



**Inuka Africa Limited v Mokaya (Appeal E141 of 2023)
[2024] KEELRC 424 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 424 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E141 OF 2023
M MBARÚ, J
FEBRUARY 29, 2024**

BETWEEN

INUKA AFRICA LIMITED APPELLANT

AND

GRALPHINE BOSIBORI MOKAYA RESPONDENT

RULING

1. The appellant filed application dated 15 December 2023 under the provisions of Order 42 rule 6 and Sections 1A, 1B, 3, 3A of the Civil Procedure Rules and seeking for orders that;

The court be pleased to stay execution of the judgment delivered on 16 November 2023 in Mombasa CMELRC No. 544 of 2022 and subsequent execution proceedings thereto, together with all consequential orders pending hearing and determination of the appeal.
2. The application is supported by the affidavit of Kalvine Likavo the regional manager, Coast region and on the grounds that judgment was delivered against the appellant on 16 November 2023 despite the appellant having a pending application set for hearing. The appellant had difficulties getting a hearing date for the application but was told that the court file was with the Magistrate who was on transfer.
3. Upon delivery of judgment, the respondent was awarded Kshs. 625,000 together with costs. The appellant was granted 30 days stay which would lapse on 16 December 2023. Aggrieved, the appellant filed this instant appeal.
4. The appellant is also seeking stay of execution on the grounds that on 14 December 2023 the respondent served a demand notice for payment within 7 days. There is risk of execution against the appellant and unless stay of execution is issued, the appellant shall suffer loss and damage. The appeal will be rendered nugatory if stay of the judgment is not granted and the appellant is ready and willing to abide conditions granted by the court.



5. Kalvine Likavo aver in his affidavit that the appellant has an arguable appeal with high chances of success and should be allowed to agitate the appeal and hence should be granted stay of execution.
6. In reply, the respondent filed his Replying Affidavit and aver that the he has a valid judgment and execution is lawful. The respondent is not deserving the orders sought as this would be to delay the enjoyment of the fruits of a lawful order of the court. The award of the court at Kshs. 625,000 should be deposited in court as security pending hearing of the appeal. The appellant has not demonstrated what substantial loss will be suffered if the orders sought to stay the judgment are not allowed.
7. Both parties attended court on 24 January 2024 and agreed to attend court on 8 February 2024 for oral submissions. Only the appellant attended and filed written submissions which are analysed and the single issue for determination is whether an order of stay of execution of judgment in Mombasa CMELRC No.544 of 2022 should issue pending hearing and determination of this appeal.
8. The appeal herein relates to judgment delivered on 16 November 2023 in Mombasa CMELRC No. E544 of 2022 on the award of Kshs. 650,000 with costs.
9. An application filed under the provisions of Order 42 rule 6 of the *Civil Procedure Rules* must first and foremost satisfy the condition that if the money decree is executed, the respondent will be unable to repay and hence suffer substantial loss. This condition, if absent, other relevant matters and conditions on the merits of the appeal and the same being expedited are not sufficient. The core of Order 42 Rule 6 is for the applicant to demonstrate what substantial loss will be suffered if the order of stay is not granted.
10. In the case of *Lloyd Masika Limited v Stanbic Bank Limited* Civil Application No. E200 of 2023, the court held that if the Applicant does not plead that the Respondent will be unable to refund the amount should the appeal succeed, the assumption is that Respondent will be able to repay.
11. In the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR and *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the court defined substantial loss to include the following;

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

12. However, the court appreciates that a party should not be locked out of court to have his appeal heard. In *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words;

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.



Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent

13. Accordingly, without the appellant giving any matter of hat loss shall be suffered save to assert that that the award of ksh. 650,000 is excessive, this amount shall be deposited in court to allow the appellant urge its appeal. The appellant moved the court under Certificate of Urgency, with that urgency, the Record of Appeal shall be filed and served with urgency and not later than the next 30 days to allow the parties to attend and have the appeal heard.
14. Accordingly, application dated 15 December is hereby allowed and stay of execution of the judgment in Mombasa CMELRC No. E544 of 2022 stayed on condition that the appellant shall deposit the judgment sum of Kshs. 560,000 in court and further file Record of Appeal within the next 30 days' failure to which the order of stay shall lapse. Mention for taking hearing directions on 9 April 2024.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29TH DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

