



**Friendship Containers Manufacturers Limited v Sibwoga & another (Employment and Labour Relations Appeal E295 of 2024) [2025] KEELRC 1034 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1034 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E295 OF 2024**

**JW KELI, J  
MARCH 28, 2025**

**BETWEEN**  
**FRIENDSHIP CONTAINERS MANUFACTURERS LIMITED ..... APPELLANT**  
**AND**  
**EVANS ONDIEKI SIBWOGA ..... 1<sup>ST</sup> RESPONDENT**  
**ESSENTIAL MANAGEMENT CONSULTANCY SERVICED LTD .... 2<sup>ND</sup>**  
**RESPONDENT**

**RULING**

1. The Appellant filed Application by way Notice of Motion dated 16<sup>th</sup> day of December 2024. brought under the provisions of Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Order 42 Rule 6(1), and Order 51 Rule 1 of the Civil Procedure Rules 2010 for Orders:-
  1. 1 Spent
  2. That there be temporary stay of execution of the judgment in Milimani CMCC no. 738 of 2016 pending the inter-partes hearing and determination of this application.
  3. That pending the hearing and determination of the appeal herein there be stay of execution of the judgment in Milimani CMCC no. 738 of 2016.
  4. That the costs of this application be in the cause.
2. Grounds of the application
  - a) The Appellant is dissatisfied with the said judgment and has lodged this Memorandum of Appeal challenging the entirety of the said judgment on Liability and Quantum of Damages.
  - b) The 1st Respondent testified at trial that he was unemployed and therefore his financial position and economic status is unknown to the Appellant. There is therefore no guarantee



that he can refund the colossal decretal sum should the Appellant's Appeal succeed. In that event the Appeal would be rendered nugatory.

- c) The Appellant, through its insurer, at the material time is ready and willing to furnish security by depositing the judgment-sum in an interest-earning account to be opened in the joint names of the Appellant's and the 1st Respondent's Advocates or by securing the same in any other manner as directed by the court.
3. The application was supported by the affidavit of Alice Keziah the legal officer of the applicant who attached copies of warrants of attachment and stated that they had triable issues, being that the Decree Holder was an independent contractor of the 2<sup>nd</sup> respondent hence no cause of action against the applicant, and that decree holder testified that he was unemployed.
4. The application was opposed by the Decree Holder/ 1<sup>st</sup> respondent through his replying affidavit dated 7<sup>th</sup> February 2025 to the extent that the appeal had no strong chances of success, that the applicant had taken out insurance to cover employees in event of injury, that since his testimony of being unemployed at trial, his economic status had since changed and was since earning Kshs. 250000 to Kshs. 400,000 depending on sales per quarter of the bonus normally paid in the month of November every year from his Ten Acre tea plantation allocated to him by his father.
5. The applicant replied to the affidavit of the Decree Holder through a supplementary affidavit of Daniel Mutuku dated 14<sup>th</sup> February 2025 and stated that the Decree Holder testified before the trial court that not only was he employed by the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> respondent also paid his salary hence they had a triable appeal. Their appeal was on both liability and quantum. The fact that they had taken out insurance was not a basis to deny them a stay. That the alleged income of the Decree Holder was not supported by any evidence. That they had already provided security for the performance of decretal sum as a condition for interim order of stay in a joint interest-earning account.
6. The application was canvassed by way of written submissions. Both parties filed.

## Decision

7. The Employment and Labour Relations Court (Procedure) Rules 2024 on stay of execution pending appeal states at Rule 21: - "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."



8. 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.”

9. In the instant case, the court was satisfied that there was no issue of unreasonable delay, that substantial loss was established as this was a money decree of Kshs. 3,774,000 and there was no evidence of the alleged income by the 1<sup>st</sup> respondent/ Decree Holder. The allegation of income of 4million from 10 acre tea farm was a tall tale in the opinion of the court. No iota of evidence was placed before the court on the financial capability of the respondent to refund the money in the event of the appeal being successful. The availability of insurance cover for injury by the applicant cannot defeat an application for stay the issue being the protection of the appeal outcome if successful not to be rendered nugatory. The applicant had already deposited security for the performance of the ½ decretal amount in the joint interest account held by advocates for the parties. The court finds the deposit to be sufficient security to satisfy the condition under section 42(6) of the Civil Procedure Rules.

10. In the upshot the application is allowed as follows:-

That pending the hearing and determination of the appeal, the Court is pleased to issue a Temporary Order of Stay of execution of the judgment and Decree in Milimani CMCC no. 738 of 2016 between the parties and another. Costs in the cause.

11. The applicant is ordered to file the record of appeal in 45 days. Mention on 12<sup>th</sup> May 2025 for further directions.
12. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2025.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Applicant : - Ndegwa

1<sup>ST</sup> Respondent: Okumu HB Nyangito

