



**Mathenge v DLR Group Africa Limited (Cause E942 of 2021)
[2025] KEELRC 1026 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1026 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E942 OF 2021
BOM MANANI, J
APRIL 2, 2025**

**BETWEEN
PATRICK MUNENE NJOGU MATHENGE CLAIMANT
AND
DLR GROUP AFRICA LIMITED RESPONDENT**

RULING

Background

1. The court delivered judgment in this matter on 2nd May 2024. In the decision, it dismissed the Claimant’s case for unfair termination. However, it ordered the Respondent to pay him a total of Ksh. 10,333,737.40 representing outstanding salary, leave commutation and severance pay.
2. Both parties were dissatisfied with the decision. As such, they instituted separate appeals against it by filing two distinct Notices of Appeal.
3. The Respondent has now moved the court for stay of execution of the judgment pending determination of its appeal. It contends that the Claimant has commenced execution proceedings by applying for the decree and certificate of costs.
4. The Respondent is apprehensive that if the anticipated execution is undertaken, its appeal will be rendered nugatory. It expresses the fear that should the appeal succeed after the Claimant has finalized the execution process, it will not be possible to recover the decretal amounts. As such, it contends that it will suffer substantial loss as a result.
5. The Respondent’s fear is anchored on the fact that after the Claimant left its employment, his whereabouts and asset portfolio remains unknown to it. As such, the prospects of his refunding the decretal sum are minimal.



6. The Respondent has expressed its willingness to provide security for the performance of the decree should its appeal fail. It proposes to provide a bank guarantee to cover a portion of the decretal sum.
7. The Respondent also contends that the request for stay of execution was lodged without unreasonable delay. As such, it contends that it is deserving of the orders sought.
8. The Claimant has opposed the application. He contends that he is entitled to enjoy the fruits of his judgment. In his view, staying execution of the decree will stand in his way to enjoy this right.
9. The Claimant argues that an order for stay of execution pending appeal can only issue in favour of a party who has satisfied the conditions for stay of execution prescribed under Order 42 rule 6(2) of the Civil Procedure Rules. These are:-
 - a. The applicant must show that if stay does not issue, he will suffer substantial loss.
 - b. The applicant must furnish security for the performance of the decree.
 - c. The applicant must file the motion for stay of execution in a timeous manner.
10. According to the Claimant, the Respondent has not satisfied these conditions. As such, it is underserving of an order for stay of execution pending appeal.

Analysis

11. Both parties agree that before the court can issue an order for stay of execution pending appeal, it must satisfy itself that the applicant has met the conditions for the order as set out under Order 42 rule 6(2) of the Civil Procedure Rules. Therefore, the court is bound to determine whether the Respondent has satisfied these requirements.
12. First, the Respondent is bound to establish that it is likely to suffer substantial loss should the proposed appeal succeed after execution has been levied. The Respondent contends that the sum of Ksh. 10,333,737.40 which the Claimant proposes to execute for is colossal. It contends that the Claimant's whereabouts and means are unknown to it. As such, it (the Respondent) avers that should the appeal succeed after execution has been levied, there will be no prospect of recovering the amount that will have been paid out.
13. In response, the Claimant contends that he is in a position to refund the decretal sum should the Respondent's appeal succeed. The Claimant contests the Respondent's assertion that he (the Claimant) has no means to refund the decretal sum.
14. The Claimant contends that the decretal sum comprises his terminal benefits which the Respondent has illegitimately withheld for more than three years. In his view, it will be unjust to allow this state of affairs to continue by issuing an order for stay of execution pending appeal.
15. What amounts to substantial loss was alluded to in the High Court case of Antoine Ndiaye v African Virtual University [2015] eKLR. Quoting from other decisions, the court observed as follows:

“...Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal...”



16. The court went further to observe as follows:-

“So the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. In other words he will be reduced to a mere explorer in the judicial process if he does what the decree commands him to do without any prospects of recovering his money should the appeal succeed. Therefore, in a money decree, like is the case here, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed. It matters not the amount involved as long as the Respondent cannot pay back.”

17. I understand the learned Judge to have been stating that in a money decree substantial loss ought to be measured against the ability of the Decree Holder to refund the decretal sum should an appeal against the decision succeed. This is irrespective of the amounts involved. In essence, what the court was stating is that if there is evidence that the Judgment Debtor will not be able to recover the money paid out under the decree in the event his appeal succeeds, then the court should arrive at the conclusion that there will be substantial loss.

18. The Respondent contends that it will suffer this kind of loss because it has no knowledge of the Claimant’s ability to refund the cash should the appeal succeed. It further states that it has no knowledge of the Claimant’s whereabouts after he left its employment. As such, it contends that recovering the cash from him if the appeal succeed will be an impossible undertaking.

19. Although the burden of proving a contested fact rests on the person alleging the fact, it is acknowledged that there are exceptions to this general rule. One such exception arises in instances where the person against whom the allegation is made has special knowledge of the facts constituting the allegation. In such case, section 112 of the *Evidence Act* places the evidential burden on him in respect of proving or disproving the assertion.

20. With regard to establishing the means of an individual, unless information regarding the individual’s assets are matters of public notoriety, evidence of what he owns is generally within his special knowledge. As such, only he can speak to his means.

21. It is for the above reason that I accept the proposition by the Respondent that once the ability of the Claimant to repay the decretal sum was questioned, he ought to have provided evidence of his means to refund the money in question. This is for the simple reason that the Claimant has special knowledge of his means. Therefore, only he can speak to this matter.

22. It was therefore not sufficient for the Claimant to merely assert that he has the means to repay the decretal sum should the Respondent’s appeal succeed. In my view, he ought to have gone further to disclose his means. As the record shows, he did not. As such, his ability to refund the impugned sum remains unknown thus exposing the Respondent to the danger of total loss should it succeed in the appeal after execution has taken place.

23. That the foregoing is the generally accepted position is self-evident from a number of judicial decisions. In *John Nduba v African Medical and Research Foundation (Amref Health Africa)* [2021] eKLR, the learned Judge expressed his agreement with the position in the following terms:-

“It is not enough for the Respondent to state that he is in a position to refund the amount because he is a reputable doctor with over 32 years of experience. He only stated that he can refund the decretal sum but did not prove such ability to refund the US\$ 149,052. The emerging jurisprudence from this Court and the Court of Appeal is that it would be a



daunting task to expect the Applicant to prove whether or not the Respondent is a man of means since such information and evidence is only within the Respondent's knowledge."

24. In *Proline Supaquick Limited v Kenol Kobil Plc Formerly Known as Kenya Oil Limited* [2020] eKLR, the court expressed itself on the subject as follows:-

"The principle of law as captured under Section 107 of the *Evidence Act* is that he who alleges must prove what he alleges....However that burden of proof, under Section 107(1) of the *Evidence Act* can shift in certain circumstances such as here where the defendant cannot be expected to know the financial capability of the plaintiff to confirm it can refund the judgment amount in the event the appeal does succeed. This is what the courts have often held."

25. The Claimant did not disclose his means to demonstrate that he has the capacity to refund the decretal sum should the Respondent's appeal succeed. As such, I find that the Respondent will be exposed to the risk of substantial loss should it succeed in the appeal after execution has been levied as there is no evidence to demonstrate that the Claimant will be in a position to refund the decretal sum.

26. The Claimant has contended that the amount he is pursuing comprises his withheld terminal dues. As such, he should be allowed to enjoy the fruits of the impugned judgment without further delay.

27. The position expressed by the Claimant is not unreasonable. However, it must be considered against the fact that the Respondent has appealed the court's decision because it believes that the Claimant is not entitled to the impugned amount.

28. These are two competing interests in the amount which is the subject of contestation. As such, the court must issue an order which will not prejudice either party. In my view, this can only be attained if the decretal sum is placed under the control of both parties pending resolution of their respective appeals.

29. The applicant is also expected to provide security for the performance of the decree should its appeal fail. In this respect, the Respondent has offered to provide a bank guarantee for a portion of the decretal sum.

30. The court retains the discretion to determine the kind of security that should be provided for the performance of the decree in the event that the pending appeal is lost. Having regard to the fact that the best interest of the parties will be served if they both have control of the decretal sum pending resolution of the appeal, I do not think that the security proposed by the Respondent is sufficient. As such, it is declined.

31. The court orders that the Respondent provides security by depositing the decretal sum in a joint interest earning account in the names of the advocates for the parties. This should be done within the timelines that will be indicated later in this order.

32. Finally with respect to whether the application was filed timeously, I agree with the Respondent that the delay in presenting the motion for approximately two months was not unreasonable. I rely on the decision in *Kepha Moreno Bosire v Titus Naikuni & another* [2020] eKLR where the court allowed a similar application despite delay of more than one month to anchor my position on this point.

Determination

33. In the ultimate, I allow the Respondent's application dated 19th July 2024 and grant an order to stay execution of the court's judgment subject to the following conditions:-



- a. That the Respondent deposits the entire decretal sum in a joint interest earning account in a reputable bank in the names of the Advocates on record for the parties within forty five (45) days from the date of this order.
- b. That the bank in which the decretal sum is to be deposited to be agreed on by the parties within seven (7) days of this order failing which, the Deputy Registrar of the court to nominate a bank for them.
- c. That should the Respondent fail to deposit the decretal sum as ordered above, the stay orders issued herein shall automatically lapse with the result that the Claimant will be at liberty to enforce the decree.
- d. Costs of the application are granted to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF APRIL, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent/Applicant

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

