



REPUBLIC OF KENYA



**Western Steel Mills Limited v Muheyi & another (Employment and Labour Relations Appeal E025 of 2014) [2025] KEELRC 120 (KLR) (23 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 120 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E025 OF 2014  
MA ONYANGO, J  
JANUARY 23, 2025**

**BETWEEN**

**WESTERN STEEL MILLS LIMITED ..... APPLICANT**

**AND**

**CHARLES MMASI MUHEYI ..... 1<sup>ST</sup> RESPONDENT**

**AFRITOP ENTERPRISES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 30<sup>th</sup> July 2024 brought by the Appellant/Applicant under Articles 21, 22, 25(c), 50(1), 159(2)(d) and 162(2)(a) of *the Constitution*, sections 12 and 20 of the *Employment and Labour Relations Court Act*, Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, section 1A, 1B, 3A & 79G of the *Civil Procedure Act*, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and section 59 of the *Interpretation and General Provisions Act*. It seeks the following orders:
  - i. Spent
  - ii. Spent
  - iii. Spent
  - iv. This Honorable Court be pleased to stay the Judgment delivered on 2<sup>nd</sup> May 2024 by Honorable P. Areri and the resultant certificate of assessed costs pending the hearing and determination of the appeal filed herein.
  - v. The costs of this application to abide in the appeal.
2. The application is premised on the grounds set out on the face thereof to wit; that the Applicant/Appellant has just instructed its Advocates RGO Advocates LLP to represent it in this appeal; that the



Appellant/Applicant was never served with the Plaint and summons with regards to the suit CMCC No.42 of 2018 in the subordinate Court and only became aware of the matter once it was served with the notice of entry of judgment; that the Appellant/Applicant filed an application dated 13/05/2024 to set aside the Judgment in CMCC No.42 of 2018 as the suit had been heard ex parte; that the Applicant even offered security as long as its constitutional rights to a fair hearing could be upheld; that the Honourable trial Court dismissed the application vide a ruling on the 18th of July 2024; that the 1st Respondent has already initiated the process of execution of the Judgment; that the Appellant/Applicant is apprehensive that if the 1st Respondent executes the Judgment before this application is heard and determined it will suffer irreparable harm; that the Appellant/Applicant is apprehensive that if the orders sought herein are not granted the appeal filed herein will be rendered mute and thus will be an academic exercise and lastly, that the Appellant/Applicant is willing to offer security or any other condition the co might direct as long as its rights to a fair hearing are upheld.

3. The application is supported by the annexed affidavit of Michael Njuguna, the Applicant's Human Resource Manager sworn on 30<sup>th</sup> July 2024. The said affidavit reiterates the contents in the grounds set out in the application.
4. The application is opposed. The 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on 19<sup>th</sup> October 2014 in which he contended that the application is incompetent and fatally defective since it is premised on wrong provisions of the law. He deposes that the Applicant's manager was personally served with all court pleadings hereto being summons to enter appearance, Plaint, Plaintiff's list of documents, Plaintiff's list of witnesses and plaintiff's witness statements which service was acknowledged by the applicant by signing. In addition, the 1<sup>st</sup> Claimant avers that the Applicant has never requested to cross-examine the process server on the contents of his affidavit of service which is on the court record. According to the 1<sup>st</sup> Claimant, there cannot be stay for taxed costs because once certificate of costs has issued it is final and binding on the parties. The 1<sup>st</sup> Claimant contends that the instant application is aimed at taking him in circles and to prevent him from enjoying the fruits of litigation, that the same is only aimed at subjecting this honourable court to double work in a matter where judgement was validly entered in his favour.
5. In a rejoinder, the Applicant filed a further affidavit sworn on 11<sup>th</sup> November 2024 by Michael Njuguna. The deponent reiterated the contents of the supporting affidavit and averred that the application is anchored on the constitutional right to a fair hearing. In addition, the deponent maintained that the Applicant was never served with any pleadings relating to this suit and that it is now seeking a chance to be heard fairly and to present its case as the judgment of the trial court which was ex-parte. The Applicant has deposed that it is willing to comply with all this court's direction including but not limited to paying thrown away costs and depositing half of the decretal amount in court.
6. The application was canvassed by way of written submissions. Both parties filed their respective submissions.
7. In its submissions dated 11<sup>th</sup> November 2024, the Applicant maintained that its appeal dated 24<sup>th</sup> July 2024 is meritorious and further, that the Applicant has met the threshold for grant of orders of stay pending appeal.
8. The 1<sup>st</sup> Claimant in its submissions dated 8<sup>th</sup> March 2024 reiterated that the judgment in Eldoret CMCC was duly and regularly entered in his favor after the Applicant refused to participate in the proceedings in Eldoret CMCC No. 42 of 2018 despite being served with pleadings.



9. It is further submitted that the Respondent was also awarded costs of the suit which costs have been assessed by the Honourable court and that there cannot be stay for taxed costs because once certificate of costs is issued, it is final and binding on the parties.
10. According to the 1<sup>st</sup> Respondent, the Applicant's intended appeal against the ruling of the trial magistrate in Eldoret CMCC No 42 of 2018 does not raise triable issues.
11. The 1<sup>st</sup> Respondent further submitted that the instant application is fatally defective for want of authority to swear on behalf of a limited company and ought to be struck out. It is the 1<sup>st</sup> Respondent's submission that order 4 Rule 1 of the Civil Procedure Rules, 2010 requires swearing of documents on behalf of a corporation to be under seal.
12. It is also the 1<sup>st</sup> Respondent's submission that the Applicant has not met the threshold for the grant of stay of execution orders. In this regard, he submits that the Applicant has not shown that it stands to suffer irreparable harm if the execution is allowed to proceed and also, that it has not demonstrated that the 1<sup>st</sup> Respondent is a man of straw incapable of refunding the decretal money should the appeal succeed.
13. It is further submitted that the Applicant's intended appeal is based on a money decree and such appeals are never rendered nugatory for one can sue for recovery.
14. In the end, the court was urged to dismiss the application with costs.

### **Determination**

15. I have considered the application before court, the rival affidavits as well as the submissions on record. In my view, the issues that falls for this court's determination are:
  - i. Whether the court can order for stay of execution of taxed costs
  - ii. Whether the Appellant has met the requirements for grant of orders of stay of execution pending the hearing and determination of the Appeal.

### **Whether the court can order for stay of execution of taxed costs**

16. The Applicant in the instant application seeks stay of execution of the trial court's judgment delivered on 2<sup>nd</sup> May 2024 and stay of the resultant certificate of assessed costs pending the hearing and determination of the appeal.
17. The 1<sup>st</sup> Respondent has contended that there cannot be a stay for taxed costs because once a certificate of costs is issued, it is final and binding on the parties.
18. The grant of stay of execution orders is discretionary. The essence of an order for stay of execution is to maintain status quo to prevent a party from suffering substantial loss which may not be compensated by way of damages. In *Absalom Dova vs Tarbo Transporters* (2013) eKLR. The court observed 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 include 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 competing rights focuses on their reconciliation.”

19. Further, in the case of *Republic v Kenya Urban Roads Authority & 3 others Ex-parte Cyttonn Investments Management Limited* [2018] eKLR the court defined a stay order as follows: -

“A Stay Order is defined as a court order halting or suspending a judicial proceeding either fully or temporarily. Such orders are issued in order to suspend or stop a legal action until a certain condition is fulfilled or a particular event occurs. The court can lift the suspension later on and re-commence the legal proceeding. In general, however, there are two types of Stay Orders: a Stay of Execution and a Stay of Proceedings. A Stay of Execution is a Stay Order issued by court suspending or delaying the enforcement of a judgment against a person.”

20. In the instant case, the trial court already assessed costs and issued a certificate of costs. The 1<sup>st</sup> Respondent contends that such certificate of costs cannot be stayed.
21. Since costs are derived from a judgement and decree which are subject to review by an appellate court, the 1<sup>st</sup> Respondent’s argument that there cannot be a stay for taxed costs because once a certificate of costs is issued it is final and binding on the parties cannot be true. Costs arise from a judgement and decree. A stay of the judgement and decree would also stay the certificate of costs and where the judgement and decree are set aside, all consequential orders including the certificate of costs are also set aside. I thus find no basis for the argument by the 1<sup>st</sup> Respondent.

**Whether the Appellant has met the requirements for grant of orders of stay of execution pending the hearing and determination of the Appeal.**

22. From a perusal of the Memorandum of Appeal filed by the Applicant in this matter, it is clear that the Applicant challenges the trial court’s decision and seeks to have the judgement and all consequential orders set aside and the suit referred back to the trial court for hearing and determination on merit.
23. Order 42 Rule 6 of the Civil Procedure Rules, 2010 provides for the circumstances when the court may order stay of execution of a decree pending an appeal. The applicant is required to demonstrate that:
- a. Substantial loss may result to the applicant unless the order was made;
  - b. The application was made without unreasonable delay;
  - c. 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.
24. In the case of *RWW v EKW* [2019] eKLR, the court observed as follows;

“The purpose of an application for 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.



Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

25. With regard to whether substantial loss may result to the Applicant if the order for stay is not granted, the trial court entered judgment in favour of the 1<sup>st</sup> Respondent on 2<sup>nd</sup> May 2024. The Applicant has averred that the 1<sup>st</sup> Respondent is in the process of executing the judgment and the resultant decree as well as the certificate of costs. There is likelihood that should the orders of stay not issue the 1<sup>st</sup> Respondent will execute against the Applicant and thereby occasion the Applicant substantial loss. I am therefore persuaded that substantial loss has been proved.
26. The next question is on delay. In the case of *Utalii Transport Company Ltd & 3 Others -vs- NIC Bank Ltd & Another* 2014 eKLR the Court observed as follows: -
- “Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth.
- Nevertheless inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable, conclusion that it is inordinate and therefore caution is advised for courts not to take the word “inordinate” in its dictionary measuring but in the sense of excessive as compared to normality”.
27. From the material placed before court, it is clear that the trial court delivered its judgment, the subject of the appeal on 2<sup>nd</sup> May 2024. The Applicant thereafter filed the application dated 13<sup>th</sup> May 2024 before the trial court seeking for orders of stay of execution of the judgment and setting aside of the ex-parte judgment which application was dismissed vide the trial court’s ruling delivered on 18<sup>th</sup> July 2024. The Applicant made a second attempt to secure a stay of execution by filing the instant application on 30<sup>th</sup> July 2024, just 6 days after the trial court’s ruling. I am thus satisfied that the filing of the application was timeous.
28. With regard to the issue of security for due performance, this court has discretion to issue appropriate orders to meet the ends of justice. The Applicant has offered to comply with any orders as to security as this court may order.
29. Flowing from the above, I find and hold that the Appellant/Applicant has satisfied this court on the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.
30. Consequently, I find the application dated 30<sup>th</sup> July 2024 to be meritorious and allow it. I therefore make the following orders:
- i. There shall be stay of execution of the judgment delivered on 2<sup>nd</sup> May 2024 and the resultant certificate of assessed costs pending determination of the Appeal filed by the Appellant/Applicant
  - ii. The stay of execution is subject to the Applicant depositing half (50%) of the decretal sum in a joint interest earning account in the names of the counsels for both parties within 30 days.
31. The costs of this application shall abide the outcome of the appeal.



DATED, DELIVERED AND SIGNED AT ELDORET THIS 23<sup>RD</sup> DAY OF JANUARY, 2025.

M. ONYANGO

JUDGE

