



REPUBLIC OF KENYA



**Patriotic Group of Companies v Barasa (Civil Appeal E001 of 2024)
[2025] KEELRC 462 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 462 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E001 OF 2024**

JW KELI, J

FEBRUARY 20, 2025

BETWEEN

PATRIOTIC GROUP OF COMPANIES APPELLANT

AND

DAVID SORE BARASA RESPONDENT

RULING

1. The applicant dissatisfied with the Judgement of Honourable L. B. Koech dated on 19th day of December, 2023 in CMEL Cause No. E834 of 2021 filed a memorandum of appeal dated 3rd January 2024 and further filed a Notice of Motion application of even date under Section 1A, 1B and 3A of the *Civil Procedure Act* Order 42 Rule 6 Order 51 Rule 1 of the Civil Procedure Rules seeking for the following substantive Orders:
 1. That, pending hearing and determination of the Appeal herein this Honourable Court be pleased to Order for Stay of Execution of the Judgment of Hon. L. B. Koech dated 19th December, 2023 in CMEL Cause No. E834 of 2021.
 2. That cost of this application be granted to the Applicant.
2. Grounds of the application -
 - a. That, the Applicant is aggrieved by the decision of the court in CMEL CAUSE NO. E834 OF 2021 delivered on 19th December, 2023 and has since lodged an appeal challenging the judgment and decree.
 - b. That, the judgment being substantial should the execution proceed the Applicant stand to suffer irreparable loss and prejudices.



- c. That, the ability of the Respondent to refund the decretal sum is unknown and indeed the Appeal raises serious triable issues with high chances of success and hence failure to stay the execution of the Judgment and or decree the appeal shall stand to be nugatory.
3. The application was further supported by the Affidavit of Jeniffer Kigen sworn on the 2nd April 2024 where she annexed the judgment of the lower court and stated that they were willing to deposit security of performance of Decree in court.
4. The application was opposed through the advocate of the Respondent, Willis Wetaba Nanjendo vide a replying affidavit dated 7th October 2024 who stated the appeal had no chance of success and the applicant had not satisfied one component of stay of execution being security. That the respondent would be prejudiced by issuance of stay for delay in access to fruits of judgment and further that the stay should be conditional to payment of auctioneer fees, release of 50 % of the decretal monies to the claimant and the other 50% in interest earning joint account within 7 days of court order.
5. The application was canvassed vide written submissions. Only the applicant filed. The respondent relied on the replying affidavit by Willis Wetaba Nanjendo Advocate.

Decision

6. The Employment and Labour Relations Court (Procedure) Rules 2024 on stay of execution pending appeal Rule states: - “21. (1) Where an application for stay of execution pending appeal has been lodged, the applicant shall, in the supporting affidavit, declare whether a similar application has been filed in any other court.
- (2) An application for stay of execution pending appeal shall be filed in the appeal file.” Since the Court Rules are silent on the conditions for granting stay then the lacuna is addressed by Order 42 Rule 6 (2) of the Civil Procedure Rules to wit:- “(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.”
7. The parties relied on several authorities which the court noted were consistent with the decision in Butt -vs Rent Restriction Tribunal (1982) KLR 417 where the Court of Appeal(Madan J.A) gave guidance on how a Court should exercise discretion in an application for a stay of execution, that: -

“ If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”



8. Applying the foregoing principles(in Butt case,supra) and the taking into consideration the contents of the replying affidavit by the Respondent's advocate in response to the application, the issues raised being the satisfaction of security, triable issues in the appeal and prejudice to the respondent for delay in enjoyment of fruits of judgment. On security the applicant vide affidavit of Jennifer Kigen stated they were willing to deposit security. The Respondent alleged some auctioneer fees but no evidence was annexed. On whether the appeal raised triable issues the court established issues raised were triable being the award of one month notice pay of Kshs 119,092 when the monthly salary was Kshs. 9600 and the finding of unlawful termination being challenged on basis of position that the respondent was dismissed for failure to perform duties as a guard. The memorandum of appeal was filed timely on the 3rd January 2014 the lower court having delivered it judgment on the 19th December 2023.
9. The power of the Court to grant or refuse an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal(Butt, supra). The risk of the appeal being rendered nugatory in the instant case was proved as the Respondent did not rebut the assertions by the applicant that he was not capable of refunding the decretal amount in the event the appellant was successful on appeal.
10. In the upshot, the court held the application as merited and exercised its judicial discretion to allow the application as follows:-
 - a. That, a temporary order of stay of execution of the Judgment of Hon. L. B. Koech dated 19th December, 2023 in CMEL Cause No. E834 of 2021 is hereby issued pending hearing and determination of the Appeal herein on condition that the decretal amount is deposited in a joint interest-earning account opened by the advocates for the parties herein within 45 days of this order in default the stay to lapse.
 - b. The parties to take directions on the appeal.
 - c. Costs of the application to the Respondent.
11. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

**J.W. KELI,
JUDGE.**

IN The Presence Of: C/A Otieno and parties absent.

