



**AGL Kenya Limited (Formerly Bollore Transport and Logistics Kenya Limited) v  
Abdalla (Appeal E070 of 2024) [2024] KEELRC 2085 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2085 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E070 OF 2024**

**M MBARÚ, J  
JULY 4, 2024**

**BETWEEN**

**AGL KENYA LIMITED ..... APPELLANT  
FORMERLY BOLLORE TRANSPORT AND LOGISTICS KENYA LIMITED**

**AND**

**NAJMA SAID ABDALLA ..... RESPONDENT**

**RULING**

1. The appellant filed an application dated 25 April 2024 under the provisions of Order 42 Rule 6, Order 51 of the *Civil Procedure Rules* and Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* seeking orders;

Pending the hearing and determination of this appeal, this court be pleased to order a stay of execution of the judgment that was delivered by the trial court on 25 March 2024 and the consequential/impending execution process flowing from the said judgment.

2. The costs be provided for.
2. The application is supported by the Affidavit of Maurice Lugadiru and on the grounds that the trial court in Mombasa MCELRC No.E566 of 2021 delivered its judgment on 25 March 2024 wherein it partly found the appellant liable to pay leave pay to the respondent. The appellant is partly dissatisfied with the decision, particularly the finding that the appellant is liable to pay for leave and has lodged an appeal.
3. In the supporting affidavit, Lugadiru aver that as the legal officer for the appellant, there is authority to support the application. The appellant filed credible evidence before the trial court to demonstrate that there was a leave schedule upon the application forms by the respondent which were not taken into account. The appellant has a good appeal with high chances of success and unless the trial court judgment is not stayed, the same will be rendered nugatory. The respondent has issued notice and



demand for payment of Ksh.1, 113,749 and there is imminent danger of execution if the same is not paid. The appellant is ready and willing to offer security as ordered by the court.

4. In reply, the respondent filed the Replying Affidavit of Kitonga Kiiva advocate in the conduct of the matter and aver that the application is devoid of merit. There is a valid judgment subject to execution and despite the appellant's right of appeal, such right does not supersede that of the respondent to enjoy the fruits of the judgment. If the application is allowed, it will perpetuate injustice considering that the respondent lost employment in the year 2021.
5. Kiiva avers that if the application is allowed, the appellant should furnish security for costs.

### **There is a Cross-Appeal.**

6. The appellant filed a Supplementary Affidavit of Lugadiru and aver that Order 42 rule 6 allows the court for good cause to order a stay of execution on terms acceptable to the court. The appellant is ready and willing to deposit security for the due performance of the judgment upon the hearing of the appeal.
7. Both parties attended and addressed the application by way of written submissions.
8. The appellant submitted that following judgment by the lower court in Mombasa MCELRC No.E566 of 2021 on 25 March 2024, the appellant was found liable to pay leave pay to the respondent. Dissatisfied with these orders, an appeal has been filed. To secure the appeal, the appellant has offered security for the due performance of the judgment. In the case of *Thomas M Nguti & 196 Others v Kenya Railways Corporation* Cause No.803 of 2013, the court held that in execution proceedings, the *Civil Procedure Act* and the rules thereto apply. Under Order 42 rule 6, an applicant must satisfy the conditions thereof and be able to demonstrate the substantive loss to be suffered if the stay of execution is not allowed as held in *Jenny Luesby v Standard Group Limited* [2014] eKLR. The appellant has demonstrated eminent danger and threat of execution since a demand to pay the total decretal sum has been issued.
9. The appellant has a good appeal with high chances of success taking into account the trial court failed to take into account the entire record and evidence while analyzing the leave days due to the respondent. If the respondent is allowed to proceed with execution, the total amount due will not be refunded upon a successful judgment.
10. The respondent submitted that Order 42 Rule 6 of the *Civil Procedure Rules* requires an applicant to demonstrate the substantial loss to be suffered. In *Elena Doudoladova Korir v Kenyatta University* [2014] eKLR, the court held that an applicant seeking a stay of execution must demonstrate what substantial loss to be suffered which the appellant has failed to address. The loss to be suffered must be that which the applicant finds important and necessary to address to secure its right of appeal which is lacking in this case. The court must be satisfied that there is a likelihood of loss if the stay is not allowed.
11. The respondent submitted that about security, the appellant has failed to comply and has not offered anything and the court should take this into account and dismiss the application with costs.

### **Determination**

12. The appellant is essentially appellant is seeking a stay of execution pending the hearing and determination of the appeal herein. The appeal arises from the judgment in Mombasa MCELRC E566 of 2021. The main issue in the appeal is that there was an error in the trial court awarding the respondent notice pay yet this was a continuing injury and was time barred. The appellant contests



that it submitted all leave records yet the trial court went ahead to award the same contrary to Section 28 of the *Employment Act*, 2007.

13. The core issue in the Memorandum of Appeal is the payment of annual leave. This is emphasized by Lugadiru in the Supporting Affidavit.
14. Order 42 Rule 6 of the *Civil Procedure Rules* has set principles to assist an applicant and the court in determining an application seeking a stay of execution.
15. The main issue for the court to address is the substantial loss to be suffered if the judgment sum is paid. the Court of Appeal in *Sbell Ltd v Kibiru and Another* [1986] KLR 410 held that;

It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. 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 a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money.

16. This position is reiterated in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR. In the case of *Nduhiu Gitahi and Another v Anna Wambui Warugongo* [1988] 2 KAR, the court held that;

We are faced with a situation where a judgment has been given. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function to disadvantage Defendant while giving no legitimate advantage to Plaintiff..... It is our duty to hold the ring even-handedly without prejudicing the issue pending the appeal...

17. In this case, the contested leave days were assessed by the trial court at Ksh.984, 549. On the grounds of appeal, it will serve justice for the court to address first before the same can be applied as necessary. It will serve justice to secure both parties where such an amount is placed in a joint interest-earning account held by both parties.
18. As outlined above, there is a cross-appeal. Both parties have an interest in having the matter heard and determined.
19. For these reasons, the application dated 25 April 2024 is with merit and is allowed on the condition that the appellant shall deposit the sum of Ksh.984, 549 in a joint interest-earning account held by both parties within 30 days and failure to which the order of stay shall automatically lapse. For the Appeal, file the Record of Appeal and Record of Cross-appeal within 14 days from the date hereof. Attend for taking hearing directions on 25 July 2024. Costs to abide by the outcome of the appeal.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 4<sup>TH</sup> DAY OF JULY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

