



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 2487 OF 2016**

(Before Hon. Lady Justice Maureen Onyango)

**LILY YEKO NGEYWA.....CLAIMANT**

**VERSUS**

**WORLD VISION KENYA.....RESPONDENT**

**RULING**

The Respondent/Applicant, World Vision Kenya filed an Amended Notice of Motion Application dated 30<sup>th</sup> July 2020 seeking for Orders:

1. Spent.
2. That this Court be pleased to enlarge time within which to file the Notice of Appeal and upon such enlargement the annexed Notice of appeal be deemed as properly filed.
3. That there be a stay of execution or the enforcement of the judgement and decree delivered on the 19<sup>th</sup> June 2020 pending hearing and determination of the application inter parties and/or until further order of this court.
4. That there be a stay of execution or the enforcement of the judgement and decree delivered on the 19<sup>th</sup> June 2020 pending hearing and determination of the intended appeal and/or until further order of this court.
5. That the costs of this application be provided for.
6. That this Court be pleased to make such further or other orders as it may deem fit and just to grant.

The Application is based on the grounds that informal stay of execution was sought and granted for 30 days and the Respondent is apprehensive that execution will issue any time after expiry of that period. The Respondent filed a Notice of Appeal on the 8<sup>th</sup> of July 2020 and served it upon the Claimant but at the time to lodge the Notice of Appeal run out due to an error and miscalculation on the number of days for filing said Notice of Appeal which ought to have been filed on or before 4<sup>th</sup> July, 2020. The Respondent/Applicant states that the delay is not inordinate or great so as to be inexcusable and the intended Appeal is arguable and has high chances of success. That the application herein has been made without undue delay and this Court has unfettered discretion to grant leave to file an appeal out of time.

Further, that it is also necessary for this Court to urgently issue a stay of execution of its judgement which is by all means a substantial sum of money where the party seeks to exercise its right of appeal. The Respondent is ready and willing to abide by such terms of security as the court will impose and is apprehensive that execution will occasion substantial loss and damage to it and will render the appeal nugatory. That it is therefore in the interest of justice that the orders sought herein are granted so as to allow the determination of the pending appeal.

The Application is supported by the Affidavit sworn by the Associate Director - Governance, Legal, Risk and Compliance of the Respondent, Eunice Muturi. She avers that judgment in the suit herein was delivered against the Respondent for the sum of Kshs.1,053,534/= together with terminal dues, interest and costs and that the advocate regrets the error and miscalculation made on the number of days to file the said Notice of Appeal.

The Claimant/Respondent filed a Replying Affidavit dated 6<sup>th</sup> August 2020 wherein she avers that apart from the award of damages, the Court also ordered payment of her terminal dues. That if the order of stay is granted, the order should exempt the payment of terminal dues since the same is not disputed by the parties herein and cannot therefore be an issue in the Court of Appeal. It is her averment that she has

waited for the said judgment for four (4) years and should thus be allowed to enjoy the fruits of the Judgment made in her favour without further delay and the Respondent be ordered to release to her the terminal dues as of the date of Judgment.

She further avers that the application herein is intended to derail the expeditious conclusion of this matter. That litigation must come to an end. That the Respondent/Applicant has failed to satisfactorily explain the cause of the delay in filing the Notice of Appeal with the reason given illustrating its lack of seriousness and indolence in this matter. That the Applicant does not therefore deserve the leave sought herein and that the Application is good for dismissal with costs.

The Claimant avers that the intended appeal has been brought in bad faith and has no chance of success and that the application herein is thus an abuse of the process of court. That if however, the Court allows the prayer for stay, she beseeches the Court to order the release of at least half of the judgment amount awarded to her to save her from economic hardship and suffering experienced since the Respondent dismissed her from employment. That the other half of the decretal sum should be paid into an interest-earning bank- account to be opened jointly by her Advocate and the Applicant/Respondent's Advocate.

### **Respondent/Applicant's Submissions**

The Respondent/Applicant submits that the inadvertent and regrettable delay of four (4) days on the admitted part of the Advocate should not be used to prevent the Applicant from exercising its constitutional right to appeal against the court's decision. It cites **Cause No. 2268 of 2014, Maina Munyua v Amref Health Africa** and prays the Court considers that the delay of 4 days is not inordinate and allow prayer 2 as sought in the Amended Application.

It is the Respondent/Applicant's submission that it is guided by **Order 42 Rule 6(2) of the Civil Procedure Rules** and the requirements for grant of stay of execution pending Appeal set out in **Butt v Rent Restricting Tribunal [1982] KLR 417** referenced in **Cause No. 1559 of 2016 Silvia Anyesi v Rahma Mohammed** by this Court that:

- a. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
- b. The general principle in 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.
- c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the Appellant had an undoubted right of appeal.
- e. 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 for costs as ordered will cause the order for stay of execution to lapse.

The Respondent/Applicant submits that should the Appeal succeed, the same will be rendered nugatory as the Claimant would not be in a position to refund the same thus occasioning substantial loss to it. That this position is supported by the Claimant's averments in paragraph 14 of the Replying Affidavit where she depones she has not been able to secure alternative employment and has been struggling.

It is the Respondent/Applicant's submission that the intended appeal is against the whole judgement of the court and that having demonstrated its apprehension, it urges the court to balance the wheels of justice and make equitable orders. It further prays the Court upholds that the Applicant has a constitutional right to a fair hearing which encompasses being able to access justice to the highest level and is therefore deserving of the orders sought in the Application.

### **Claimant/Respondent's Submissions**

The Claimant/Respondent submits that the Application herein should be denied for want of valid explanation. That it is trite that extension of time is not a right of a party but an equitable remedy available only to a deserving party, at the discretion of the Court. She further submits that in the instant case, an appeal from this Court to the Court of Appeal is governed by **part IV of the Court of Appeal Rules, 2010** where the said appeal is intimated by filing of a Notice of Appeal as under the rules. It is her submission the Applicant having conceded to not having complied with the Rules, must justify why the Court should exercise discretion in its favour. She cites the case of **Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR** where the High Court held that where there is no explanation for non-compliance there shall be no indulgence by court.

She submits that the Court of Appeal in **Thuita Mwangi v Kenya Airways Ltd [2003] eKLR** held that the court in an application for extension of time ought to take into account several factors including:

- a. The period of delay;
- b. The reason for the delay;
- c. Whether the appeal is arguable;

- d. The degree of prejudice which could be suffered by Respondent if extension is granted;
- e. 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.

She also cites the case of **Joseph Kakomo Mbenga v Maingi Charles & Another [2018] eKLR** which cited with approval the decision in **First American Bank of Kenya Ltd V Gulab P Shah & 2 Others Nairobi (Milimani) HCCC No.2255 of 2000 [2002] 1 EA 65**. She further submits that there is also a duty now imposed on courts to ensure that the factors considered are in consonance with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

It is the Claimant/Respondent's submission that this is a clear case of **inaction** on the part of the advocate as opposed to error of judgment or a slip and that inaction is not excusable, while further considering the hollow explanation given. That the Applicant was well aware of the right of appeal before and after judgment and should have proceeded to file the notice of appeal expeditiously following delivery of judgment. That it is hypocritical for the Applicant to claim it was not aware when the time to file Notice of appeal expired yet it was alert of the date when the 30 days' period of stay of execution granted would lapse so as to be apprehensive that execution would issue after the expiry of that period. That in this sense the Applicant is guilty of selective adherence to timelines.

She relies on the case of **Daphne Parry v Murray Alexander Carson [1963] EA 546** where it was held that if the Appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the Appellant. That the Court of Appeal in **Alibhai Musajee v Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998** held that failure to act does not constitute a good or sufficient cause to allow for extension of time to file appeal.

As to whether this Court should grant a stay of execution, the Claimant/Respondent submits that the Applicant must meet the conditions provided by **Order 42 Rule 6(2) of the Civil Procedure Rules** that is: that substantial loss may result to the applicant unless the order is made; the application has been made without unreasonable delay; and such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

That in the instant case, no substantial loss has been demonstrated or deposited to by the Respondent/Applicant despite this being a money decree and she submits that failure to prove substantial loss is enough reason to warrant dismissal of the application. To support this position, she cites the Court of Appeal case of **Charles Wahome Gethi v Angela Wairimu Gethi [2008] eKLR**. Further, that the Applicant's ability to furnish security should not give an unfair advantage to the Respondent/Applicant as **Article 27(1) of the Constitution of Kenya** provides for equality of all persons before the law.

The Claimant/Respondent submits that since the Applicant has failed to prove the ground for extension or enlargement of time to file an appeal out of time, the ground for stay of execution must fail since without an order extending time the stay cannot be granted in a vacuum. That if however, the Court decided in the alternative, she urges this Court to be persuaded by the case of **Henry Owino Obonyo & Another v Kenya Airways Ltd [2019] eKLR** where the Court allowed an application for stay of execution on condition that half of the decretal sum be released to each of the claimants.

On the issue of costs of the application, the Claimant/Respondent submits that the Court should not reward an errant applicant who has failed to file the intended appeal within time.

### **Analysis and Determination**

The issues for determination are: -

1. Whether the Respondent/Applicant has set out sufficient grounds to warrant an enlargement of time to file his Notice of Appeal.
2. Whether the Respondent's Application has met the threshold for grant of stay of execution pending Appeal.

In the case of **Njuguna v Magichu & 73 others [2003] KLR 507** Waki, JA held that:

“The discretion exercisable under Rule 4 of this Court's Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless, the discretion has to be exercised judicially, that is on sound factual and legal basis.”

In the case of **Maina Munyua v Amref Health Africa (Previously African Medical and Research Foundation Kenya) [2019] eKLR**, this Court allowed the application to file notice of appeal out of time after considering that the applicant has a constitutional right to a fair hearing which encompasses being able to access justice to the highest level. The Court further notes that the delay in filing the notice of Appeal is only 4 days, which is by no means, inordinate delay. I will therefore grant leave to the Applicant to file Notice of Appeal out of time and that the Notice of Appeal dated 7<sup>th</sup> July 2020 be deemed as having been properly filed.

As to whether the Respondent/Applicant is entitled to an order for stay of execution, **Order 42 Rule 6(2) of the Civil Procedure Rules** provides that:

**(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.**

An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order has been given.

In **Butt v Rent Restriction Tribunal [1979]**, the Court of Appeal stated that the power of a court to grant or refuse an application for a stay of execution is discretionary, that the discretion should be exercised in such a way as not to render an appeal nugatory. That a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. That in exercising its discretion whether to grant or refuse an application for stay the court will consider the special circumstances of the case and its unique requirements.

As to what substantial loss is, it was observed in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, 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. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so 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.”

Again in **RWW v EKW [2019] eKLR**, the court addressed its mind to the purpose of a stay of execution order pending appeal as follows-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

The court is bound to consider the interests of both parties. In the instant case the applicant is apprehensive that should order of stay not be granted, it would be unable to recover the decretal sum from the Respondent who has already confessed that she has not been able to secure employment since leaving the employment of the Respondent.

With regard to security for costs, the court in **Absalom Dova v Tarbo Transporters [2013] eKLR**, stated:

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

Further, in **Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR**, the court observed-

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

Again in **Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] eKLR**, the court observed:

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings

where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

This position has been upheld in many decisions including **Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others [2014] eKLR, Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018] eKLR, RWW v EKW.**

In the instant suit the court observed that the Applicant admitted that it had not paid the Respondent herein, the Claimant, her terminal dues. I do not think that it will be able to successfully renege from this admission even on appeal. It is further apparent that what the Respondent is unhappy about is the award of compensation which in the application it refers to as a substantial amount of money.

From the decisions reviewed above, it is clear that the issue of security is discretionary and it is upon the court to determine. Taking into account the circumstances of this case and the fact that the Respondent herein has a valid judgment, further taking into account the concerns of the Applicant, I allow the application partially and make orders as follows –

- 1. The time within which to file Notice of Appeal is hereby enlarged and the Notice of Appeal filed herein is deemed as properly filed;**
- 2. There be and is hereby granted stay of execution of the sum of Kshs.1,053,534.00 pending hearing and determination of the intended appeal;**
- 3. The said sum shall be deposited into an interest earning account in the name of counsel for the Applicant/Judgment Debtor and the Respondent/ Decree-Holder within 30 days from the date hereof;**
- 4. The Applicant/Judgment Debtor shall pay the Respondent/Decree-Holder all her terminal dues as set out in the letter of termination forthwith together with interest from date of judgment herein**
- 5. Costs of this application shall in any event be paid to the Respondent/Decree-Holder.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF DECEMBER 2020**

**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**