



**Muthoni v Barium Capital Limited & another (Cause E199 of 2022)  
[2025] KEELRC 849 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 849 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E199 OF 2022  
AK NZEI, J  
MARCH 14, 2025**

**BETWEEN**

**TERESIA MUTHONI ..... CLAIMANT**

**AND**

**BARIUM CAPITAL LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CENTUM INVESTMENT COMPANY PLC ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Court's records herein shows that Judgment was on 30<sup>th</sup> September, 2024 entered in favour of the Claimant as follows:-
  - a. Declaration that termination of the Claimant's employment on account of redundancy was unfair.
  - b. The Respondent owes the Claimant her redundancy dues, awarded as admitted, Kshs.10,903,410.52.
  - c. Equivalent of 2 months' salary, Kshs.1,960,000/=.
  - d. Costs of the suit.
2. On 5<sup>th</sup> November, 2024, the 2<sup>nd</sup> Respondent filed an urgent application, dated 30<sup>th</sup> October, 2024, seeking the following Orders:-
  - a. That the application be certified urgent, and be heard ex-parte at the first instance.
  - b. That there be a stay of the Judgment of this Court dated 30<sup>th</sup> September, 2024 and the resultant decree pending the hearing and determination of the application.



- c. That there be a stay of execution of the Judgment of this Court dated 30<sup>th</sup> September, 2024 and the resultant decree pending the hearing and determination of the Applicant's intended appeal.
  - d. That costs of the application be in the cause.
3. The application is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules, among other provisions of the law; sets out on its face the grounds on which it is anchored, which are amplified in the affidavit of Thomas Omondi sworn on 30<sup>th</sup> October, 2024 in support of the application. It is deponed in the said supporting affidavit:-
  - a. that the Applicant is aggrieved by part of this Court's Judgment delivered on 30<sup>th</sup> September, 2024 (Gakeri, J), and wishes to pursue an appeal in respect thereof at the Court of Appeal and had, following delivery of the Judgment, filed a Notice of Appeal on 8<sup>th</sup> of October 2024.
  - b. that upon delivery of the Judgment, the Court granted a 30-days stay of execution, and that the same was lapsing on 31<sup>st</sup> October, 2024, hence the necessity to file the present application.
  - c. that it is in the greater interest of Justice that execution of the Judgment and the resultant decree be stayed.
  - d. that if the Orders sought are not granted, the applicant stands to suffer prejudice and substantial loss as the Claimant/Applicant intends to proceed and execute the decree.
  - e. that it is imperative that there be a stay of execution of the Court's decree to avoid the appeal being rendered nugatory.
  - f. that the Respondent/Applicant has an arguable appeal with high chances.
  - g. that if the Claimant is paid the decreed sum and the appeal succeeds, the Applicant will be unable to recover the decreed sum back as the Applicant has no knowledge of the Claimant's employment status or source of income.
  - h. that the Applicant is ready, able and willing to abide by such conditions as the Court may issue as a condition for stay, including an order to furnish security as would be reasonable and just.
  - i. That the application was brought without delay.
4. The Claimant/Applicant has opposed the application vide grounds of opposition dated 5<sup>th</sup> November, 2024 and a replying affidavit sworn by her on 18<sup>th</sup> November, 2024. It is deponed in the said affidavit, inter-alia:-
  - a. that following termination of her employment, the Claimant/Respondent incorporated a business, Rubicon Landing LLP (Rubicon) which helps businesses to secure financing from Private Capital Markets; and that one of the 2<sup>nd</sup> Respondent/Applicant's subsidiaries, Two Rivers Development Limited (TRDL), has previously engaged the said company and paid to it fees amounting to Kshs.24.5 million. (Documents in support of this are annexed to the affidavit).
  - b. that the Claimant/Respondent has sufficient assets to refund the entire amount awarded, including some short-term liquid assets amounting to Kshs.28 million; should the appeal succeed. (Documents in support are annexed to the affidavit).



- c. that considering that the Judgment relates to specific awarded amounts, the 2<sup>nd</sup> Respondent/Applicant cannot suffer loss or financial hardship by paying the Claimant/Respondent Kshs.12,863,410.52/= plus costs.
  - d. that the 2<sup>nd</sup> Respondent/Applicant pursued hazardous business strategies that led to the financial ruin of the 1<sup>st</sup> Respondent, its subsidiary, and that evidence in that regard was presented by the Claimant/Respondent at the trial. (Documents in support are annexed to the affidavit).
  - e. that the 2<sup>nd</sup> Respondent/Applicant has reported a financial loss of Kshs.9 Billion in 2023. (Documents/audited financial statements in support are annexed to the affidavit).
  - f. that given the financial concerns, there is a risk that the Claimant/Respondent will be deprived of the awarded amount, as an unsecured creditor, should the appeal be unsuccessful.
5. The application was placed before me under a certificate of urgency on 30<sup>th</sup> October, 2024, and finding no urgency in it, I directed that the same be served. I eventually granted an interim stay of execution of the Court's decree on 6<sup>th</sup> November, 2024, pending hearing and determination of the application, and directed parties to file written submissions on the application. Written submissions have since been filed. It is worthy noting that the 2<sup>nd</sup> Respondent/Applicant did not file a further affidavit in response to matters of fact deponed to in the Claimant/Respondent's replying affidavit; though leave to file and serve such affidavit within specific timelines had been given by the Court.
  6. The 2<sup>nd</sup> Respondent/Applicant has deponed in the affidavit sworn in support of the application herein that it is dissatisfied with part of the Court's Judgment herein. It has, however, not stated what part and/or extend of the Judgment that it is dissatisfied with. It is to be noted that the Court's decree herein is a money decree. The fact of the 2<sup>nd</sup> Respondent/Applicant having appealed against this Court's decree/Judgment is not in dispute.
  7. Section 13 of the *Employment and Labour Relations Court Act* provides that this Court's decrees and orders are enforceable in accordance with Rules made pursuant to the *Civil Procedure Act*. The 2<sup>nd</sup> Respondent/Applicant is seeking a stay of execution/enforcement of this Court's decree pending hearing and determination of an appeal. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules provides as follows:-
    1. No appeal or second appeal shall operate as a stay of execution of 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 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 made by the applicant."



8. The single issue for determination in the application before me is whether the stay order sought, pending hearing and determination of appeal, is merited. The Court of Appeal (Madan, JA) stated as follows in *Butt – vs – Rent Restriction Tribunal [1979] eKLR*:-

“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 that 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 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 to prevent the appeal, if successful, from being nugatory . . .”

9. In the words of Cotton LJ in *Wilson – vs – Church (No. 2) [1879] 12 Ch D 454 at P. 458*:-

“ . . . when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

10. In securing the rights of an appealing party to ensure that his appeal or intended appeal, if successful, is not rendered nugatory, a Court must always appreciate the fact that execution of a Court’s decree is not an unlawful occurrence. It is a lawful process initiated by a successful litigant towards realization of his rights as determined vide a valid decree of the Court. There is always need to balance the rights of the parties in each case, depending on the facts and circumstances of each case. That is why the issue of whether or not to grant stay pending appeal, and on what conditions, is left to the Court’s discretion. This, in my view, is what informs the wording of Order 42 Rule 6(2)(a) and (b) of the Civil Procedure Rules, which I have set out at paragraph 7 of this Ruling.

11. At paragraph 8 of the affidavit of Thomas Omondi sworn on 30<sup>th</sup> October, 2024 in support of the application herein, it is deponed as follows:-

“ 8. The applicant is aggrieved by part of the Judgment and wishes to pursue an appeal in respect thereof at the Court of Appeal. In this regard, and following the delivery of the said Judgment, the Applicant filed a Notice of Appeal dated 8<sup>th</sup> October, 2024 evidencing its intention to appeal against the said Judgment.”

12. As already stated in this Ruling, the 2<sup>nd</sup> Respondent/Applicant has not stated the extend of this Court’s Judgment that it impugns, despite the fact that the decree herein is a money decree.

13. On whether the Claimant/Respondent will be able to refund any money paid over to her if the appeal against this Court’s decree eventually succeeds, the Claimant/Respondent has deponed that following termination of her employment, she incorporated a business (Rubicon Landing LLP) and runs a viable business, and that she has sufficient assets to refund the entire awarded sum if the appeal succeeds. She annexed to her replying affidavit documents relating to what she referred to as short-term liquid assets amounting to Kshs.28 million. The validity/authenticity of the said documents was not questioned by the 2<sup>nd</sup> Respondent/Applicant as no further affidavit was filed by it, despite leave to file a further affidavit having been granted by this Court on 6<sup>th</sup> November, 2024. Although no certificate of registration/incorporation of Rubicon Landing LLP was exhibited by the Claimant/Respondent, I have noted that the Claimant/Respondent is shown to have signed some exhibited document(s) as the authorised signatory for Rubicon Landing LLP; her alleged business. The authenticity of those documents was not questioned by the 2<sup>nd</sup> Respondent/Applicant.



14. Having considered the deposition that the 2<sup>nd</sup> Respondent/Applicant is only aggrieved by a part of this Court's Judgment, the facts of the case and demonstration by the Claimant/Respondent that she will be able to refund any money paid to her if the 2<sup>nd</sup> Respondent's appeal succeeds, I allow the Notice of Motion dated 30<sup>th</sup> October, 2024 in the following terms:-
- a. There will be a stay of execution of this Court's decree pending appeal on condition that the 2<sup>nd</sup> Respondent/Applicant pays a half of the decreed sum to the Claimant/Respondent and deposits the other half in this Court, all within fourteen (14) days of this Ruling, failing which the stay herein granted shall lapse.
  - b. Each party shall bear its own costs of the application.
15. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH 2025**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Miss Mulindi for the Claimant/Respondent

Miss Akoko for the Respondent/Applicant

