



**Victonell Academy Ltd v Mwangi (Appeal E023 of 2023)
[2024] KEELRC 144 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 144 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL E023 OF 2023
DN NDERITU, J
FEBRUARY 8, 2024**

BETWEEN

VICTONELL ACADEMY LTD APPELLANT

AND

FELISTER GATHONI MWANGI RESPONDENT

RULING

I. Introduction

1. In a notice of motion dated 15th September, 2023 (the application) filed through Raydon Mwangi & Associates Advocates the appellant is seeking the following –
 1. Spent
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 3. That this Honourable Court be pleased to grant a stay of execution of the Honourable Magistrate’s court’s judgment and all consequential orders given on 26th day of July, 2023 pending the hearing and determination of the Appeal already filed.
 4. That costs of this application be provided for.
2. The application is expressed to be brought under Rules 3, 8, and 17 of the *Employment and Labour Relations Court (Procedure Rules)* 2016 and all other enabling provisions of the law.
3. The application is based on the grounds on the face of it and supported with the affidavit of James Mbevi, the manager of the appellant, sworn on even date with several annexures thereto.
4. The application is opposed and the respondent through Odhiambo Opar & Co Advocates filed a replying affidavit sworn by herself on 19th September, 2023.



5. Interim orders for stay of execution pending the hearing and determination of the said application were issued on 21st September, 2023. On the same date, it was, by consent, agreed that the application be canvassed by way of written submissions. Miss Nyaga for the appellant filed her submissions on 20th September, 2023, while Mr. Opar for the respondent filed on 26th October, 2023.

III. Analysis & Determination

A. Affidavits

6. Essentially, the applicant is seeking for stay of execution of the judgment and decree arising from Nakuru CMCC (ELRC) No. E91 of 2022 (P. Nyotah SRM).
7. In the supporting affidavit it is deposed that the trial court delivered a judgment on 26th July, 2023 in which the claimant (the respondent herein) was awarded a total of Kshs.281,358/= plus costs and interest, and that the appellant (respondent in the lower court) was aggrieved by the same.
8. Subsequently, the appellant commenced this appeal by way of a memorandum of appeal dated 22nd August, 2023, filed in court on the date that followed. Of course, that is within the 30 days allowed for an appeal to be filed. Contemporaneously, the appellant wrote to the executive officer of the lower court applying for a certified copy of typed proceedings and the judgment.
9. However, on 8th September, 2023 warrants of attachment in execution were issued by the court to Direct "O" Auctioneers to attach and sell by public auction movable assets of the appellant in satisfaction of the decretal sum plus costs standing at Kshs.372,358/= as at the date of issuance of the warrants. The said auctioneer proceeded to proclaim moveable assets of the appellant on 13th September, 2023, but the appellant obtained orders for stay of execution from the court on 15th September, 2023, which orders were subsequently extended on 21st September, 2023, pending the hearing and determination of the said application.
10. It is deposed that the appeal raises triable issues and if the execution is allowed to proceed the appeal shall be rendered nugatory. It is deposed that in the event that the appeal succeeds the respondent can be compensated by way of costs. It is further deposed that the application is made in good faith and without undue or inordinate delay.
11. In the replying affidavit, the respondent deposes that the application is devoid of merit and the court is urged to dismiss the same with costs.
12. It is deposed that upon delivery of the judgment the appellant was granted stay of execution for 35 days but no efforts were made to settle the decretal sum plus costs or make proposals thereof. It is urged that the application does not meet the conditions for issuance of the orders sought for. It is deposed that no substantial loss has been demonstrated to be likely to be suffered by the appellant if the stay is denied and no prejudice has been alleged or demonstrated.
13. The court is requested to dismiss the application and order the appellant to settle the decretal sum plus auctioneer's charges forthwith.

B. Submissions by counsel

14. On the one hand, counsel for the appellant submits that there is only one issue for determination in this application – Whether the appellant is deserving of the orders for stay of execution as sought pending the hearing and determination of the appeal.



15. It is submitted that the applicable law in this application is Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides as follows –

No order for stay of execution shall be made under sub-rule(1) unless: The Court is satisfied that;

1. Substantial loss may result to the applicant unless the order is made and that
2. The application has been made without unreasonable delay and;
3. Such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant.

16. It is submitted that the court should order that status quo be maintained to avert substantial loss on the part of the appellant. Counsel has cited *Mukuma v Abuoga* (1988) KLR 645 and *National Industrial Credit Bank Ltd V Aquinas Francis Wasike & Another* (2006) KLR in support of maintaining status quo.

17. It is submitted that the application was filed without undue delay and that the appellant is ready and willing to comply with such terms as the court may impose including depositing of security in due performance of the decree. This issue is not raised in the supporting affidavit.

18. Finally, it is submitted that the appellant has an arguable appeal. It is submitted that an arguable appeal does not necessarily imply an appeal that shall ultimately succeed and that even a single arguable ground of appeal suffices for this purpose. Counsel has cited several decisions including *Josephine Koki Raymond V Philomena Kanini Maingi & Another* (2018) eKLR and *Royal Media Services Limited V Veronica Chepkemoi* (2015) eKLR in that regard.

19. Counsel has cited the old case of Butt V Rent Restriction Tribunal in urging this court to exercise its discretion in favour of the appellant and grant the stay of execution. The court is urged to follow the reasoning in *Reliance Bank Ltd V Norlake Investments Ltd* (2002) KLR and allow the application so as not to render the appeal nugatory.

20. On the other hand, counsel for the respondent has submitted that the appellant has not met the threshold to deserve the orders sought for stay of execution pending the hearing of the appeal. It is submitted that the appellant has not demonstrated the likelihood of substantial loss in case the stay is denied.

21. Further, it is submitted that the appellant has not furnished or offered any security in due performance of the decree and the court is urged not to allow the application.

22. It is submitted that the issue of whether the appeal raises triable issues is not one of the factors that this court should consider under Order 42 Rule 6(2) of the *Civil Procedure Rules* being the applicable law and counsel has cited *Daniel Maina Wanyoike V Kenya Power & Lighting Company Limited* (2015) eKLR in support of that proposition.

23. It is submitted that the appellant did not depose in the supporting affidavit or by way of any other evidence that the respondent is incapable of refunding the decretal sum in case the same is paid to her and the appeal ultimately succeeds. It is alluded that this issue was only raised in the submissions by counsel from the bar and it is submitted that in any event that is not one of the factors that the court should consider based on the law cited above. Counsel has cited *Cosmas Kipkoach Sigei v Madrugada Ltd & Another* (2010) eKLR in support of that position.



24. For the foregoing reasons, the court is urged to dismiss the application and order the appellant to pay the auctioneer's charges incurred in the stayed execution.

IV. Determination

25. There is only one issue for determination in this application – Should the appellant be granted the stay of execution and on what terms?
26. The primary and overriding objective and duty of this court is to do justice in accordance with Article 159 of the Constitution, Sections 1A and 1B of the Civil Procedure Act, and Section 3 of the Employment and Labour Relations Court Act, amongst many other provisions of the law.
27. Bearing the contents of the above paragraph in mind, the applicable law in this application is Order 42 Rule 6(2) of the Civil Procedure Rules, cited and reproduced in an earlier part of this ruling. This law provides that for this court to grant the orders sought for stay of execution it must satisfy itself that – substantial loss may result to the applicant if the stay is not granted; the application has been brought without undue delay; and, such security as the court may order for due performance of the decree has been given by the applicant.
28. However, Order 42 Rule 6(6) of the Civil Procedure Rules invokes the discretion of this court in an application for stay of execution in the following terms – “Notwithstanding anything contained in subrule (1) of this rule the High Court (ELRC) shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
29. In my considered view and opinion, the above provision allows this court to grant stay of execution in the interest of justice in line with the constitutional and statutory provisions cited above. This means that beyond the provisions in Order 42 Rule 6(2) of the Civil Procedure Rules, this court has discretionary powers when considering an application for stay of execution beyond the three conditions stated therein. This explains why courts have considered factors such as - whether the appeal raises triable issues; whether the appeal shall be rendered nugatory if stay is denied; whether the decree-holder has the ability to repay the money in case the appeal ultimately succeeds; and, the wider interests of justice, depending on the facts and the circumstances of each application.
30. While the application herein was filed without undue delay, and the court may impose provision of security in due performance of the decree, failure of which the stay shall lapse, it has not been demonstrated by the appellant what substantial loss it would incur if the stay is denied. There is no allegation in the supporting affidavit that the respondent may be unable to repay the money if the appeal ultimately succeeds. That allegation has been made from the bar by counsel for the appellant hence denying the respondent a chance to provide evidence of her financial muscle.
31. In the entire circumstances of this application, considering the evidence availed, and the submissions made from both sides, it is in the interest of justice that the decretal sum plus costs in this matter be secured pending the hearing and determination of the appeal. The amount due as per the warrants of attachment issued on 8th September, 2023 is Kshs.372,358/=.
32. The court orders and directs that the above sum of Kshs.372,358/= be deposited by the appellant in a joint interest earning account to be opened in the name of both law-firms of the lawyers of both parties within 30 days hereof.



V. Costs

33. The appellant shall pay auctioneer's costs for work done and the same may be agreed or assessed in the usual manner.
34. The costs of this application shall abide with the costs in the appeal.

VI. Orders

35. For all the foregoing reasons, the notice of motion dated 15th September, 2023 is allowed on the following terms -
 - a. Stay of execution be and is hereby granted pending the hearing and determination of the appeal on the following terms and conditions.
 - b. The entire decretal sum plus costs in the sum of Kshs.372,358/= shall be deposited in a joint interest earning account in the name of both law-firms representing the parties herein within 30 days of this ruling.
 - c. In default of (b) above the stay of execution shall automatically lapse.
 - d. The appellant shall pay auctioneer's charges for work done, and the same may be agreed or assessed/taxed in the usual manner.
 - e. Costs of the application shall be in the appeal.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 8TH DAY OF FEBRUARY, 2024.

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DAVID NDERITU
JUDGE

