



**Keiser v Makupa Transit Shade Limited (Cause 47 of 2020)
[2024] KEELRC 1470 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1470 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 47 OF 2020
M MBARŪ, J
MARCH 14, 2024**

BETWEEN

DENNIS KEISER CLAIMANT

AND

MAKUPA TRANSIT SHADE LIMITED RESPONDENT

RULING

1. The respondent, Makupa Transit Shade Limited filed application dated 25 January 2024 under the provisions of section 79G and 95 of the Civil Procedure Act, order 42, 43 and 51 of the Civil Procedure Rules and seeking for orders that;
 - Pending hearing and determination of this application, the court do grant a stay of execution of its judgement delivered on 18 December 2023.
 - Pending the hearing and determination of the intended appeal, this court do grant a stay of execution of its judgment delivered on 18 December 2023.
2. The application is supported by the affidavit of Abdiwahid Haji Yerrow and on the grounds that following judgment herein on 18 December 2023, the respondent was dissatisfied and has filed an appeal. the claimant has irregularly caused a proclamation and warrants of attachment to be served upon the respondent yet no decree has been served pursuant to the judgment herein.
3. Mr Yerrow aver in his affidavit that he is a director of the respondent and since judgment issued herein, the claimant has not served any Decree of the court to justify the execution process commenced and unless the orders sought are issued, there will be harm, damage and prejudice. The decretal sum is substantial and if the claimant is allowed to proceed with execution, there will be loss and damage to the respondent who employs over one hundred employees and will be forced to wind up business to pay the claimant.



4. Mr Yarrow also aver that the respondent is required to give security to ensure the satisfaction of the decree in the event the appeal is not successful and the respondent is willing to issue a reasonable security pending appeal. there will be no prejudice visited against the claimant if the orders sought are issued.
5. In reply, the claimant filed the grounds of objection and no replying affidavit as required under *Employment and Labour Relations Court (Procedure) Rules, 2016*. Rule 17(9) though not mandatory requires that;
 - (9) A party may respond to an application by filing grounds of opposition verified by an affidavit.
6. The objections are that the application by the respondent is bad in law and the court is functus officio.
7. Both parties attended and filed written submissions and made oral submissions. These are analysed and the sole issue for determination is whether stay of execution should issue pending hearing and determination of the appeal.
8. The respondent's application is premised on the provisions of section 79G and 95 of the *Civil Procedure Act*. Section 79G of the *Civil Procedure Act* relates with the filing of appeals from the subordinate courts while Section 95 thereof relates enlargement of time. These provisions are unrelated in these proceedings and no linkage was given by the respondent in the application, affidavit or submissions.
9. Further, the respondent has relied on the provisions of order 42, 43 and 51 rule 1 of the *Civil Procedure Rules*. The reference to order 42 and 43 is without relating these orders to any rules. Order 51 rule 1 relates to Objection Proceedings.
10. The cited provisions of the *Civil Procedure Act* and the rules thereto are largely unrelated to the instant application and the nature of orders sought.
11. Even a careful consideration of the application, the respondent is seeking for order that there be stay of execution pending the hearing and determination of its intended appeal. an applicant seeking stay of execution is required to abide the conditions set out under order 42 rule 6(2) of the *Civil Procedure Rules*. These requires that;
 - No order for stay of execution shall be made under sub rule (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 respondent has made a case that they intend to file an appeal against the judgment herein. A Notice of Appeal has been filed but there are no draft memoranda or any outline of what issues arise from such intention.
13. Under order 42 rule 6, an applicant is also required to demonstrate what substantial loss is to be suffered if the order of stay is not granted as held in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:

No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has



been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.

14. The respondent's case is that the judgment award is substantial and no decree has issued to allow them assess, the judgment award was in United States Dollars and if execution is allowed to proceed, the entire business will be affected and over 100 employees will have no wages. The claimant has a valid judgment of this court and even though he did not file an Affidavit to oppose the application herein, in securing the interests of both parties, to allow the respondent a fair chance to urge its appeal and to secure the claimant herein, in the interests of justice, a conditional stay of execution shall issue.
15. Accordingly, application dated 25 January 2024 is allowed in the following terms;
 - a. Stay of execution is hereby allowed for 45 days to allow the respondent to file and serve appeal;
 - b. The award of unpaid salary shall be released to the claimant within 30 days;
 - c. Non-compliance with (a) above, the order of stay shall automatically lapse;
 - d. No orders on costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 14 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

