



**Watchdog Limited v Obwege & 6 others (Employment and Labour Relations Appeal E145 of 2023) [2024] KEELRC 702 (KLR) (28 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 702 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E145 OF 2023**

**K OCHARO, J  
MARCH 28, 2024**

**BETWEEN**

**WATCHDOG LIMITED ..... APPLICANT**

**AND**

**PETERSON NYABUTO OBWEGE ..... 1<sup>ST</sup> RESPONDENT**

**PIUS MURUNGA SHIRONGO ..... 2<sup>ND</sup> RESPONDENT**

**FRANCIS KIVINDU MITHU ..... 3<sup>RD</sup> RESPONDENT**

**GEOFFREY KATUMANGA INDECHE ..... 4<sup>TH</sup> RESPONDENT**

**VINCENT BARASA OMANYO ..... 5<sup>TH</sup> RESPONDENT**

**JOASH MAYIEKA MOSE ..... 6<sup>TH</sup> RESPONDENT**

**TITUS OKUMU ODUORI ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 7<sup>th</sup> August 2023 expressed to be under Order 51 Rule 1 of the [Civil Procedure Rules 2010](#); and Sections 1A, 1B, 3, 3A and 63 (e) of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya, the Appellant/Applicant has sought for a stay of execution of the decree of the lower court in Milimani Commercial Courts, CMEL No 2315 of 2019 pending the hearing and determination of the appeal herein.
2. The application is buttressed by the grounds contained in the Supporting Affidavit sworn on 7<sup>th</sup> August 2023, by Sylvia Mbaire Gene, the Applicant's Advocate.
3. The Respondents have opposed the application through a Replying Affidavit sworn on 5<sup>th</sup> October 2023 by one Titus Okumu Oduori, the 7<sup>th</sup> Respondent.



4. The Appellant/Applicant states that the Trial Court dismissed its application for setting aside a judgment that had been entered against it *ex parte*, for non-appearance. The application before the Learned Chief Magistrate was solidly anchored on the fact that the Respondent was not at all served with the summons to enter appearance and the Respondent's pleadings, hence the failure to enter appearance and file a response in the matter. The appeal herein seeks to unseat the Trial Court's ruling and order.
5. Flowing from the default judgment, the Respondents have initiated execution of the decree proceedings against it, and indeed, they did on 20<sup>th</sup> July 2022 proclaim its property. The Appellant/Applicant argues that it shall suffer irreparable loss, injury and great prejudice if the execution proceedings are allowed to proceed. The decretal sum is colossal, standing at Kshs 4,537,770.14. The Appellant/Applicant is not able to raise the same all at once. They are, however, willing to pay a reasonable amount of the same in the meantime or to provide a bank guarantee as security as security pending appeal.
6. The Respondents counter the Appellant/Applicant's application by stating that litigation should come to an end and the Respondents allowed to enjoy the fruits of their judgment delivered on 22<sup>nd</sup> October 2021. The Appellant/Applicant has been indolent and is therefore not deserving of the exercise of this Court's discretion in their favour.
7. The Respondents further state that should this Court be inclined to issue a stay of execution pending appeal, then it should make the same conditional upon the Appellant/Applicant depositing the entire decretal sum plus costs of the suit into a joint interest-earning account in the names of the Advocates for the parties, as security.
8. Following the directions of this Court issued on 9<sup>th</sup> October 2023, that the application should be canvassed by way of written submissions, the Appellant/Applicant filed submissions dated 14<sup>th</sup> November 2023; and the Respondent filed submissions dated 30<sup>th</sup> October 2023.
9. I have considered the Notice of Motion dated 7<sup>th</sup> August 2023 and Affidavit in Support thereof; the Replying Affidavit sworn on 5<sup>th</sup> October 2023; the parties' submissions and authorities that they rely on. The issue for determination is as follows: -
  - a. Whether this Court should grant the orders sought in the Notice of Motion dated 7<sup>th</sup> August 2023.

### **Analysis and determination**

#### **Whether this Court should grant the orders sought in the Notice of Motion dated 7<sup>th</sup> August 2023.**

10. The present application is one for a stay of execution pending appeal. The history of the matter is that default judgment was entered against the Appellant/Applicant on 22<sup>nd</sup> October 2021 after the Appellant/Applicant failed to enter appearance and/or file a defence in the suit before the trial court. Vide an application dated 1<sup>st</sup> August 2022, the Appellant/Applicant sought before the trial court that the default judgment be set aside, and the matter be allowed to proceed to be heard on merit. The Court pronounced itself on this application vide its Ruling delivered on 14<sup>th</sup> July 2023, dismissing the application. The ruling is the subject of the appeal before this Court.



11. For a stay of execution pending appeal, the applicable provision of law is Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules 2010](#) which provides as follows:

“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.”

12. The Applicant herein has satisfactorily demonstrated that the Honourable Court (Hon. Ruguru, SPM) in MCELRC Cause No 2315 of 2019 – Peterson Nyabuto Obweg & 6 others v Watchdog Limited delivered a Ruling on 14<sup>th</sup> July 2023, refusing to set aside a default judgment entered against the Applicant/Appellant on 22<sup>nd</sup> October 2021.

13. No doubt, there is an appeal herein pending filed within time by the Appellant/Applicant.

14. This Court’s mandate, therefore is to analyze whether the Appellant/Applicant has met the conditions necessary for grant of an order of stay of execution, under Order 42 Rule 6 (2). Firstly, has the Appellant/Applicant proved that they will suffer substantial loss if the orders are not granted? The Appellant/Applicant insists that they will suffer substantial loss since the Respondents may continue to carry out the already commenced execution process to conclusion, subjecting it to substantial loss as the decretal sum is colossal.

15. In [Timsales Limited v Hiram Gichobi Mwangi](#), Civil Appeal Number 94 of 2008 (2013) eKLR the Honourable Court held that: -

“The mere fact that the process of execution has commenced or is likely to commence does not amount to a substantial loss for the reason that execution is a legal process and that the Appellant must establish other factors.

16. The Applicant in the instant application, besides just stating that the amounts are colossal, has not bothered to demonstrate what loss it could suffer if execution is allowed to proceed for the realization of the sum of the lower court’s decree. As a result, I hold that the Applicant has failed to establish, this first condition necessary for grant of a stay of execution.



17. The Court notes that the Judgment in this matter was entered back on 22<sup>nd</sup> October 2021, more than 2 years ago, ordinarily, and drawing support from the apt holding in the case of *Thomas M. Nguti & 196 others v Kenya Railways Corporation* [2022] eKLR, I could allow the Respondents to enjoy the fruits of their judgment by declining to grant a stay of execution, however, I come to a clear view that the justice of this case militates against such a move.
18. The Appellant/Applicant herein has expressed that they are willing to deposit reasonable security for the due performance of the decree, which expression I find to be in sync with the Respondents' expressed desire. In the case of *Michael Ntouthi Mithen v Kivondo Musau* [2021] eKLR, 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 *Ndubiu Gitabi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.”
19. Considering the present application was brought without unreasonable delay, having been filed on 7<sup>th</sup> August 2023, less than one month after the delivery of the impugned Ruling on 14<sup>th</sup> July 2023, and that the Respondents have expressed their comfort with the issuance of a conditional stay, I am inclined to, and hereby, grant a stay of execution of the decree of the lower in the suit hereinabove mentioned, MCELR Cause No 2315 of 2019 – Peterson Nyabuto Obweg & 6 others v Watchdog Limited pending the hearing and determination of the Appeal herein.
20. In the upshot, the Applicant's application for a stay of execution pending appeal is granted on the condition that:
- a. 50% of the decretal sum of Kshs 2,268,885.07/- be deposited in a joint interest-earning account in the names of the Advocates for the parties within 30 days of the date of this Ruling.
  - b. In default, execution to issue forthwith.
  - c. The Appellant/Applicant is to file and serve its submissions on the appeal within 21 days of today.
  - d. The Respondents are to file and serve their submissions within 21 days of service.
  - e. Mention on 15<sup>th</sup> May, 2024 to confirm compliance and fix the appeal for judgment.
21. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2024.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Ms. Ngene for Appellant



Mr. Kibara for 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**

