



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. E042 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KHALSA SCHOOLS.....1ST APPLICANT

MANJIT DHADIALA/CHAIRMAN BOM2ND APPLICANT

SEBASTIAN CHACKO/ PRINCIPAL/

SECRETARY BOM3RD APPLICANT

VERSUS

SAMUEL ODHIAMBO OTIENO.....RESPONDENT

RULING

1. Before me for determination are two Applications dated 6th October 2020 and 17th November, 2020. The application dated 6th October 2020 seeks the following orders:

i) Spent

ii) THAT this Court be pleased to order stay of execution of the Judgment and/or Decree resulting from the decision of Hon. D.M. Kivuti (SRM) delivered on 28th August 2020 pending the hearing and determination of this Application.

iii) THAT this Court be pleased to grant leave to the Applicants' to file an Appeal out of time against the whole Judgment and/or Decree resulting from the decision of Hon. D. M. Kivuti (SRM) in Nairobi CMEL Cause No. 658 of 2018, delivered on 28th August 2020.

iv) THAT this Court be pleased to order stay of execution of the Judgment and/or Decree resulting from the decision of Hon. D. M. Kivuti (SRM) delivered on 28th August 2020 pending the hearing and final determination of the appeal.

v) THAT the costs of this application be in the cause.

2. The application is based on the following grounds:

a) The judgement in the matter was delivered on 28th August 2020 and the magistrate only read the dispositive part of his decision and the Applicants received a copy of the Judgment on 1st October

2020 when the stay period had already lapsed.

b) *The Applicants Being dissatisfied with the reasoning of the judgement instructed their advocates to appeal by which time the time for filing an appeal had lapsed hence seeking leave to appeal out of time.*

c) *The Applicants state that the intended appeal raises arguable issues with high chances of success and is apprehensive that the Respondent may execute against the Applicants or their movable/immovable properties if stay of Execution is not granted rendering the intended appeal nugatory.*

d) *The Applicant is ready and willing to furnish security through issuance of a bank guarantee for the full decretal sum to be deposited in court.*

3. The Application is supported by the affidavit of **MOSES MUGWE**, an advocate who has the conduct of the matter on behalf of the Applicants, sworn on 6th October, 2020 in which he reiterated the grounds set out on the face of the Application.

4. The **Application dated 17th November 2020** seeks the following orders:

i) ***THAT*** *this Application be certified as urgent, service of the same be dispensed with and heard ex-parte in the first instance.*

ii) ***THAT*** *the interim orders for stay of execution of the judgment and decree in **Nairobi CMEL Cause No. 658 of 2018** granted on 6th October 2020 to remain in force pending the hearing and determination of this application.*

iii) ***THAT*** *this Court be pleased to vary and/or alter the conditional stay order issued on 6th October 2020 on deposit of the decretal sum in Court within 14 days and in its place accept a Bank Guarantee from the Applicants' bankers, I&M Bank Limited a reputable bank for the judgement sum of **Kshs.611,667/=** as adequate security pending the hearing and determination of the intended appeal.*

iv) ***THAT*** *the costs of this application be in the cause.*

5. The application is based on the following grounds;

a) *The Applicant filed an application dated 6th October 2020 and interim order for stay was granted on condition that the Applicants deposit the entire decretal sum in court within 14 days pending the hearing and determination of the application.*

b) *The Applicants states that they were unable to provide security in financial form and instead offered a Bank Guarantee as security for the due performance of the decree since its only source of funds which is school fees was greatly affected by COVID 19 pandemic.*

c) *The Applicant prays that the court do alter/vary its orders granted on 6th October 2020 in its place accept a Bank Guarantee from the Applicants Bankers I & M Bank Limited for a sum of Kshs.611,667 as adequate security pending the hearing of the intended appeal.*

d) *The Applicant is apprehensive that the Respondents may at any time execute against the Applicants movable/immovable properties if the orders sought are not granted and it will render the intended appeal nugatory.*

6. The Application is supported by the affidavit of **MOSES MUGWE**, an advocate who has the conduct of the matter on behalf of the Applicants, sworn on 8th October, 2020 in which he reiterated the grounds

set out on the face of the application.

7. In response to the two applications the Respondent filed a replying Affidavit sworn by **SAMUEL ODHIAMBO OTIENO** in which he avers that the application is as a result of the judgment delivered on 28th August 2020 for Kshs.611,667 in favour of the Respondent. The Respondent contends that despite the court issuing a decree and certificate of costs and granting the Applicants 30 days stay of execution they did not file the application for stay within time.

8. He further states that the court granted the Applicant interim orders for stay of execution pending hearing of the application on condition that the Applicants deposit the decretal sum in court within 14 days which they have failed to do. The Respondent urges the court not to extend interim orders since the Applicants have failed to obey the court orders. Further the Respondent avers that the Applicants advocates should have advised their clients on the timelines to file an appeal and urges the court to decline the application seeking leave to appeal out of time.

9. The Respondent urges the court to grant an order depositing the entire decretal sum together with accrued interests in a Joint interest earning Account in the names of the Respondent and the Applicants Advocate. It further prays that the applications be dismissed as they lack merit and are a waste of courts time.

Rejoinder

10. In response to the Respondent's replying affidavit, the Applicant filed a Supplementary affidavit sworn on 15th December 2020 Moses Mugure, Counsel for the Applicants.

11. The Affiant states that the allegations that the application is intended to delay justice is untrue. That the Applicants were unable to comply with the orders of the court since they were not in a position to furnish security in financial form but have offered to issue a Bank Guarantee from I & M Bank Limited. The Affiant states that the bank guarantee is a good and adequate security for due performance of the decree as it can easily be realized within 5 days from date of demand.

Submissions

12. On the 2nd December 2020, parties took directions to dispose of both applications together by way of written submissions

Applicant's Submissions

13. The Applicant relies in the case of In **Thuita Mwangi v Kenya Airways Ltd [2003] KLR** cited with approval in **Teachers Service Commission v Benson Kuria Mwangi [2020] eKLR** where the Court expounded on the factors the Court should consider in granting leave to appeal out of time. They include:

- a) The period of delay;*
- b) The reason for the delay;*
- c) The arguability of the appeal;*
- d) The degree of prejudice which could be suffered by the Respondent if the extension is granted;*
- e) The importance of compliance with time limits to the particular litigation or issue; and*
- f) The effect if any on the administration of justice or public interest if any is involved.*

14. The Applicants submit that they filed the application for leave to appeal out of time 8 days after the

lapse of 30 days stay of execution. That this period is not inordinate as the magistrate who delivered the judgment only read the dispositive part and the Applicants only got a copy of the judgment after the stay period had lapsed.

15. The Applicants further submit that the intended appeal is arguable as it raises both factual and legal issues that may overturn the original verdict.

16. The Applicants also submit that if the application is not allowed it will suffer prejudice despite having an arguable appeal. It urges the court to exercise its discretion to extend time in furtherance of the ends of justice as the application has met the threshold for grant of leave to appeal out of time.

17. The Applicants further submit that they have met the principles of granting Stay of Execution as provided in Order 42 Rule 6(1) of the Civil Procedure Rules and they will not be able to recover the decretal sum if the Respondents proceed to levy execution. They submit that they are ready to offer security in form of a Bank Guarantee as an alternative to security in monetary form as the decretal sum is a substantial amount that might cripple the 1st Applicants operations.

18. The Applicant relies in the case of **Kenya Shell Limited v Kariga 1982-88 1 KAR** cited with approval in the case of **Tsusho Capital Kenya Limited v Antony Mbuthia Kiburi & Another [2019] eKLR** where the Court of Appeal held that:

"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 cornerstone of both jurisdictions for granting stay".

19. With respect to the second application, the Applicants rely on Rule 33 of the Employment and Labour Relations Court (Procedure) 2016. They pray for review of the court orders issued on 6th October 2020 directing the Applicant to deposit the entire decretal sum in court and instead they offer to deposit a Bank Guarantee from I&M Bank Limited. They rely on the case of **Gitahi & Another v Warugongo [1988] KLR 621** cited with approval in the case of **Mathu v Gichimu [2004] eKLR** where the Court adopted the principles set out in **Rosengren's case** by Parker LJ as follows:

"The process of giving security is one which arises constantly ... So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way which is least disadvantageous to the party giving that security. It may take many forms. A bank guarantee and payment into court are but two of them ... so long as it is adequate, then the form of it is a matter which is immaterial".

20. The Applicant urges the court to allow the applications and also to consider that the Applicant is a school that had been closed for the better part of the year due to Covid 19 pandemic which greatly affected their source of income.

Respondent's Submissions

21. The Respondent submits that the Applicants have not demonstrated that they will suffer substantial loss and will not be able to recover the decretal sum from the Respondent should the appeal succeed. The Respondent submits that Execution of a decree is a lawful process which he has a right to. He relies on the decision in **James Wangalwa & Another v Agnes Naliaka Cheseto (2020) eKLR** where the Court observed that:

"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself does not amount to substantial loss under Order 42 Rule 6 of the Civil Procedure rules. This is because execution is a lawful process. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented

by preserving the status quo because such loss would render the appeal nugatory.”

22. The Respondent submits that the application should not be allowed as the Applicant has failed to obey the court orders. The Respondent relies on the decision in **Civil Appeal No. 20 of 2020; HE v SM (2020) eKLR** where the court in its ruling relied on the case of **Butt v Rent Restriction Tribunal (1979)** where the Court of Appeal stated that –

“The power of the court to grant or refuse an application for stay of execution is discretionary and it should also consider the special circumstances of the case and its unique requirements”.

23. The Respondent submits that the Applicants should be denied leave to appeal out of time as the reasons given are not sufficient to warrant extension of time. He relies on **Section 79G** of the Civil Procedure Act Cap 21 Laws of Kenya which provides that:

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 filling the appeal on time.

24. The Respondent urges the court to dismiss the application as it lacks merit.

Analysis and Determination

25. I have considered the two applications filed by the Applicants herein, the responses by the Respondent and the submissions. The issues for determination are: -

- a) Whether the Applicants have met the threshold for stay of execution and extension of period for filing appeal
- b) Whether the Applicants meet the threshold for review of this Court’s orders of 6th October 2020 and
- c) Whether the Applicants are entitled to the orders sought.

Extension of period for filing appeal

26. Section 79G of the Civil Procedure Act provides for both the period within which an appeal must be filed and for extensions of such period as follows –

79G. Time for filing appeals from subordinate courts

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.

[Emphasis added]

27. In the instant case, judgment was delivered on 28th August 2020 virtually. The Applicants have stated that the Learned Senior Resident Magistrate only read the deposition in the judgment and it was not until

the Applicants read the full judgment and the reasoning for the decision that they decided to appeal

28. It is evident from the record that a copy of the judgment was supplied to the Applicants on 1st October 2020, some three days after the lapse of the statutory period for filing appeal and the application for leave to file appeal out of time made on 6th October 2020.

29. As was stated in the case of **Thuita Mwangi v Kenya Airways Ltd (2003) KLR** as cited in **Teachers Service Commission v Benson Kuria Mwangi (surpa)** the factors that the Court should consider in granting leave to appeal out of time are the period of delay, the reason for delay, the arguability of appeal and the prejudice to the Respondent in granting the application. The other factors for consideration are the importance of compliance with time limits in the particular case and the effect on administration of justice or public interest if any.

30. In the instant case the delay was only 8 days and was occasioned by delay in issuance of a copy of the judgment to the Applicants. I find this delay not inordinate and satisfactorily explained.

31. The Applicants have further filed a draft memorandum of appeal which I have considered. I find that there are arguable issues raised in the grounds of appeal and the appeal is therefore not frivolous.

32. On the issue of prejudice, the Applicant has in the application offered to deposit security of a bank guarantee.

33. I am satisfied the Applicant meets the threshold for grant of the orders in the application dated 6th October 2020.

Review of orders made on 6th October 2020.

34. On 6th October 2020, the Court granted the Applicant temporary stay of execution conditional upon the Applicant depositing the entire decretal sum in Court within 14 days.

35. The Applicants have pointed out to the Court that in the application they specifically offered to deposit a bank guarantee. They have explained that being a school, the 1st Applicant requires the cash at hand for school operations.

36. Order 42 Rule 6(2)(b) provides for “... *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.*” The provision does not specifically require the deposit of cash but adequate security for the due performance of the decree or order.

37. As was stated by Parker LJ in **Rosengren v Safe Deposit Centres Ltd (1984) E ALL ER 198** which has been quoted widely with approval in many cases in Kenya, security for the due performance of a decree out to be given in a way that is least disadvantageous to the party giving security and may be in many forms including a bank guarantee. What is important is that it must be adequate and binding.

38. It is my view that a bank guarantee from a reputable bank is adequate security for the due performance of the decree herein.

39. Having found that the Applicant has offered adequate security, it is my further finding that the Respondent is unlikely to suffer prejudice should the orders of this court made on 6th October 2020 be varied from a requirement for deposit of decretal sum in Court to a deposit of a bank guarantee. The guarantee must however cover both the decretal sum and any such other sum that may arise from additional interest and costs should the intended appeal fail.

Disposition

40. Having found the applications dated 6th October 2020 and the amended notice of motion dated 17th November 2020 merited, I make the following orders; -

i) The Applicants be and are granted leave to file appeal against the decision of Hon. Kivuti, Senior Resident Magistrate in Milimani CMEL Case No. 658 of 2018 out of time.

Provided that the same must be filed within 30 days from the date of this ruling.

ii) The orders of this Court made on 6th October 2020 for deposit of entire decretal sum in Court is set aside and in place thereof an order is made that the Applicants do deposit with the Court a Bank Security issued by I & M Bank Limited as such would be valid and subsisting and be adequate to cover the decretal sum and any further costs and interest likely to arise from the appeal until the appeal is heard and determined.

iii) That there shall be a stay of execution of the decree in Milimani CMEL No. 658 of 2018 pending filing and determination of the intended appeal by the Applicants conditional upon the Applicants complying with orders (i) and (ii) above.

iv) The costs of the application herein shall in any event be borne by the Applicants.

41. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF JULY 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 had 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