



**Olang v Barasa (Appeal E114 of 2023) [2024] KEELRC 399 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 399 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**  
**APPEAL E114 OF 2023**  
**M MBARŪ, J**  
**FEBRUARY 15, 2024**

**BETWEEN**

**SUZZANE OLANG ..... APPELLANT**

**AND**

**ANTHONY WAFULA BARASA ..... RESPONDENT**

**JUDGMENT**

1. The appellants filed Notice of Motion dated 7 December 2023 under the provisions of Order 42 rule 6 seeking for orders of stay of execution the judgment delivered on 21 September 2023 in Mombasa MCELRC No.426 of 2019 pending the hearing and determination of the intended appeal. The appellants are also seeking to be allowed to deposit security through a bank guarantee.
2. The application is supported by the Affidavit of Suzanne Olang, the 2<sup>nd</sup> appellant and on the grounds that the lower court judgment delivered on 21 September 2023 and the appellants were dissatisfied with the same and have since served a memorandum of appeal. The appellants have applied for certified proceedings for the purpose of the appeal and also filed this application to secure the subject matter pending hearing of the intended appeal. The appellants have also made 50% cash deposit of the decretal sum as directed by the court in its interim orders on 8 December 2023 and shall abide the court directions pending the hearing of the appeal.
3. In response, the claimant filed his Replying Affidavit and aver that on 7 December 2023 warrants of attachment and sale were issued by the trial court against the appellants. On 8 December 2023 at 11.45am, he accompanied M/S Mungami Auctioneers and proclaimed movable properties of the appellants which was acknowledged by Suzzane Ndungu. At 15.23pm his advocates were served with stay orders herein. However, there is no service of the Memorandum of Appeal against the trial court judgment and hence strangers to these proceedings.
4. The respondent also aver that his claim arose way back in the year 2018 and he should be allowed to enjoy the fruits of his judgment and the instant application should be dismissed.



5. Both parties filed written submissions which are analysed and the twin issues for determining are whether the court should allow stay of execution pending filing of the intended appeal and whether the appellants should be allowed to furnish acceptable bank guarantee as security pending hearing of the appeal.
6. Judgment of the lower court was delivered on 21 September 2021 in favour of the respondent herein. He has since commenced execution proceedings and been issued with Warrants of Attachment. The appellants have acknowledged receipt of such Warrants on 8 December 2023 when the application subject of this ruling was served.
7. Whereas under the law the appellant has a right of appeal and should be allowed to exercise such right, Order 42 rule 6 outline key principles that must be met by an applicant seeking to stay valid orders of the court pending the hearing of its appeal.
8. Order 42 rule 6 of the Civil Procedure Rules requires an applicant seeking stay of execution to demonstrate what loss and damage will be suffered if the judgment award is paid pending appeal. The indigence of a party, though relevant is not the sole consideration as upon the judgment, such a party has a valid order and should be allowed to enjoy the fruits of his claim while on the other hand safeguarding the right of appeal.
9. As noted above, pending the hearing of this application, the respondent has commenced execution which was stayed through orders of 8 December 2023. The appellants have also made a deposit of 50% of the judgment sum in court for the due performance of the outcome of the appeal. Such then requires a balance of rights, to secure the appeal filed herein and to allow the respondent a fair chance to enjoy the fruits of his judgment.
10. Pending the filing of the instant application, the respondent has incurred execution costs which should be paid by the appellants. The cash deposited in shall serve as security hearing until the appeal is heard.
11. The cause of action having arisen way back in the year 2018, the appellants shall file the Record of Appeal within the next 30 days to ensure the appeal is expedited.
12. Accordingly, stay of execution of judgment in Mombasa MC ELRC No. 426 of 2019 is hereby allowed on the following conditions;
  - a. The appellant shall file the Record of Appeal and serve the respondent within the next 30 days;
  - b. The appellants shall meet auctioneer's costs due to M/S Mungami Auctioneers;
  - c. The cash deposit shall remain herein as security for the due performance of the judgment;
  - d. Upon lapse in (a) above, the cash deposit herein shall be released to the respondent immediately;
  - e. The appellants shall pay due costs herein to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 15<sup>TH</sup> DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....



