

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. E053 OF 2023

MKOMBE MUNGA MWAIKIZA APPELLANT

VERSUS

BABITO GENERAL CONTRACTOR & SUPPLIERS LIMITED RESPONDENT

RULING

The respondent, Babito General Contractors & Suppliers Limited, filed an application dated 13 September 2024, seeking orders to stay the taxation process to allow for the hearing of the appeal. The respondent is also seeking that the judgment of the trial court be set aside and be substituted with an order of this court determining the dispute.

The application is supported by the Supporting Affidavit of Abeid Kombo Abeid, the human resource officer, who avers that judgment was delivered on 22 February 2024 in Mombasa CMELRC E118 of 2020 with a finding:

- a) There was unfair termination of the appellant's employment by the respondent.**
- b) Compensation awarded at Ksh. 18,880.57;**
- c) Notice pay awarded at Ksh. 18,880.57;**
- d) House allowance due is ksh. 101,025.45.**
- e) underpayments assessed at KSh. 275,879;**
- f) A Certificate of Service shall issue in accordance with Section 51 of the Employment Act, 2007;**
- g) The appellant is awarded costs of this appeal. Each party to bear own costs for the lower court proceedings.**

The appellant filed the party and party bill of costs.

Aggrieved by the judgment, the respondent filed a Notice of Appeal on the grounds that there was an error in the judgment in finding that the procedures adopted by the respondent in terminating employment were unfair, whereas there was evidence of the appellant absconding from duty. There were justified reasons leading to the termination of employment. The appellant was entirely responsible for the termination of his employment by absconding from duty, and therefore, the awards by the court were not justified.

There is an arguable appeal with high chances of success. The respondent shall abide by the terms and conditions as directed by the court for the stay of execution. The instant application is filed without

delay and should be allowed to secure the respondent's right of appeal.

In reply, the appellant filed the Replying Affidavit of Caroline Mboku, advocate, who avers that she is conducting the matter. The application by the respondent does not meet the threshold for the grant of a stay of execution. Judgment was delivered on 22 February 2024, and there was no payment of the default sum or offer to negotiate on the payment. The respondent has not demonstrated the substantial loss to be suffered if the order of stay of execution is not issued. There is an incredible delay in finalising the instant application without any reasonable explanation. The respondent has not offered any security for the due performance of the judgment herein.

Mboku avers that Order 42 rule 6 requires an applicant to meet the conditions for stay of execution, which the respondent has failed to address. The orders ought not to be justified, and the application should be dismissed with costs.

Both parties attended and addressed the application through written submissions.

The submissions are analysed, and the single issue for determination is whether the court should allow a stay of execution of the judgment herein delivered on 22 February 2024.

Indeed, an applicant seeking a stay of execution to allow the hearing of an appeal at the Court of Appeal is regulated under Order 42, Rule 6 of the Civil Procedure Rules. The applicant must satisfy the conditions that:

- 1) The length of the delay and whether it is inordinate.
- 2) The explanation for the delay and whether it is reasonable and bona fide.
- 3) Whether the application was brought promptly once the applicant became aware of the delay.
- 4) Whether the intended appeal has reasonable prospects of success (i.e., is arguable).
- 5) Whether the respondent would be prejudiced by the grant.

Whereas judgment was delivered on 22 February 2024, the instant application was filed on 13 September 2024. The delay in addressing the issue of stay of execution only arose while the appellant was addressing the Party and the Party's bill of costs. The respondent did not address the issue of staying for over 7 months. The delay is not addressed. A period of 7 months lapse is inordinate.

Although there are grounds of appeal addressed in the application, that alone is not a sufficient ground for the grant of a stay of execution. The loss to be suffered if the order of stay of execution is not gone into. An application should address the nature of loss to be suffered and the prejudice apparent if the orders sought are not issued.

For the court to allow a stay of execution, reasonable grounds must be gone into, taking into account that there is a valid judgment and the appellant should be allowed to enjoy the fruits of his judgment. The discretion of the court to stay its orders must be based on cogent reasons.

The hearing of the instant application was stalled on various occasions to allow the respondent to consult between counsel and the client. This was to agree on a security deposit to ensure the due performance of the judgment herein, pending the hearing of the appeal. There was no offer or deposit.

The court interprets this as an indication that the respondent is unwilling to deposit any security and desires to proceed with its appeal without conditions. The conditions under Order 42 Rule 6 are inherently protective of both parties. Whereas an appellant should be allowed the right of appeal, a respondent should be secured in the judgment at hand.

Without the respondent herein satisfying the conditions of stay, the application dated 13 September 2024 is without merit and is hereby dismissed with costs to the appellant. Taxation to proceed before the Taxing Master.

Delivered in open court at Mombasa, this 16th day of October 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Japhet

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