



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kanjau v Kenya Power & Lighting Co. Ltd (Employment and Labour Relations Cause E005 of 2022) [2024] KEELRC 1090 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1090 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E005 OF 2022**

**ON MAKAU, J**

**MAY 15, 2024**

**BETWEEN**

**EPHRAHIM MUTHAMBUKI KANJAU ..... CLAIMANT**

**AND**

**KENYA POWER & LIGHTING CO. LTD ..... RESPONDENT**

**RULING**

1. This ruling determines the respondent's Notice of Motions dated 1<sup>st</sup> November 2023 brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 40, 42 Rule 6, and Order 51 Rule 1 of the [Civil Procedure Rules](#). The application seeks the following orders:
  - a. That pending the hearing and determination of the Application, there be a stay of execution of the judgment and consequent decree.
  - b. That Pending the hearing and determination of the intended Appeal, there be a stay of execution of the judgment and consequent decree.
  - c. That Costs of the application be provided for.
2. This Application is premised on the grounds on the body of the motions and in the affidavit sworn on 1<sup>st</sup> November 2023 by the applicant's Advocate, Ms Anne Mulela. In brief the affiant deposes that the applicant was dissatisfied with the judgment of this court delivered on 29<sup>th</sup> September 2023 and lodged a notice of appeal dated 4<sup>th</sup> October 2023.
3. She deposes further that the appeal is arguable and has good prospects of success; that unless stay of execution is granted the execution will be done and applicant will suffer substantial loss; that the claimant will not suffer any prejudice if stay is granted; that the application has been made without undue delay; that it is in the interest of justice to allow the application; and that the applicant is willing



to provide one third of the decretal sum, being Kshs 547,053, as security to be deposited in a joint interest earning account in the name of both parties.

4. The claimant opposed the motion by filing his own Replying Affidavit Sworn on 6<sup>th</sup> October 2023 which I think is an error since the motion was filed in November. In summary, the claimant deposed that the intended appeal has no prospects of success since the applicant never adduced any evidence during the trial; that the applicant has not demonstrated the substantial loss that will be incurred if stay is declined; that the security offered is not sufficient to cover the decretal sum should the appeal fail; that the application is an abuse of the process of the court intended to prevent him from executing his decree; that granting stay will prejudice him for the foregoing reason; and that if the court is inclined to grant stay, the same ought to be on condition that the applicant deposits the whole decretal sum in a joint interest earning account between the advocates of the two parties.
5. The application was to be canvassed by written submissions but only the claimant filed. The claimant's submission basically reiterates the facts summarized above and cited the case of *Antonie Ndiave v African Virtual University* [2015] eKLR and *Kenya Commercial Bank Ltd v Sun City Enterprises & Another* [2012] eKLR to fortify his case.

### Issues for determination and analysis

6. The main issue for determination is whether the applicant has met the legal threshold for granting stay pending appeal. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides as follows: -

“No order for stay of execution shall be made under sub-rule (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.”

7. The foregoing provision is couched in mandatory terms and it basically means that granting of an order of stay pending appeal is a discretionary power that must be exercised judiciously upon the said threshold. The court has to consider whether it will be in the interests of justice to grant the same. The underlying interest ought to be that an appeal should not be rendered nugatory or rendered futile. In my view, an appeal becomes nugatory if the successful appellant is unable to recover all the decretal sum paid or does so with much difficulties. This is what the above provision refers to as substantial loss to the applicant.
8. The applicant has not expressed any fear that if the decretal sum is paid, the claimant would be unable to refund the same should his appeal succeed. The legal burden is upon the applicant to show that the decree-holder is a person of straw before the evidential burden of proof can shift.
9. Courts have discussed the obligations of both parties to an application for stay pending appeal. In the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another* [2006] eKLR, the Court of Appeal held that:

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once



an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

10. Again, in *ABN Amro Bank N v Lemond Foods Limited* Civil Application No.15 of 2002 the Court Appeal held that:

“... the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land cash in bank and so on.”

11. As observed above, the applicant has not registered any doubt or fear that the claimant has the ability to repay the decretal sum should the appeal succeed after being paid the said sum. Without expression of such doubt or fear, the evidential burden of prove did not shift to the claimant to adduce evidence to prove his capacity to repay the decretal sum in the event the appeal succeeds after execution of the impugned decree. Consequently, the applicant has not satisfied this court that substantial loss will be occasioned to it should the court withhold the stay order sought.

12. Since proof of substantial loss is the corner stone of an application for stay pending appeal, and the same has not been proved, the application herein lacks merit.

13. For avoidance of doubt, I am satisfied that the application was brought without undue delay and the applicant was willing to offer security as a condition for the stay of execution sought. However, for the reason that the applicant has failed to meet the primary threshold for granting stay pending appeal, the application fails. For the same reason the authorities cited to fortify the issue of security by the applicant are not relevant to this case. In the end, the notice of Motion dated 1<sup>st</sup> November 2023 is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 15<sup>TH</sup> DAY OF MAY, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

