



REPUBLIC OF KENYA



KENYA LAW
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Banking, Insurance & Finance Union v Elimu Sacco Society Ltd (Cause E6536 of 2020) [2025] KEELRC 398 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEELRC 398 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6536 OF 2020
CN BAARI, J
FEBRUARY 14, 2025

BETWEEN
BANKING, INSURANCE & FINANCE UNION CLAIMANT
AND
ELIMU SACCO SOCIETY LTD RESPONDENT

RULING

1. Before Court is the Respondent/Applicant's Motion application dated 21st May, 2024, brought pursuant to Sections 1A and 1B of the [Civil Procedure Act](#) and Order 42 Rule 6 & 7 of the Civil Procedure Rules. The Respondent/Applicant seeks orders that: -
 - i. This Honorable Court be pleased to grant orders of stay of execution pending appeal of the judgment and decree by this Honorable court delivered on the 28th day of March 2024.
 - ii. This Honorable Court be pleased to make such further orders it deems fit to meet the ends of justice.
2. The application is supported by grounds on the face of the motion and the affidavit of Angela Nyanjong, sworn on 21st May, 2024.
3. The application is premised on a judgment rendered on 28th March, 2024, against the Applicant, and for which it lodged a notice of appeal on 15th April, 2024. The Respondent/Applicant states that it is apprehensive that the decree holder shall proceed and initiate execution proceedings as against it, despite its intended appeal.
4. The Applicant avers that it is its honest belief that its intended appeal as exhibited in the draft Memorandum of Appeal is meritorious and should this honorable court not grant the orders as sought and the Claimant proceed with execution; then the intended appeal shall be rendered nugatory and



the Applicant shall have been denied its right of appeal and equally an opportunity to have its appeal heard and determined in a court of justice.

5. The Claimant/Respondent opposed the motion vide a replying affidavit sworn on 22nd July, 2024. The Claimant/Respondent avers that the Notice of Appeal was filed on 12th April, 2024 and that it is now over 90 days since the date of filing the notice, and therefore the sixty (60) days period for the life of a Notice of Appeal has expired and without filing a certificate of delay, the notice of appeal does not exist and should therefore be struck out so that the decree holders may proceed with the execution process.
6. The Respondent further avers that flowing from the Applicant's failure/refusal to obey the court's direction despite being ordered to do so in the Judgment, the court cannot listen to a disobedient litigant.
7. That the fact that the Respondent/Applicant has filed a Notice of Appeal does not give an automatic stay of execution to party. It avers further that fairness, justice and the principles of equity must tilt towards the two (2) union members, who have been denied their rightful retirement benefits for many years and that the intended appeal has no merit at all and is merely a time wasting manouver and a delaying tactic employed by the Respondent to unnecessarily deny the employees the fruits of their victory in court.
8. The motion was canvass by way of written submissions. Both parties filed submissions, and which have been duly considered.

Determination

9. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, provides for stay of execution in the following words:-
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under sub-rule (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.”



10. The general rule in an application such as the one before me, is that if there is no overwhelming hindrance, a stay of execution ought to be granted so that an appeal, if successful, may not be rendered nugatory. Cotton L J in *Wilson v Church* (No 2) 12 Ch D (1879) 454 opined thus on stay:-

“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.”

11. The grant of an order of stay is an equitable remedy and which is given at the discretion of the court. In exercise of its discretion in an application for stay orders, the Court is guided by the grounds set out in the case of *Stephen Wanjohi v Central Glass Industries Ltd Nbi HCCC No. 6726 of 1991* where the Court emphasized that:-

“For the Court to grant stay of execution there must be:

- (a). Sufficient cause.
- (b). Substantial loss.
- (c). No unreasonable delay and security offered for due performance of the decree.”

12. It is not disputed that the judgment now impugned was delivered on 28th March, 2024, and a Notice of Appeal and Request for typed proceedings lodged on 12th April, 2024. It is also true that the instant motion for stay pending appeal was filed on 21st May, 2024.

13. A reading of the impugned judgment shows that the award made for the grievants as against the Applicant, is a total sum of Kshs. 1,858,272/- exclusive of the costs of the suit. the Claimant/ Respondent has not at all shown that the grievants have the ability to refund the said amount should the appeal by the Applicant succeed, and which is indication that the Applicant/Respondent could suffer substantial loss should this motion not be allowed.

14. In *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007*, the court stated:-

“.....The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal, so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

15. I note however that the Applicant has not indicated its readiness to provide security for the due performance of the decree herein, which is a prerequisite to the grant of stay orders. In the premise, I proceed to allow the motion in the following terms:-

- a. That an order of stay of execution do hereby issue against the execution of the Judgment and decree rendered in this matter on 28th March, 2024, until the appeal is heard and determined.
- b. That the Respondent/Applicant to deposit the decretal sum in a joint interest earning account within 45 days of this order, and in default execution to issue.
- c. Parties shall bear their own costs of this motion.

16. Orders accordingly.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
14TH DAY OF FEBRUARY, 2025.**

C. N. BAARI

JUDGE

Appearance:

N/A for the Claimant/Respondent

Mr. Juma present for the Respondent/Applicant

Ms. Esther S – C/A

