC. APPLICATION NO. 71 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

P. J DAVE FLOWERS LIMITED.....APPLICANT

VERSUS

LINET NAMUNDA SOITA.....RESPONDENT

RULING

Before me for determination is a Notice of Motion Application dated 27th July 2020 seeking the following orders THAT:

1. Spent

2. This Honourable Court be pleased to restrain the Respondent, her servants, employees or agents from executing against the Appellant/Applicant in satisfaction of the judgement entered in **Kajiado Chief Magistrate Employment Cause No. 4 of 2018 – Linet Namulunda Soita v.s P.J. Dave Flowers Limited** pending the hearing and determination of this application

3. This Honourable Court be pleased to restrain the Respondent, her servants, employees or agents from executing against the Appellant/Applicant in satisfaction of the judgement entered in **Kajiado Chief Magistrate Employment Cause No. 4 of 2018 – Linet Namulunda Soita v P. J. Dave Flowers Limited** pending the hearing and determination of the intended appeal.

4. Spent

5. This Honourable Court be pleased to issue interim orders staying the execution of the judgement entered in **Kajiado Chief Magistrate Employment Cause No. 4 of 2018 - Linet Namulunda Soita vs P.J. Dave Flowers Limited** pending the hearing and determination of this appeal.

6. This Honourable Court be pleased to enlarge and/or extend time for filing and/or lodging appeal to enable the Appellant/Applicant to lodge and/or file before the Honourable Court.

7. Costs of this application be provided for.

Which Application is based on the grounds as set up on the face of the Notice of Motion Application and in the supporting affidavit of Judy Sambay, the Human Resource Manager of the Applicant, sworn on the same date.

The Applicant avers that the Respondent filed a cause against it on 9th October 2018 claiming unlawful and unfair dismissal from employment. She sought payment in lieu of notice, overtime worked, payment in lieu of rest days, compensation, costs and interest. The matter proceeded for hearing upon which judgement was reserved for 24th October 2019. However, the Applicant avers that its advocates received a notice dated 13th September 2019 through the Respondent's advocates notifying it that judgement in the matter would be delivered on 24th October 2019.

That upon attending court on the allocated date, the Court informed both parties that the judgement was not ready and that they would be notified on when it would be delivered. The Applicant avers that it learnt that judgment was delivered in the matter on 06th February 2020 on/or about 13th July 2020 through a letter of even date sent by the Respondent to its representative through electronic mail. The applicant sought for a copy of the judgment from the court registry and managed to get it on 20th July 2020.

The Applicant avers that it is aggrieved by the entire judgement of the Learned Magistrate and intends to appeal to this court against the entire judgement. It acknowledges that the intended appeal is out of time and seeks the court's discretion to grant leave and/or enlarges time for it to file the appeal. It contends that it is apprehensive that the Respondent will proceed to execute the judgement to its detriment notwithstanding that it has an arguable appeal with high chances of success.

The Applicant avers that it is willing and ready to deposit the entire decretal sum in a joint interest earning account held between its representatives and the Respondents Advocates or to deposit the entire judgement sum in court as this Court may direct. It contends that it stands to suffer irreparable harm if the orders sought herein are not granted as it will be denied the opportunity to be heard on its appeal notwithstanding the fact that it was unaware of the date of judgement and would have appealed in time had it been notified early.

It adds that the Respondent will not suffer any harm and in the instance she does, she can be compensated by the award of damages. It concludes it is only fair and just that the orders sought are granted.

The Respondent filed her response vide a Replying Affidavit dated 18th September 2020 in which she argues that the Application is unmeritorious, misleading and a waste of the Court's time as it seeks to deny her the fruits of justice. She adds that the application for stay of execution should have been made in the trial court as per Order 42, Rule 6 of the Civil Procedure Rules, as such, the Applicant here is forum shopping.

She avers that the judgement was delivered on 6th February 2020 and parties were notified of the same through the Kenya Law portal and it was incumbent upon the Applicants to exercise due diligence. That the Application does not try to give a reason for the delay but is re-litigating the suit even before leave to file an appeal has been granted.

She states that the claim of a looming execution as alleged is untrue as her advocate has neither extracted a decree nor instructed an auctioneer as such the tone of urgency is meant to hoodwink this court. That the Applicant has not demonstrated any evidence of the alleged "substantial loss and paralysis of business operations" as no financial statement or records have been provided and therefore this court should guard itself against the danger of being led away by sympathy as intended by the Applicant.

The affiant argues that from her reading of the memorandum of appeal, it raises no arguable issues and that is a clear misapprehension of the law given that it seeks to challenge issues that were not addressed or challenged in the trial stage.

She prays for the court to strike out the Application with costs to her as she claims that she is suffering hardship as a result of the unfair dismissal and in addition the withholding of the fruits of her judgement from the Applicant who she claims is a "very stable and wealthy flower and spices exporting farm". She concludes that should the court grant the stay of execution and leave to file the appeal out of time, it should pay her half of the decretal sum of **Kshs.627,937/=**. The remaining half be deposited in a joint interest earning account of both advocates on record within 14 days of the order and in default, the orders should be vacated.

The Applicant/Appellant filed another Notice of Motion Application dated 14th November, 2020 in which it prays for the following orders:

1. THAT through an application dated 27/07/2020 filed before this honourable Court, the Appellant/Applicant sought orders to extend the appeal period and allow it file an Appeal out of time and in the meantime sought a stay of execution of the judgement dated 6th February 2020 pending the determination of the application thereof.

2. THAT on 28/07/2020 a ruling was entered by this Honourable Court on the application inter alia granting Orders that;

i. The application is certified urgent and fixed for hearing on the date to be set by the registry.

ii. That the applicant to serve the respondent.

iii. That temporary stay of execution is hereby granted pending inter partes hearing of the application.

3. THAT the appellant /applicant served the Court Orders on the respondent with whom it subsequently agreed to dispose the application by way of written submission.

4. THAT on 12/10/2020 the matter was mentioned to confirm compliance on the filing of the submission upon which the respondent sought an extension of time to enable it file its submissions. The applicant never objected and the respondent was allowed a further period of 14 days to file its submissions. That during the mention, the Appellant/Applicant did not apply for extension of the interim Orders as it verily believed that the same were valid until the determination of the application which is still pending.

5. THAT without, prejudice to the above, the appellant /Applicant

apologises and invokes the wisdom of the court to extend the Interim Orders until the current application is dispensed with.

6. THAT pending the determination of the application and in blatant disobedience of the Court Orders, the Appellant/Applicant was notified of proclamation notices dumped at its gate from Nairobi Connection auctioneers seeking to attach and sell the assets of the Appellant/ Applicant.

7. THAT on 13/11/2020 the appellant/Applicant sent a letter (attached) vide the email for the Advocates of the applicants bringing to its attention the proclamation notice and forwarding a copy of the Orders of this Court dated 19/08/2020 A copy of the letter was

sent to the auctioneers hoping that the same would stop the violation of the Court Orders though execution process that had since been halted.

8. THAT unfortunately the letter has not elicited any response and/or assurance that the threatened attachment will be halted in line with the Court Order.

9. THAT on 14/11/20, I placed a call to the Advocate on record for the respondent seeking an undertaking that he would as an officer of the Court advise the auctioneers to stop the intended attachment. However, the Advocate on record was non-committal prompting the appellant/applicant to seek the protection of the Court through this urgent application.

10. THAT the proclamation Notice is not only in violation of the court order but also in bad faith as it seeks to attach almost the entire fleet of the Appellant over a judgement that can easily be realised without paralysing the operations of the Appellant/Applicant that is in the delicate business of growing and export of flowers.

11. THAT the respondent and its Advocates on record are aware that their action may amount to Contempt of Court and should be held to account by showing cause why proceedings for Contempt of court should not be instituted against them.

12. THAT unless this court urgently intervenes and stops the execution of the judgement appealed against the current application and its intended and possible outcome will be rendered nugatory with detriment to the applicant.

13. THAT the Appellant/Applicant stands to suffer irreparable harm if the instant file is not urgently placed before the Judge for directions and further restraint on the respondent and the Auctioneers against proceeding with the execution process.

14. THAT on the contrary the Respondent will not suffer any harm and if any is suffered, it may be compensated by the award of damages.

15. THAT in the circumstances it is only fair that the file be urgently placed before the Judge for direction and or further Orders.

The Application is further supported by the Affidavit of **PETER KINYANJUI**- Legal Officer of the Applicant/Appellant in which he reiterates the averments on the face of the motion.

Applicant/Appellant Submissions

The Applicant set out the following issues:

1. Whether the order for stay of execution pending appeal is merited.
2. Whether the order for enlargement of time to appeal is merited.

The applicant submitted that the Application for stay of execution is based on Order 46 Rule 6(2) of the Civil Procedure Rules must demonstrate that:

i. Substantial loss may result to the applicant unless the order is made

ii. The application is made without unreasonable delay.

iii. Such security as the court orders for the due performance of such decree or order may ultimately be binding on him has been given by the applicant.

The applicant submitted that it will suffer substantial loss if the orders for stay are not granted as the Respondent's physical address is not known in the instance the Court allows the Application for stay and subsequently the appeal. It further claims that the Respondent has not demonstrated that she is engaged in any gainful employment or has a steady source of income so that she can reconstitute the amounts if the appeal succeeds. This was the position that was held in **National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another (2006)**.

On this premise, the Applicant argued that as a registered company with a known physical address and with known assets, it can always have the Respondent execute the decree against it. That it is willing to deposit the decretal sums in a joint interest earning account or in court to counter the Respondent's claim for deposit of half of the decretal sums and therefore there is no basis to release the same.

It relies on the decision, in **Selestica Limited v Gold Rock Development Limited (2015) eKLR**, where the court held that the grant or refusal of an application for stay pending appeal is discretionary and court has to balance the interests of both parties.

It submitted that the Respondent's argument that the notice of the judgment was issued by the court vide Kenya Law was unsubstantiated as she did not provide evidence to prove the same. It argued that the mere posting on the website without sending it directly to the parties is not sufficient. It added that the Employment and Labour Relations Court (Procedure) Rules, 2016 do not provide guidelines on how judgement is to be delivered and hence recourse is made to the Order 22 Rule 1 Civil Procedure Rules, 2010. It urged the court to find that the Application has met the conditions precedent to grant stay of execution pending appeal as prayed.

Regarding the Respondent's argument that the application ought to have been filed in the trial court, the applicant submitted that it seeks both stay of execution and for enlargement of time which is the main prayer of the application and this court has jurisdiction to grant both prayers. It argued that while the civil procedure dictates the above, these provisions are procedural and do not take precedence over substance as is the spirit of the constitution under Article 159(2)(d). The case of **Kenya Ports Authority v Jennifer Alois Wandera (Administratrix of the estate of Alois Wandera Odhiambo- Deceased) (2016) eKLR** which made reference to the overriding objective was relied on. It urged this court to find that it is the furtherance of substantive justice to entertain the application given that it is largely depended on the grant of the order for leave to appeal out of time.

On the prayer for enlargement of time to appeal, the Applicant submitted that Section 79(G) of the Civil Procedure Act and relied on the case of **Paul Musili Wambua v Attorney General & 2 others (2015) eKLR** where the Court of Appeal stated that the court has unfettered discretion to decide on whether or not to extend the time for filing an appeal. It added that the court should however act upon reason and not base its decision on whims or caprice.

To further support its claim, the Applicant relied on **Hajar Services Limited v Peter Nyangi Mwita (2020) eKLR** where 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.

The applicant submitted the draft memorandum of appeal which it argued raises arguable grounds of appeal with a high chance of success. It relied on the **County Government of Bomet v Moi University & 2 others (2016) eKLR** where the court of Appeal stated that an arguable appeal by definition need not be one that must necessarily succeed and that the threshold for interim relief is relatively low since what one needs to show is arguability of the proposed appeal and not great or preponderate chances of its success. It stated that the learned magistrate erred in law in its decision hence the grounds of appeal contained in the memorandum are not frivolous as they are arguable and stand a high chance of success and that it has met the conditions required by law for extension of time within which to file an appeal.

Respondent's Submissions

The respondent submitted that in as much as the right to be heard

is provided for in the constitution, it is not absolute as it is dependent on clear set guidelines, timelines and the corresponding rights of the other parties. It relied on **Union Insurance Co. of Kenya Ltd. v Ramzan Abdul Dhanji Civil Application No. Nai 179 of 1998** where the Court of Appeal held:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself... The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

The respondent submitted that the Applicant has started re-litigating the lower court case even before leave to appeal out of time is granted in an attempt to misdirect and mislead the court. It urged the court not to entertain such tactics.

It placed reliance on Section 8(1) & (2) of the Employment and Labour Relations (Procedure) Rules of 2016 and Section 79 of the Civil Procedure Act. In the case of **Edward Kamau v Hannah Mukui Gichuki & another (2015) eKLR** Aburili J. quoted the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others, SC App. 16 of 2014** where the Supreme Court set out the underlying principles that a court should consider in the exercise of discretion to extend time to file appeal out of time by holding that;

"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. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

3. As to whether the court should exercise the discretion to extend time, it is a consideration to be made on a 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 to be suffered by the respondents if the extension is granted. 6. The application should have been brought without undue delay; Applying the above principles, the question therefore is whether the applicant has shown good and sufficient cause for not filing the appeal in time."

The respondent submitted that the court had given directions that

judgement would be delivered on notice and that both parties would liaise with the Court clerk and that the Applicant's advocate were to undertake all due diligence and follow up with the court. She argued that the Applicant had not given sufficient reasons for the delay and insisted that there must be an end to litigation, relying on **Joseph Kangethe Kabogo v Micheal K. Ngari HCCC 944 of 2011**. The respondent argued that the delay and inordinate given that the five-month period has not been justified.

In **Nicholas Kiptoo Arap Korir V IEBC (Supra)** the Court of Appeal held:

“One gets the distinct impression from the record that the appellant, though aware of his default has resorted not only to diversionary blame, but a veritable taunt at the applicants “mta-do.”

I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

Furthermore, the Respondent submitted that allowing this matter to proceed for another two years or more will not only prejudice her but deny her the fruits of justice she rightfully obtained. On the contrary, no prejudice will be suffered by the Applicant as it is a multi-million flower export company and the Decretal amount herein of Kshs.627,977/= will not make any dent to its finances.

On the appeal, the respondent submitted that the applicant had not filed any appeal which amounts to an abuse of the court process as was held by Emukule J. in **Gerald M’limbine v Joseph Kangangi (2009) eKLR**. The learned judge held that the appeal must be filed at the same time as the application to extend time to file out of time. In this case, the Respondent argued that even if the annexed draft memorandum of appeal was to be considered, it still amounts to a frivolous one as it raises no arguable points with its only intention being to delay the justice rightfully owed to the Respondent.

She also relied on the decision in **Sankale Ole Kantai T/A Kantai & Co Advocates v Housing Finance Co. (K) Ltd (2014) eKLR** which referred to a balancing act between the rights of parties – the Applicant’s right to his appeal and its prospects on one hand and the right of the Respondent to the fruits of his judgement – was highlighted. The Respondent submitted that the Applicant had not demonstrated that it stands to suffer any loss unless the order for stay is granted given that it is a multi-million shilling company. It however is shifting the burden and blame on the respondent for the simple reason that she is not as wealthy as the Applicant and its contention that it would suffer substantial loss because her physical address is unknown to them. She added that having had an employment relationship with the Applicant, her personal information is in its custody. She submitted that she would be capable of paying the decretal sum if the appeal is in favour of the Applicant as her salary can be attached and she has property in her rural home.

In conclusion, the demand for the pay of half of the decretal sum was based on the court’s decision in Sankale Ole Kantai case (supra) where the court held as such. She therefore prayed for the dismissal of the Application with costs to her.

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 6th February 2020.

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 which 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 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.

(3) Notwithstanding anything contained in subrule (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 did not get a judgement notice from the trial court. It is the obligation of an advocate in a matter to follow up on its progress. Given that the trial court had informed the advocates to pursue the matter with the clerk, due diligence dictates that the Applicant was to follow up with the same. I understand a delay in filing for a month or two but for five months? That failure to follow up with the matter was entirely the failure of the Applicant's Advocate and it is trite that mistakes of counsel should not be visited upon the client. The Court further takes cognisance of the disruptions to the court process due to COVID-19 which changed the mode of operation in court proceedings.

I find that there is reasonable justification and 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.

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.”*

The right to appeal is a right that is enshrined in the Bill of Rights under the right to fair hearing. Having already recognised the fact that judgement was delivered without notice to parties, I will be inclined to find in favour of the Applicant guided by the decision in **Hajar Services Limited v Peter Nyangi Mwita (2020) eKLR** where the court found that delivery of judgement without notice is sufficient grounds of enlargement of time.

From the foregoing reasons I hereby extend time of lodging appeal for 30 days failing which the orders granted herein shall lapse.

Costs of the applications herein shall be paid to the Respondent by the Applicant in any event.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH 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 15th March 2020 and subsequent directions of 21st 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