



Royal Garments Industries EPZA Limited v Fumo (Miscellaneous Case E118 of 2023) [2025] KEELRC 13 (KLR) (14 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 13 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E118 OF 2023**

**JW KELI, J
JANUARY 14, 2025**

**BETWEEN
ROYAL GARMENTS INDUSTRIES EPZA LIMITED APPLICANT
AND
MWANGOKA SHEHE FUMO RESPONDENT**

RULING

1. The Applicant vide Notice of Motion application dated 12th April 2023 and brought under sections 3A, 3B, 6 and 63 (e) of the [Civil Procedure Act](#) Cap 21; and Procedure Rules sought for the following Orders:-
 - a. Spent
 - b. That leave be granted to the Intended Appellant/Applicant to Appeal the whole of the Judgment delivered by Honourable E.K Suter on 2nd February 2023 of out of time.
 - c. That pending the hearing and determination of the Intended Appeal this Honourable Court be pleased to issue stay of execution of the said Judgment and Order delivered by Honourable E.K Suter on 2nd February 2023.
 - d. That the costs of this Application be in the cause.
2. Grounds of the application
 1. That on 2nd February 2023 Honourable E.K Suter delivered a Judgment in favour of the Respondent.
 2. That the Appellant/Applicant applied for copies of the said decision 21February 2023.



3. That despite following up with the registry on several occasions through their counsels on record, the Intended Appellant/Applicant was only supplied with a copy of the said decision on 5th April 2023.
 4. That the Intended Appellant/Applicant is aggrieved by the said decision and Intended Appellant/Applicant intends to appeal against the whole of the said decision.
 5. That the lower Court granted stay of execution of the Judgment and order thereof for 30 days which lapsed and the Appellant/Applicant is apprehensive that the Respondent will proceed with execution before the appeal is heard and determined thus rendering this application and the appeal nugatory.
 6. That the Appellant's delay is occasioned by the delay in the registry in issuing certified copies of the proceedings and judgement.
 7. That the Appeal is arguable and has chances of success, in particular that the Honourable Court failed to consider the Appellant's /Applicant's reasons for the lawful and just termination and awarded the Respondent compensation based on wholly different issues not raised by the Appellant.
 8. THE Appellant/Applicant will suffer substantial loss unless a stay of execution is granted since there is no evidence that the Respondent has the means to refund the amount awarded if the appeal is successful.
 9. That the Respondent will not be prejudiced if this Application is allowed.
 10. That this Application has been brought without unreasonable delay.
 11. That it is in the interests of justice that the prayers sought herein are granted.
3. The Application was further supported by the affidavit of Victoria Nyaga who annexed a copy of the memorandum of appeal (VN-1), a copy of correspondence on the execution(VN-2), a copy of a letter to the Court requesting for certified typed proceedings, and judgment(VN-3).
 4. On the 14th June 2023 the application was placed before Justice B.O. Manani. The Judge issued an exparte Order of Stay of execution of the Decree in Mavoko CMELRC No. E033 of 2022 pending the hearing and determination of the application.

Response

5. The Respondent filed a Replying Affidavit sworn on the 25th August 2023 by Owuor O. Reen Advocate in response to the application. He averred that the execution of the Decree would not render the appeal nugatory. That the applicant had not demonstrated valid reasons for the delay in filing the appeal or that they stood to suffer substantial loss if the stay was not granted. That the applicant had not demonstrated a willingness to furnish security for the performance of the Decree. The deponent stated that the application had no merit and further that in the event the court was inclined to grant the application then the decretal sum should be deposited in a joint interest-earning account held by advocates for the parties.

Decision

6. The application was canvassed by way of written submissions. Both parties filed. The court on perusal of the pleadings and the written submissions by the parties discerned the issues for determination in the application to be:-



- A. Whether to grant leave for the applicant to file appeal out of time.
- B. Whether to grant Order of stay of execution of the judgment delivered by Honourable E.K Suter(PM) on the 2nd February 2023 pending the hearing and determination of the appeal.

Whether to grant leave for the applicant to file appeal out of time.

7. Rule 12 Employment and Labour Relations Court (Procedure) Rules 2024 provides for time for filing appeal to the court as follows:- “12. (1) Where a written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified under that written law.

(2) Where an appeal is from a magistrate’s court or where no period of appeal is specified in the written law referred to in sub-rule (1), the appeal shall be filed within thirty days from the date the decision is delivered.”
8. The judgment of the Trial Magistrate Court was delivered on the 2nd February 2023. According to Rule 12(2) of the ELRC (Procedure) Rules 2024, the appeal ought to have been filed within 30 days. No appeal was filed. The instant application was dated 12th April 2023. The applicant states that this was not inordinate delay and further stated that their intended appeal raised triable issues being that their evidence was not considered and the compensation in the judgment was based on issues not raised by the parties. A draft memorandum of appeal was annexed (VN-1).
9. Rule 18 of the ELRC (Procedure) Rules 2024 provides for extension of time to file appeal as follows:- “18. The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal.”
10. The principles for extension of time for filing appeal were stated by the Supreme Court in Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR where it upheld its earlier decision in Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR) as follows:- “29] As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:-

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising 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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the



satisfaction of the Court;

5. whether there will be any prejudice suffered by the respondents, if 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”

11. The Court applying the foregoing principles is satisfied with the basis laid by the Applicant for the request for the extension of time to file appeal. The court further finds there was no inordinate delay in filing the instant application the judgment having been delivered on the 2nd February 2023 and the application filed on the 9th June 2023. The court finds that there is a draft memorandum of appeal raising arguable issues for determination(VN-1). In the upshot the Court allows the prayer for an extension of time for the Applicant to file appeal out of time.

Whether to grant an Order of stay of execution of the Judgment delivered by Honourable E.K Suter(PM) on 2nd February 2023 pending the hearing and determination of the appeal.

12. The ELRC (Procedure) Rules 2024, Rule 21 provides for a stay of execution in case of appeal as follows: -’21. (1) Where an application for stay of execution pending

appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court.

(2) An application for stay of execution pending appeal shall be filed in the appeal file.” Since the Rules are silent on the conditions for granting a stay of execution then the lacuna is addressed by Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:- ‘(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) 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.”

13. The court is of the opinion that the law is settled on the conditions for grant of stay of execution as stated by the Court of Appeal in Butt -vs Rent Restriction Tribunal (1982) KLR 417 where the Court gave guidance on how a Court should exercise discretion in an application for stay of execution and held that: -

- “1. The power of the Court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle is granting or reusing 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. (sic) (trial Court judgement).



3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
 4. 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 of costs as ordered with cause the order for stay of execution to lapse”.
14. The court is focused to ensure that the intended appeal is not rendered nugatory and with the compliance with the conditions of Order 42 Rule 6 (2) of the Civil Procedure Rules and as enunciated in the Butt decision (supra). The court holds that there was no inordinate delay in filing the application. The decretal amount was Kshs. 93500 plus interest and costs taxed at Kshs. 47,600 total sum of Kshs. 141,100(VN-2). The applicant was silent on the security for the performance of the Decree in the event the appeal is unsuccessful. The court holds that the condition of security for performance of decree is a key condition for grant of stay as held in the Butt case. The Order of stay is granted conditional to provision of security of performance of the Decree.
15. In the upshot, the application dated April 12, 2023 is allowed as follows: -
- a. The Court grants leave to the intended Appellant/Applicant to Appeal the whole of the Judgment delivered by Honourable E.K Suter (PM) in Mavoko CMEL No. E033 of 2021 on the February 2, 2023 out of time. The memorandum of appeal to be filed within 21 days of this Order.
 - b. The Court issues an Order of stay of execution of the Judgment delivered by Honourable E.K Suter (PM) in Mavoko CMEL NO. E033 of 2021 on the 2nd February 2023 pending the hearing and determination of the intended Appeal on condition the entire decretal amount plus costs in the sum of Kshs. 141,100 is deposited in interest-earning joint account within 30 days to be opened in the name of the advocates for the parties and in default execution may proceed.
 - c. That the costs of this Application to the Respondent.
16. Mention on the February 17, 2025 to confirm compliance and issue further directions in the appeal.
17. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF JANUARY , 2025.

**JEMIMAH KELL,
JUDGE.**

In The Presence Of:

Court Assistant: Caleb

Applicant : - Nafuna h/b Kipkirui

Respondent: Kemuma h/b Namada

