



**Gurdev Engineering & Construction Works Limited v Kimathi (Employment and Labour Relations Appeal E065 of 2023) [2024] KEELRC 173 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 173 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E065 OF 2023**

**K OCHARO, J  
FEBRUARY 9, 2024**

**BETWEEN**  
**GURDEV ENGINEERING & CONSTRUCTION WORKS  
LIMITED ..... APPLICANT**  
**AND**  
**DOMICIANO KIMATHI ..... RESPONDENT**

**RULING**

**Background**

1. The Appellant/Applicant herein filed a Notice of Motion dated 10<sup>th</sup> May 2023 seeking the following orders: -
  - a. Spent.
  - b. Spent.
  - c. This Honourable Court be pleased to issue an order for a stay of execution of the Judgment and Decree in CMEL E219 of 2020 pending the hearing and final determination of the Appellant/Applicant’s appeal.
  - d. Costs of the Application be provided for.
2. The Notice of Motion dated 10<sup>th</sup> May 2023 is premised on the Grounds stated on the face of it, and the Supporting Affidavit of one Ben Maurice Odhiambo sworn on 10<sup>th</sup> May 2023.
3. The Respondent has not filed a response to the Application despite being served with the same as evidenced by the Affidavit of Service sworn on 30<sup>th</sup> May 2023. The application is unchallenged, therefore.



4. The Appellant/Applicant's application is expressed to be under the provisions of article 165 of the Constitution of Kenya 2010; Sections 1A, 1B and 3A of the Civil Procedure Act 2010, Order 22 rule 22, Order 42 rule 6 and Order 51 rule 1 of the Civil Procedure Rules 2010.
5. The Grounds upon which the Notice of Motion Application is anchored are that:
  - i. Judgment was entered against the Appellant/Applicant on 17<sup>th</sup> April 2023. The trial Court gave a temporary stay of execution for 30 days, which lapsed on 14<sup>th</sup> May 2023.
  - ii. Being dissatisfied with the said judgment, the Appellant/Applicant lodged an Appeal to this Court.
  - iii. That in the absence of stay orders, the Respondent shall certainly proceed to initiate execution proceedings against the Appellant/Applicant.
  - iv. That the Appellant/Applicant will suffer irreparable loss if the order of stay of execution is not granted. The Appellant will not be able to recover the decretal sum of KShs. 1,370,146/- in the event, the same is paid to the Respondent, and the appeal herein succeeds with a result of requiring him to refund the money.
  - v. That the Appellant/Applicant has a good appeal with high chances of success and the same would be rendered nugatory should execution proceed before it is heard and determined.
  - vi. That the instant application has been filed timeously without undue delay.
  - vii. The Appellant/Applicant is ready to comply with any conditions this Court may deem fit to attach to the grant of the stay order.

#### **Analysis and Determination**

7. I have carefully considered the Notice of Motion dated 10<sup>th</sup> May 2023, the Grounds, and Affidavit in Support, thereof, and return that the sole issue for determination is as follows: -

#### **a. Whether this Court should grant the Applicant stay of execution of the Judgment and Decree of the trial Court, pending the appeal herein.**

8. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules 2010 provides for a stay of execution pending appeal, thus;

“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 an application being made, to consider such application and to make such order thereon as may to it seems 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 above provision grants this Court, as an appellate Court, jurisdiction to grant a stay of execution pending appeal. No doubt, there is a judgment and consequential decree against the Applicant in CMEL E219 of 2020 – Dominiciano Kimathi vs Gurdev Engineering & Construction Works Limited entered judgment for the sum of Kshs.1,370,146/-, costs of the suit and interest at Court rates.
10. It is evident that the Appellant/Applicant appealed herein against the said Judgment vide a Memorandum of Appeal dated 10<sup>th</sup> May 2023 and filed before this Court on 12<sup>th</sup> May 2023. The appeal was therefore filed in time.
11. Despite the Application being unopposed, this Court is still enjoined to examine the Applicant’s application and decide whether it meets the threshold for the grant of the orders sought by the Applicant. The discretion to grant a stay of execution pending appeal is fettered, only exercisable where the particular conditions set out by the law, Order 42 of the Civil Procedure Rules are met.
12. In an application like the instant application, the first condition that must be satisfied by the Applicant is a demonstration that he or she will suffer substantial loss if the orders are not granted. In the case of *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi* (Milimani) HCMCA No. 1561 of 2007, the Court viewed substantial loss, thus:

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer a 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.”
13. In the present case, the Appellant/Applicant makes a general assertion that it stands to suffer irreparable loss and damage in the event the stay of execution of the decree is not granted. I have scanned through the supporting affidavit and the grounds set forth on the face of the application and must state that I am unable to see any explanation[s], the basis for which the Applicant charges that it will suffer substantial loss if the orders sought are not granted. It is time Applicants like the Applicant in this matter realized that it will not suffice for one to baldly state that he or she will suffer a substantial loss, without demonstrating how, and what informs the holding.
14. As a result, this Court holds that the Applicant has failed to demonstrate that it will suffer substantial loss if the orders sought are not granted. Having found as I have, I see no necessity for proceeding to render myself on the other conditions. Consequently, the Appellant’s/Application herein dated 10<sup>th</sup> May 2023, is hereby dismissed. As the same was not opposed, the dismissal shall be without costs.
15. It is so ordered.

**READ, DELIVERED AND SIGNED THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**



**OCHARO, KEBIRA**

**JUDGE**

In the presence of:

Mr. Ochieng for Appellant/Applicant

Mr. Otieno for the Respondent

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**

**JUDGE**

