



**Mwita v DHL Worldwide Express Kenya Limited (DHL) (Cause E1005 of 2021) [2024] KEELRC 645 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 645 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E1005 OF 2021  
B ONGAYA, J  
MARCH 15, 2024**

**BETWEEN**

**OLIVER MATIKO MWITA ..... CLAIMANT**

**AND**

**DHL WORLDWIDE EXPRESS KENYA LIMITED (DHL) ..... RESPONDENT**

**RULING**

1. The respondent filed the application on 26.02.2024 through Anjarwalla & Khanna LLP. Learned Counsel Ms. Macharia and Ms. Ouma appeared in that regard. The application was by the notice of motion under rule 17 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016. The applicant prayed for orders of stay of taxation proceedings pending the hearing and determination of Nairobi Civil Appeal No. E106 of 2024 (DHL Worldwide Express Kenya Limited –Versus- Oliver Matiko Mwita); consequential orders as the court deems just to grant to ensure that Nairobi Civil Appeal No. E106 of 2024 (DHL Worldwide Express Kenya Limited –Versus- Oliver Matiko Mwita) is not rendered nugatory; and, the costs of the application be provided for.
2. The application was based upon the supporting affidavit of Paul Robert Clegg and it was urged for the applicant as follows:
  - a. The applicant is dissatisfied with part of the judgment delivered by the Court on 27.11.2023 and has filed Nairobi Civil Appeal No. E106 of 2024 (DHL Worldwide Express Kenya Limited –Versus- Oliver Matiko Mwita) pending hearing and determination in the Court of Appeal.
  - b. The party and party bill of costs has been served for the claimant on 05.02.2024.
  - c. The applicant filed an application for stay of execution of the decree herein by way of Civil Application No. E048 of 2024(DHL Worldwide Express Kenya Limited –Versus- Oliver Matiko Mwita). The Court of Appeal certified the application as urgent on 20.02.2024 and



timelines for parties to file submissions were given. The application will therefore be heard and determined soonest possible.

- d. If the application for stay of execution succeeds and the appeal subsequently succeeds, then the orders made upon taxation will be liable to setting aside. The bill of costs set to be taxed is astronomical at Kshs. 2 million and the taxation should be stayed pending the determination of the appeal.
  - e. The Court granted temporary stay of execution orders but which have since lapsed.
  - f. Taxation of costs is part of the execution process complete with provisions for stay of execution under the *Civil Procedure Rules* and the *Employment and Labour Relations Court (Procedure) Rules*, 2016. Seeking to tax the bill of costs is essentially initiating the execution proceedings. The taxation of costs should not be instalments and should be done after determination of the appeal and the stay of execution application both pending in the Court of Appeal. If taxation is allowed to proceed and execution carried out, then the applicant will have to institute proceedings to recover the same if successful at the Court of Appeal. If the applicant fails at the Court of Appeal, the claimant will be awarded costs, which will be taxed together with the pending bill of costs. Thus, the claimant will not suffer prejudice. Taxing the bill of costs will therefore be premature.
  - g. If the costs are taxed and execution issues, then the applicant will suffer substantial loss as may be difficult to recover the money from the claimant if the applicant is successful at the Court of Appeal.
  - h. The application has been made without prompt delay.
3. The claimant responded to the application by filing the replying affidavit of Judith A. Guserwa Advocate for the claimant. It was urged for the claimant as follows:
- a. The judgment was delivered on 27.11.2023 in favour of the claimant and a sum of Kshs. 9, 117, 785.38 awarded as damages for unfair and unlawful termination from employment.
  - b. The application is made to delay taxation in the instant case. The party and party bill of costs filed is dated 26.01.2024.
  - c. On 27.11.2023, the applicant sought and obtained stay of execution orders and after the order of stay of execution lapsed thereafter, the bill of costs was filed and served. The present application duplicates the application for stay of execution already filed by the applicant in the Court of Appeal.
  - d. The taxation was fixed for 05.03.2024. The application is an afterthought made in bad faith and should be dismissed with costs.
4. The Court has considered the parties' respective positions on record including submissions made by the respective counsel. The Court returns as follows.
5. To answer the 1<sup>st</sup> issue, as submitted for the applicant, the Court has jurisdiction to stay taxation proceedings but upon judicious exercise of the attached discretion. The respondent appears not to oppose that position. The parties' mutual position is that taxation is part of execution process. The Court finds accordingly.
6. The 2<sup>nd</sup> issue is whether the instant application is an abuse of Court process. It appears to the Court that it is not, only to the extent that it seeks a relief pending the hearing and determination of the application



for stay of execution pending before the Court of Appeal. It further appears to the Court that if the stay application is successful before the Court of Appeal, then by order of the Court of Appeal the taxation proceedings would be stayed. Conversely, if the Court of Appeal declines the pending application, then the taxation proceedings might progress. Except to that extent, taxation being part of execution proceedings as mutually submitted and urged for parties, in view of the pending application before the Court of Appeal, the instant application would be a duplicity and therefore an abuse of court process. It cannot be that the Court grants stay of the taxation proceedings beyond the liberty of the Court of Appeal allowing or staying execution of the decree herein, one way or the other. The Court cannot curtail the jurisdiction of the Court of Appeal that has already been moved and such holding should be obvious to both parties. The Court finds accordingly.

7. To answer the 3<sup>rd</sup> issue, the Court has considered parties' margins of success and all circumstances and each party to bear own costs of the application.

In conclusion, the application filed for the respondent on 26.02.2024 and dated 23.02.2024 is hereby determined with orders:

- a. There be stay of taxation of the claimant's party and party bill of costs herein dated 26.01.2024 pending the hearing and determination of Court of Appeal at Nairobi Civil Application No. E048 of 2024 (DHL Worldwide Express Kenya Limited –Versus- Oliver Matiko Mwita) or pending such further order and direction by the Court of Appeal, in that regard.
- b. Each party to bear own costs of the application.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15<sup>TH</sup> MARCH 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

