



**Sierra Flora Limited v Kerubo (Appeal 29 of 2023)
[2024] KEELRC 1812 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1812 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL 29 OF 2023
DN NDERITU, J
JULY 11, 2024**

BETWEEN

SIERRA FLORA LIMITED APPELLANT

AND

DORCAS KERUBO RESPONDENT

*(Being an appeal from the judgment of the Principal Magistrate (Hon K. Kibelion)
delivered on 2nd October, 2023, in Nakuru CMCC (ELRC) No. 30 of 2022)*

RULING

I. Introduction

1. The appellant herein was the respondent in the above cited lower court trial while the respondent was the claimant.
2. In a judgment delivered on 2nd October, 2023 the lower trial court found in favour of the respondent and awarded her thus –

The claimant’s claim for public holiday and annual leave succeeds as it was incumbent upon the Respondent who is the custodian of leave schedules and approvals to produce the same but did not.

Consequently, I award a sum of Kshs48,616.60 for payment of public holiday worked as pleaded and Kshs29,980/= for annual leave, I therefore tabulate it as follows;

Annual leave Kshs29,980/=

Public holidays Kshs48616.60

Total sum payable Kshs78,596.60



Cost of the claim awarded to the claimant.

Dated and delivered at Nakuru this 2nd day of October, 2023.

K. Kibelion

Principal Magistrate

3. On 17th October, 2023 the appellant filed a memorandum of appeal raising the following grounds of appeal against the impugned judgment –
 - a. That the learned trial magistrate erred in law and fact by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent Kes29,980 being annual leave.
 - b. That the learned magistrate erred in law and fact by failing to consider the evidence adduced by the Appellant by awarding the Claimant/Respondent Kes48,616.60 as payment for public holidays.
 - c. That the learned magistrate erred in law and fact by failing to consider the evidence adduced by the Appellant by awarding the Respondent costs of the suit.
 - d. The learned magistrate totally misdirected himself in delivering the judgment in favour of the Respondent, by failing to consider and appreciate the evidence on record, thus reaching a wrong and unfair conclusion awarding the Claimant/Respondent payment for annual leave and public holidays.
 - e. The learned magistrate erred in law and fact in disregarding the evidence adduced by the Appellant in the award to the Claimant/Respondent resulting in unjust enrichment of the respondent to the unfair detriment of the Appellant.
4. In the intended appeal the appellant is seeking that –
 - a. The appeal be allowed.
 - b. The Judgment of Honourable K. Kibelion made on 2nd October, 2023 in Nakuru CMELRC/ E030/2022 Dorcas Kerubo versus Sierra Flora Limited, be set aside in entirety and be substituted by appropriate orders of this Honourable Court.
 - c. That this Honourable court do dismiss the Respondents case in CMELRC30/2022 Dorcas Kerubo versus Sierra Flora Limited with costs to the Appellant.
 - d. The Appellant be awarded costs of this Appeal.
5. In a notice of motion (the application) dated 16th October, 2023, filed under a certificate of urgency the appellant is seeking for the following orders –
 1. Spent.
 2. That this Honourable court be pleased to order stay of execution in NakuruCMELRC Suit No.30 of 2022 Dorcas Kerubo Vs Sierra Flora Limited pending the hearing and determination of this Application.
 3. That this Honourable court be pleased to order stay of execution in NakuruCMELRC Suit No. 30 Of 2022 Dorcas Kerubo Vs Kierra Flora Limited pending the hearing and determination of this appeal.



4. That the costs of this Application be provided for.
6. The application is based on the grounds on the face of it and expressed to be brought pursuant to Order 12 Rule 7, Order 22 Rule 22, Order 42 Rules 4 & 6, Order 51 Rules 1 & 3 of the Civil Procedure Rules, Sections 3, 3A, 79G, & 95 of the [Civil Procedure Act](#).
7. The application is supported with the affidavit of Tom Welikhe, the human resources & administration of the appellant, with several annexures thereto.
8. On 17th October, 2023 the court issued an ex-parte order for stay of execution which order was by consent extended on 24th October, 2023 pending the hearing and determination of the application inter-partes. The court, with concurrence from counsel for the parties, Mr. Aziz for the appellant and Miss Eveliah for the respondent, directed that the application be canvassed by way of written submissions.
9. Counsel for the appellant filed his written submissions on 13th December, 2023, while counsel for the respondent filed on 12th February, 2024.

II. Evidence & Submissions by Counsel

10. In the supporting affidavit, it is deposed that after the judgment was delivered and communicated to the appellant by the respondent's counsel on 4th October, 2023, the appellant applied and obtained a copy of the judgment on 11th October, 2023. Thereafter, the appellant filed the memorandum of appeal on 17th October, 2023.
11. I have not seen on record a replying affidavit by the respondent and as such the court, in terms of evidence on record shall go by the depositions in the supporting affidavit by the appellant.
12. Counsel for the appellant raised two issues for determination – Whether the court should grant and issue an order for stay of execution pending the hearing and determination of the intended appeal; and, Costs.
13. On the conditions upon which a court may stay execution pending appeal, counsel cited *Lavington Guards Limited V Jeremiah Mosei Omambia (2023) eKLR* arguing that for an applicant to succeed he/she/it needs to demonstrate sufficient cause, substantial loss, no unreasonable or inordinate delay, and security offered by an applicant for due performance of the decree.
14. On the first ingredient it is submitted that the intended appeal is not an idle one. It is submitted that the filed grounds of appeal speak for themselves that the appeal is arguable. Counsel cited *Kenya Airways Limited V Kenya Aviation & Allied Worker Union (2020) eKLR* in that respect.
15. On the appeal being rendered nugatory, it is submitted that the respondent has not demonstrated her ability to repay the decretal sum in case the appeal ultimately succeeds. It is submitted that in that case the appeal shall be rendered merely academic hence nugatory.
16. The court is invited to exercise its discretion and allow the application. In that regard the court is urged to follow *Butt V Rent Restriction Tribunal (1979) KLR*.
17. On substantial loss it is submitted that the amount involved in the sum of Kshs78,596.60 plus costs and interest is substantial especially when viewed from the fact that the respondent has not demonstrated ability to repay in case the appeal ultimately succeeds. The court is urged to be persuaded by *G. N. Muema P/AMt View Maternity & Nursing Home V Mariam Bishar & Another (2018) eKLR* to the effect that substantial loss does connote huge or substantial amounts of money.



18. Further, it is submitted that the memorandum of appeal and the application were filed without undue delay. It is submitted that the appellant is ready and willing to comply with orders of court in regard to provision for security in due performance of the decree. On costs it is submitted that costs follow the event.
19. On the one hand, counsel for the respondent submitted that the application is frivolous, vexatious, abuse of court process, and that the same should be dismissed with costs.
20. It is submitted that the application does not meet the threshold set in Order 42(6)(2) of the Civil Procedure Rules. Citing *G N Muema V Miriam Maalim Bishar & Another (Supra)* and *Silverstone V Chesoni (2002) eKLR* it is submitted that the appellant has not demonstrated what substantial loss may be incurred if the stay of execution is denied. It is further submitted that the appellant has not offered or proposed any security in due performance of the decree.
21. It is submitted that justice delayed is justice denied and the court is urged to consider that the respondent is entitled to the fruits of a lawful judgment and decree from a competent court.

III. Issues for Determination

22. The court has carefully gone through the memorandum of appeal, the application, and the written submissions by counsel for both parties. There is only one issue for determination in the application – Should the court issue an order for stay of execution pending the hearing and determination of the appeal?
23. There is no doubt that the appellant filed the memorandum of appeal and the application without delay. Although the amount involved is not substantial per se, the alleged likelihood of the respondent not being capable of refunding the same in case the appeal ultimately succeeds may render the appeal merely academic and hence nugatory.
24. On the other hand, it is submitted that the appellant is ready and willing to comply with any orders that the court may impose in providing security for due performance of the decree in case the appeal ultimately fails.
25. In an application for stay of execution the interests of the decree-holder and those of a judgment-debtor come into direct conflict. This is so because on the one hand the decree-holder is legally entitled to the fruits of a lawful judgment and on the other the judgment-debtor argues that it has an arguable appeal that may be rendered nugatory or merely academic if the decretal sum is paid and the appeal ultimately succeeds. More so where the decree-holder has no means to repay.
26. In my considered view, the appellant has, without doubt, demonstrated the likelihood of an arguable appeal based on the memorandum of appeal. The respondent has not demonstrated or alluded to her ability to repay the money if the appeal ultimately succeeds. The court has gone through the decisions cited by either side in support of their respective positions.
27. In the entire circumstances of the application, the court should secure the decretal sum pending the hearing and determination of the appeal on such conditions as not to prejudice either party. The application is thus allowed on the conditions set below.

IV. Orders

28. In allowing the application, the court issues the following orders -



- a. An order for stay of execution be and is hereby issued pending the hearing and determination of the appeal.
- b. The entire decretal sum of Kshs78,596.60 shall be deposited in court within 14 days of this ruling.
- c. The appellant shall prepare, file, and serve a record of appeal and set the same for directions within 30 days of this ruling.
- d. In default of (b) or (c) above the stay shall automatically lapse.
- e. The costs of the application shall abide in the appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 11TH DAY OF JULY, 2024.

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DAVID NDERITU

JUDGE

