Scott Bowerbank Day v Victory Farms Limited (Employment and Labour Relations Cause E181 of 2022) [2025] KEELRC 1842 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KEELRC 1842 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E181 OF 2022

JW KELI, J

JUNE 20, 2025

BETWEEN

SCOTT BOWERBANK DAY ..... CLAIMANT

AND

VICTORY FARMS LIMITED ..... RESPONDENT

RULING

1. The applicant following the judgment of the court dated 31st January 2025 against it filed applictaiion under certificate of urgency by way of Notice of Motion application dated 3rd March 2025 brought under Rules 73 (2) of the Employment & Labour Relations Court (Procedure) Rules 2024, Rule 42 (6) of the Civil Procedure Rules and all other enabling provisions of the law seeking for the following Orders:-

    1. Spent

    2 Spent

    3 Spent

    4. Pending the hearing and determination of the intended appeal to the Court of Appeal, an order do issue for the stay of implementation and/or execution of the judgment and decree of this Honourable Court delivered herein on 31 January 2025.

    5. Pending the hearing and determination of the intended appeal to the Court of Appeal, an order do issue for the stay of any further and/or consequential proceedings in this suit.

    6. This Honourable Court do grant any other order that it may deem just and expedient to grant in the circumstances.

    7. The costs of this application be provided for.

2. The application was premised on the grounds in the application and reiterated in the supporting affidavit sworn by Caesar Asiyo on the 3rd March 2025 as follows:-

   a. This Honourable Court (Hon. Mr. Justice Ocharo Kebira) delivered a judgment dated 31" January 2025 (the Judgment) that, inter alia, awarded the Respondent herein a sum of USD 234,352 constituting an award of 10 months' salary and a management incentive payment of USD 154,350.

   b. A temporary stay of execution was granted by the Trial Court on 31 January 2025 for a period of 30 days that has already lapsed on 2 March 2025.

   c. The Respondent is aggrieved by the findings of the Court as set out in the Judgment and intends to appeal to the Court of Appeal. The Respondent has an arguable appeal with good prospects of success as detailed in the Draft Memorandum of Appeal annexed herewith including the following

   d. The Learned Judge erred in law and in fact by failing to consider the evidence on record that the Claimant's contract of employment did not contain any provisions on payment of a Management Incentive and thus erred in finding that it was a contractual entitlement

   e. The Learned Judge erred in law and in fact by failing to consider that the Management Incentive offered by the Respondent to its management level employees, was strictly subject to the discretion of the Respondent's senior management and achievement of the vesting requirements which the Claimant had not achieved. The judge erred in finding that Respondent's senior management only had discretion over the fixing of the value of the shares and had no discretion to determine the entitlement to the Management Incentive.

   f. The Learned Judge erred in law and in fact by failing to consider the evidence on record of negotiations towards a possible mutual separation between the Respondent and the Claimant and that these negotiations did not result in an agreement as the parties did not agree to the terms of a mutual separation. Further, the Learned Judge erred by awarding the Management Incentive payment to the Claimant based on the failed discussions between the parties.

   g. The Learned Judge erred in law and in fact by failing to consider the evidence of the Respondent that the operational requirements of the Respondent had changed which led to a restructuring of its operations and job designations of members of its staff.

   h. The Learned Judge erred in law and in fact by failing to consider the evidence of the Respondent that following the restructuring of its organization due to operational requirements, the Respondent offered the Claimant the position of Director of Aquaculture within the reorganized structure of the Respondent and the Claimant declined to take up that position and that the Respondent's previous position of Farm Manager had been rendered superfluous. The Learned judge misdirected himself by considering the superfluity of the Claimant's services as opposed to the position as envisaged by the definition of redundancy under section 2 of the *Employment Act*.

   i. The Learned Judge consequently erred in law and in fact by holding that the restructuring and subsequent situation that led to the redundancy of the Respondent was non-existent and lacked substantive justification and that the Claimant was forced to resign at the meeting of 25 October 2021.

j. The Learned Judge further erred in law and in fact by holding that the Claimant was entitled to a relocation allowance and by awarding a relocation allowance based on discussions between the Respondent and the Claimant that did not lead to an agreement.

k. The Learned Judge erred in law and in fact by awarding prorated severance pay to the Claimant for a 6-month period. The Claimant had been employed for 4 years and 6 months and had already received severance pay for the 4 complete years of service in line with section 40 of the *Employment Act*.

l. The Learned Judge erred in law and in fact by finding that the Claimant was entitled to compensation for unfair termination of employment and awarding, inter alia, the equivalent of 10 months' salary to the Claimant.

m. The Judgment of this Honourable Court is for payment of a total of USD 238,352 with interest and costs. If the Respondent is forced to pay this significantly high amount before this application and intended appeal are determined, its cash flow and attendant operations would be adversely affected.

n. The Respondent has demonstrated that it has an arguable appeal with prospects of success and if the orders sought herein are not granted, it will suffer irreparable harm as the Respondent is apprehensive that it will not be able to recover this very large and significant amount from the Claimant thus rendering the intended appeal nugatory.

o. The Respondent is also apprehensive that if the orders sought herein are not granted, the Claimant will take steps towards execution of the Judgement and decree of this Court to the detriment of the Respondent.

p. The Respondent has lodged a Notice of Appeal dated 10th February 2025 expressing its intention to appeal the decision to the Court of Appeal. This has also been served on the Claimant's advocates. The Respondent also filed a letter dated 10th February 2025 requesting a copy of the typed proceedings required for the substantive appeal to the Court of Appeal. The Respondent is awaiting the copy of the proceedings to enable it to lodge the intended appeal.

q. In view of the matters set out above and in the Draft Memorandum of Appeal, it is necessary that the orders sought herein be granted in order to preserve the subject matter of the intended appeal.

3. The application was opposed by the Respondent/ claimant vide his replying affidavit sworn on the 14th March 2025 at Lusaka as follows:-

1. The Respondent has not demonstrated sufficient cause for the grant of Orders sought on account of failure to provide the security for the judgment amount and failing to establish any substantial loss that it may suffer upon payment of the judgment amount.

2. That the Respondent herein is a Foreign Company operating in Kenya and whose shareholders and directors are all foreigners made up of the following:-

a. Stephen John Moran, owning zero shares and a nationality of British Indian Ocean Territory:

b. Sphynx Enterprises BV registered in Netherlands owning 9.999 shares.

c. Joseph Christian Rehmann a nationality of United States owning 1 share. (annexed and marked as "SBD1" was a copy of CR12 dated 13th March 2025)

3. That the Respondent being a foreign owned Company may easily fold up its affairs in Kenya and relocate outside the jurisdiction of the Court making the recovery of the judgment amount a futile attempt.

4. That the Respondent's attempt to seek an order for stay of execution with no order for provision of security of Judgment Amount is therefore aimed at ensuring:-

   SUBPARA a.

   That the Claimant's rights in the judgment stand exposed on account of the fact that the Respondent may easily relocate to another jurisdiction where the Claimant may be unable to pursue recovery of the judgment amount.

   SUBPARA b.

   That the responsibility to settle the judgment amount remains unsecured notwithstanding the outcome of the Appeal.

   SUBPARA c.

   That the Claimant's right of access to the judgment amount remains defeated at all times.

5. That in view of the foregoing an order for stay of execution without securing the Judgment Amount of USD 238,352, costs of the Suit approximately in the sum of Kshs.972,914.30, together with the interest will greatly prejudice his rights as a successful party entitled to the judgment amount.

6. The claimant believed that the Respondent's application is only aimed at delaying payment of the decretal amount, scuttling future attempts for recovery of the judgment amount, and stopping the Claimant from enjoying the fruits of a judgment lawfully entered by this Honourable Court. The Respondent's intention in filing the instant application has been to delay the payment of my employment dues and conclusion of the dispute which commenced in the year 2021 when he unfairly lost his employment.

7. The claimant stated that he was capable of refunding the Respondent the decretal amounts costs and interest in the unlikely event that the Judgment is overturned on appeal.

4. The applicant filed a reply to the response vide further affidavit of Caeser Asiyo sworn on the 18th March 2025 as follows:-

   1. In response to paragraph 3 of the Replying Affidavit, the Respondent avers that:-

      a. The Respondent has demonstrated through the Draft Memorandum of Appeal that it has an arguable appeal with good prospects of success. It is therefore necessary and just that the subject matter of the appeal be preserved through a stay of execution order pending the hearing and determination of the appeal.

      b. If stay is not granted as sought in the Respondent's application dated 3rd March 2025, the intended appeal will be rendered nugatory which will be extremely prejudicial to the Respondent and will have denied the Respondent its right of appeal and access to justice.

   2. In response to paragraphs 4, 5 and 6 of the Replying Affidavit, the Respondent averred that the characterization of the Respondent as a foreign entity is false, wrong and misleading to this Honourable Court. In further response thereto the Respondent avers that:-

i. The search of the Respondent company as at 13th March 2025 is self-evident that the Respondent is duly registered in Kenya under registration number CPR/2015/210735 and has its registered office in Nairobi within the jurisdiction of this Honourable Court.

ii. That it was advised by its advocates on record that , it is well settled in law that the shareholders of a company are separate from the Company which has its own separate legal personality.

3. Respondent anchored relationships with the communities that it works with. It is further self-evident from the documents filed by the Claimant in the suit that the Claimant was living and working at a farm owned by the Respondent. Therefore the Claimant's characterization of the Respondent as foreign is disingenuous.

4. In response to paragraphs 7 to 10 of the Replying Affidavit, the Respondent reiterates that it has an arguable appeal with prospects of success. It is necessary for the matter to be properly ventilated through the appellate process and for the Respondent's right of appeal to be allowed. The assertion that the Respondent will relocate to another jurisdiction is unfounded as it is clear from the documents on record that the Respondent is duly registered in Kenya and has its place of business in Kenya.

5. That the figure of the Claimant's costs set out in paragraph 8 of the Replying Affidavit is incorrect as the Claimant's costs have not yet been taxed by this Honourable Court

6. In response to paragraph 11 of the Replying Affidavit, the Claimant has not produced any evidence to show that he is capable of refunding the decretal sum as alleged. Further, the Replying Affidavit clearly states that the Claimant is a resident of Zambia, and he is also a citizen of the USA-which are both foreign states.

7. Additionally, the Claimant has no known address or assets in Kenya within the jurisdiction of this Honourable Court from which the decretal sum can be recovered in the event that the Respondent is successful on appeal. It would therefore be more prejudicial to order payment of the decretal sum to the Claimant than not.

8. It will be extremely prejudicial and detrimental to the Respondent's operations if it is required to pay or deposit the significant decretal sum of USD 238,352 will adversely affect the Respondent's operations

5. The application was canvassed by way of written submissions. Both parties complied.

Decision

6. The issue was whether the application was merited.

7. The application was premised on Rule 73(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024 to wit:- '73(2) Rules on execution or stay of execution of an order or decree of the Court shall be in accordance with the Civil Procedure Rules."

8. The relevant Civil Procedure Rule is Order 42 Rule 6 which states:-

" 6. Stay in case of appeal [Order 42, rule 6.]

(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 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."

9. The court finds that it is mandatory for a party seeking for a stay of execution of a Decree to meet the conditions under Order 46(2) (supra).

10. On substantial loss, the judgment against the applicant is a money degree of USD 238352. The Respondent is correct in stating that the subject decree, being a money decree, can be refunded if the Intended Appellant is successful. However, the Respondent has not demonstrated his ability to re-pay the decretal sum. The test for whether an Applicant will suffer substantial loss where a money decree is in issue was set out in the case of Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 where the court held:-"Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. 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." The court upheld the decision of the Court of Appeal in National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another [2006] eKLR where the observed:- 'This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge — see for example section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya." The applicant met the condition of demonstrating substantial loss.

11. On the security for performance of the decree under Order 42(6)(2)b of the Civil Procedure Rules to wit :- '(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. 'The applicant did not offer any security. This is a compulsory condition for grant of stay of execution. In submissions the applicant sought for status quo to be maintained. The twin conditions for grant of stay for emphasis is that :-' (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.'' This rule is couched in mandatory terms. In the case of Michael Ntouthi Mitheu vs Kivondo Musau [2021] e KLR, the Honourable Court pronounced itself as follows on the reason why security should be given:-

> " 22. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See Nduhiu Gitahi v Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100. (Emphasis Mine) The applicant has not offered any security for performance of the decree and relied on status quo. The court upheld the decisions relied on by the respondent in Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd (2019) e KLR, Nganga Kabae v Kahunyo Kimani, 1999 e KLR and Wycliff Sikuku Walusaka v Philip Kaita Wekesa 2020 e KLR to the effect that the condition of security for performance of decree is mandatory . The court for the lack of security and /or offer of security by the applicant for the due performance of such decree or order as may ultimately be binding on it , finds the application to be a decoy to delay the claimant's right to enjoy the fruits of his judgment. The court noted a temporary stay had been issued 6th March 2025 hence the applicant had sufficient opportunity time to provide security for performance of judgment delivered on the 31st January 2025. It failed to comply.

12. The court having been the trial court cannot rely on the issue of arguable appeal to determine the merit of the application. The only relevant factors to consider are as stated in order 42(6)(2) of the Civil Procedure Rules of which the court has considered above. The question of arguability of the appeal is the preserve of the Court of Appeal in determining similar applications.

13. Consequently, for the lack of compliance with the mandatory condition of security for performance of the Decree under Order 42 (6)(2)(b) of the Civil Procedure Rules, the application dated 3rd March 2025 is dismissed with costs to the respondent .

14. It is so Ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF JUNE 2025.

J.W. KELI,

JUDGE.

In The Presence of:

Court Assistant: Otieno

Applicant – Wataka

Respondent/Decree Holder : Njuguna