



Mwangi v Family Bank Limited (Employment and Labour Relations Cause 331 of 2014) [2024] KEELRC 2177 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2177 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE 331 OF 2014**

DN NDERITU, J

JULY 4, 2024

BETWEEN

FLORA NJOKI MWANGI CLAIMANT

AND

FAMILY BANK LIMITED RESPONDENT

RULING

I. Introduction

1. In a judgment delivered on 27th September, 2023 the court ruled in favour of the claimant and made the following orders:
 - a. A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful
 - b. If the respondent has not done so as at the time of delivery of this judgment, the respondent be and is hereby restrained from advertising, selling, transferring, realizing, or in any other term or manner referred, from disposing of the claimant's properties being LR Bahati/Kabatini block 1/6018 and LR Naivasha/Mwicingiri 4/4909 charged as security in respect of the claimant's loan and mortgage facilities respectively pending the computation and tabulation of the amount actually due and payable in regard to the said facilities based on order (c) below.
 - c. The respondent shall within 30 days of this judgment supply to the claimant a payment schedule that was applicable at the time of the unlawful dismissal based on the preferential interest rate applicable to members of staff and the claimant shall not be liable to pay any other or further amounts beyond those based on the applicable schedule.



- d. Upon the tabulation in (c) above the respondent shall at liberty to demand payments accordance with the terms of the facilities and in case of default proceed to realize the securities in accordance with the law
 - e. Upon payment and settlement of the amounts due and payable the respondent shall immediately notify CRB to delist the claimant
 - f. Having found that the dismissal of the claimant was wrongful, unfair, and unlawful the respondent is hereby restrained from circulating or giving negative or false information to prospective employers concerning the fitness of the claimant for recruitment and employment
 - g. The claimant is awarded a sum of Kshs 2,875,500/= made up as follows:
 - i. One month's salary in lieu of notice....Kshs 120,000/=
 - ii. Compensation for wrongful, unfair, and unlawful dismissal.....Kshs 1,440,000/=
 - iii. Overtime pay.....Kshs 1,075,500/=
 - iv. Salary arrears Kshs 240,000/=

Total Kshs 2,875,500/=
 - h. The respondent is ordered to deliver to the claimant through his counsel a certificate of service within 30 days of this judgment.
 - i. The claimant is awarded costs of this cause.
 - j. All the other claims are denied.
2. In a notice of motion dated 2nd November, 2023 (the application) filed under a certificate of urgency through Murimi, Ndumia, Mbago & Muchela Advocates the respondent is seeking the following orders: -
- a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this application honourable court be pleased to grant stay of execution of the judgment dated 21st September, 2023
 - d. That pending the hearing and determination of the intended Appeal in the Court of Appeal against this Court's judgment dated 21st September, 2023 this honourable court be pleased to grant stay of execution of the court's judgment dated 21st September, 2023
 - e. That cost hereof be in the cause.
3. The application is expressed to be brought under Sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 Rule 6 & Order 51 Rule of the Civil Procedure Rules.
4. The application is based on the grounds on the face of it and supported with the affidavit of Stephen Kimani Ngaru, the respondent's human resource manager, sworn on even date with several annexures thereto.
5. The claimant opposed the application through Manasses, Mwangi & Associates by filing a replying affidavit sworn by herself on 15th November, 2023.



6. Interim orders for stay of execution pending the hearing and determination of the application were issued on 6th November, 2023. On 22nd November, 2023, it directed that the application be canvassed by way of written submissions. Mr. Kirimi for the respondent filed his written submissions on 25th January, 2024 while Mr. Gai for the claimant did not file any submissions.

II. Affidavits

7. As indicated above the respondent is seeking for stay of execution pending the hearing and determination of an intended appeal. There is a notice of appeal annexed to the application dated 26th September, 2023, and filed on 28th September 2023, four (4) days after the judgment was delivered.
8. In the supporting affidavit it is deposed that the decretal sum is substantial and that the claimant's assets are not within the knowledge of the respondent and the respondent shall suffer substantial loss unless stay of execution is granted.
9. It is deposed that the respondent has discharged the legal burden by demonstrating that on reasonable grounds the claimant is incapable of repaying the decretal sum if the appeal ultimately succeeds. Further, it is deposed that the respondent moved to court within reasonable time and it is willing to provide security for the due performance of the decree as by it may be directed by this Honourable court.
10. In the replying affidavit, the claimant deposed that the application is an abuse of the court process, a delaying tactic, and that the same does not meet the legal threshold for stay of execution to issue. It is deposed that if allowed the stay shall cause substantial loss to the claimant.
11. Further, it is deposed that the respondent has not provided security for due performance of the decree hence making the application unmerited and prejudicial to the claimant if granted.
12. It is deposed that the claimant is a financially stable business owner with uniform shops across Kenya. It is further deposed that the respondent has failed to prove that it is likely to suffer substantial loss if the decree is executed.
13. It is deposed that as the court considers the respondent's right to appeal, it should also consider the claimant's right to enjoy the fruits of the lawful judgment. It is deposed that if a stay of execution is granted, the court should direct the respondent to deposit the entire decretal sum in an interest-earning account in the joint names of advocates for the parties.

III. Submissions By Counsel

14. Counsel for the respondent submitted on the principles for granting stay of execution pending appeal as provided for under Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which 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.
15. Counsel cited the case of [Kiambu Transport v Kenya Breweries](#) on conditions applicable for stay of execution.



16. On the issue of unreasonable delay, counsel argues that the notice of appeal was filed within the seven days period provided for under Rule 77 of the [Court of Appeal Rules](#) after the impugned judgment was delivered on 21st September, 2023.
17. On the issue of substantial loss, counsel argues that the logbook furnished by the claimant was not accompanied with a valuation report and no proof of ownership of the alleged business was availed. Counsel further argues that if the appeal ultimately succeeds the respondent will not be in a position to recover the decretal sum from the claimant hence substantial loss. Counsel cited [Mukuma v Abuoga](#) (1988) KLR 645, [Tropical Commodities Suppliers Ltd & others v International Credit Bank Ltd](#) Misc Application No 379/2003 which cited [Antoine Ndiaye v African Virtual University](#) [2015] eKLR and [Daniel Chebutul Rotich & 2 others v Emirates Airlines](#) Civil Case No 368 of 2001 on what amounts to substantial loss.
18. On the issue of proof of ability of a decree-holder to repay the decretal sum, counsel cited [ABN Amro Bank v Le Monde Foods Ltd](#) Application No 15 of 2002, [National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another](#) Civil Application No 238 of 2005(UR 144/2005); and [Alhyder Trading Company Ltd v Lucy Jepngetich Mibei](#) (2016) eKLR. Counsel submitted that the claimant admitted that she is unemployed and that she has failed to demonstrate her ability to repay the decretal sum in case the appeal ultimately succeeds.
19. On the issue of security, counsel argues that the respondent is willing to tender security in accordance with Order 42 rule 6(2) of the [Civil Procedure Rules](#) and that it is willing to have the decretal sum deposited in an interest earning account in the joint names of the advocates for the parties within 60 days. Counsel cited [Vista Holdings International Limited v Span Image \(K\) Limited](#) [2014] eKLR and [Ndubiu Gitabi Warugongo](#) [1988] KLR; 1 KAR 100 [1988-92] 2 KAR 100 on provision of security in an application for stay.

IV. Determination

20. The primary and overriding objective and duty of this court is to do justice in accordance with Article 159 of [the Constitution](#), Sections 1A, & 1B of the [Civil Procedure Act](#), and Section 3 of the [Employment & Labour Relations Court Act](#), amongst many other provisions of the law.
21. Order 42 Rule 6 (2) of the [Civil Procedure Rules](#) grants this court discretionary powers in allowing stay of execution considering factors such as - Whether the appeal raises triable issues; Whether the appeal shall be rendered nugatory if stay is denied; Whether the decree-holder has the ability to repay the money in the case the appeal ultimately succeeds. See - [Butt v Rent Restriction Tribunal](#) (1979) KLR.
22. The application was filed on 2nd November, 2023 and a notice of appeal was filed on 28th September, 2023, four days after the judgment was delivered. Further, the respondent has offered to provide security in due performance of the decree pending the hearing and determination of the appeal.
23. In [Absalom Dova v Tarbo Transporters](#) (2013) eKLR the Court of Appeal interpreted Order 42 Rule 6(2) of the [Civil Procedure Rules](#) on stay of execution pending an appeal to a superior court as follows -

“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 compelling rights focuses on their reconciliation.”

24. In the interest of justice, therefore, the court shall allow the application on the terms set hereunder.

V. Costs

25. The costs of the application shall abide with the costs in the appeal.

VI. Orders

26. The notice of motion dated 2nd November, 2023 by the respondent is allowed on the following terms -

- a. Stay of execution be and is hereby granted pending the hearing and determination of the intended appeal.
- b. The respondent shall within 30 days of this ruling –
 - i. Pay a sum of Kshs 1,500,000/= to the claimant.
 - ii. Deposit the balance of Kshs 1,375,000/= in a joint interest-earning account to be opened in the joint names of the law firms for both parties in a different but reputable financial banking institution other than the respondent.
- c. In default of (b) above, the stay of execution shall automatically lapse.
- d. Costs of the application shall be in the appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 4TH DAY OF JULY, 2024.

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DAVID NDERITU

JUDGE

