



Kilonzo (Suing as the administrator and persona representative of the Estate of Benjamin Kyalo Masila) v Albeity Logistics Limited & another (Miscellaneous Application E004 of 2024) [2024] KEELRC 2092 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2092 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E004 OF 2024**

M MBARŪ, J

JULY 25, 2024

BETWEEN

MARY WAVINYA KILONZO (SUING AS THE ADMINISTRATOR AND PERSONA REPRESENTATIVE OF THE ESTATE OF BENJAMIN KYALO MASILA) APPLICANT

AND

ALBEITY LOGISTICS LIMITED 1ST RESPONDENT

FEISAL ISLAM 2ND RESPONDENT

RULING

1. The respondents, Albeity Logistics Limited and Feisal Islam filed an application dated May 2024 seeking orders that;
 1. ...
 2. ...
 3. After the hearing interparties of this application, the court be pleased to grant a stay of execution of the ruling of this suit delivered on 9 May 2024 pending the hearing and determination of the intended appeal to be lodged at the Court of Appeal.
 4. Costs.
2. The application is supported by the affidavit of Feisal Islam the 2nd respondent who avers that in the ruling delivered on 9 May 2024, the respondents are dissatisfied with the order that they should pay the applicant the sum of Ksh.982, 080 as compensation assessed by the Director for work injury within 30 days after which costs and interests should accrue. The 30-day ultimatum given is due to lapse on



- 8 June 2024 and unless the respondent re allowed to appeal, execution will proceed and frustrate the same. The intended appeal is bona fide, arguable and has a higher chance of success.
3. Feisal Islam avers that the respondents have applied for typed proceedings and ruling herein to allow them to file an appeal. The pronouncement of the Court of Appeal on the issues of law herein will bring to a stop the current conflicting precedents touching on matters in question. The court on various occasions has had different positions on the question of the enforcement of work injury claims hence, a judgment by the Court of Appeal will address the same. Unless the order of stay is allowed, prejudice and loss will occur.
 4. In reply, the applicant filed a Replying Affidavit and avers that the respondents' application does not comply with the principles of Order 42 Rule 6 of the [Civil Procedure Rules](#). There is no security deposit or any offer to secure the orders herein while the matter is addressed in the intended appeal. There is a money decree and nothing to demonstrate what substantive loss the respondent will suffer if the same is paid to the applicant. There is nothing to demonstrate there is an intended appeal, no memoranda is filed in save to urge the court that there are conflicting decisions by the court.
 5. Both parties attended court and agreed to address the application by way of written submissions.
 6. The respondents submitted that in the case of [Tshusho Capital Kenya Limited v Anthony Mbutia Kiburi & Another](#) [2019] eKLR the court outlined the principles to be addressed by an applicant seeking a stay of execution to allow the filing of an intended appeal. Order 42 rule 6 requires the applicant to demonstrate the substantial loss to be suffered, and to apply without delay and also the security deposit. The respondents have met these conditions.
 7. The respondents have filed a Notice of Appeal and applied for typed proceedings to allow them to file the appeal. in the case of [Richard Akama Nyambane v Maitoro Spa](#), Nakuru ELRC; [Jared Ingling Obuya v Handicap International](#); and [Ruth Wambui Mwangi & Another v Alfarah Wholesalers Limited](#) [2017] eKLR the court has in these decisions has made conflicting decision on the same question of the enforcement of work injury claims. Litigants faced with similar cases will benefit from the Court of Appeal's decision on the matters herein.
 8. The respondents submitted that the applicant's claim of Ksh.982, 080 is a substantial sum and is not able to repay if the appeal is successful there is an arguable appeal with high chances of success and for security, the respondents have offered a bank guarantee which I allowed as held in the case of [Geonet Communications Limited v Safaricom Plc](#) [2021] eKLR.
 9. The applicant submitted that under Order 42 rule 6, an applicant seeking a stay of execution must demonstrate the substantial loss to be suffered if the stay of execution is not allowed. In [James Wagalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR the court held that without demonstrating the substantial loss to be suffered, an application seeking a stay of execution should not be allowed to deny a decree holder the fruits of the judgment. In the case of [Saidi Mohamed v Diamond Industries Limited](#) [2018] eKLR the court has jurisdiction to enforce work injury awards which are not contested by the respondents in the instant application. To allow the application will deny the applicant a fair chance to be paid for the work injury suffered by the Estate of the deceased which has been due and owing from the date of the award on 8 February 2023. The application should be dismissed with costs.

Determination

10. The application is premised under the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#). Under these provisions, an applicant should demonstrate that pending the hearing of the intended appeal, there is the likelihood of suffering substantive loss and damage if the stay is not allowed. Hence,



the purpose of an application for a 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. See Nicholas Stephen Okaka & another v Alfred Waga Wesonga [2022] eKLR.

11. The issue by the respondents herein as applicants is that they seek orders of stay herein to allow them to prosecute an intended appeal. There is no appeal. The intention to file an appeal is only based on the Notice of Appeal. In the written submissions, the respondent has urged the court to consider various decisions by the court concerning the enforcement of the decisions of the Director of Occupational Health and Safety through the court. However, to allow a stay of execution pending an intention as to whether to file an appeal or not is discretionary. The court must be persuaded that, even where such a right of filing an intended appeal exists, it is indeed actualized through a draft memorandum of appeal. Even though this is not the court to address the intended appeal, there exist valid orders herein. The applicant holds the legitimate expectation that the fruits of the orders herein will be realized.
12. The Court when granting the stay of execution pending an applicant filing an intended appeal must therefore, must balance the interests of the Appellant with those of the Respondents.
13. In this case, the court is not persuaded by what substantial loss the respondents stand to suffer if the order of stay is not granted. Also, there is nothing to demonstrate that the intention to appeal is actualized through any draft memorandum as held in Cabinet Secretary Ministry of Health v Aura & 13 others (Civil Application E583 of 2023) [2024] KECA 2 (KLR) that even though no draft memorandum of appeal is attached to the application, such must be demonstrated in the body of the application, this is lacking in this application. To contradistinguish various cases decided by the court to apply as the sole reason for seeking a stay of execution pending hearing an intended appeal is to negate the principle. See Commissioner of Customs v Anil Doshi, {2017} eKLR; Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008.
14. It is not sufficient to state that the applicant as the respondent herein will not be able to repay the decretal sum if this is paid pending the hearing of the intended appeal. There is a valid order of the court which should only be stayed for cogent reasons.
15. This position is aptly captured in the case of Kenya Shell Ltd v Kibiru & Another [1986] KLR the court held that;

There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money if payment was made since the Respondents would be unable to repay the decretal sum plus costs in two courts...

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. Accordingly, the application dated 8 February 2024 is hereby found without merit and is hereby dismissed. Costs to the applicant.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25 DAY OF JULY 2024.

M. MBARŪ



JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

