



REPUBLIC OF KENYA



Pelt Security Services Limited v Makana (Employment and Labour Relations Appeal E005 of 2023) [2024] KEELRC 581 (KLR) (12 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 581 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2023**

HS WASILWA, J

MARCH 12, 2024

BETWEEN

PELT SECURITY SERVICES LIMITED APPELLANT

AND

JARED MAKANA RESPONDENT

RULING

1. This ruling is in respect of the Appellant/ Applicant, Application Notice of Motion dated 11th August, 2023, brought pursuant to sections 1A & 3A of the [Civil Procedure Act](#), Order 18 Rule 10 and Order 51 Rule 1 of the [Civil Procedure Rule](#) and all other enabling provisions of the law, seeking for the following orders; -
 1. Spent.
 2. That the Honourable court be pleased to grant interim stay of Judgement delivered on 23rd March, 2023 by the Honourable Principle Magistrates A.P Ndege sitting at Nakuru Magistrate Court in MCELRC Cause No. 066 of 2022; Jared Makana vPelt Security Services Limited and the Respondent was awarded Kshs 889,912.04 plus costs and interest.
 3. That there be stay of execution of the Judgement delivered on the 23rd March, 2023 and the resultant decree and all incidental orders entered herein be set aside pending the hearing and determination of this Application.
 4. That the Application be heard inter partes on such date and time as this Honourable Court may deem fit.
 5. That the costs of this Application abide the outcome of the Appeal.
2. The Application is premised on the grounds on the face of the Application and the supporting affidavit of Reuben Binayo, the Appellant's operation manager, sworn on the 11th August, 2023.



3. The Applicant stated that he is aggrieved by the judgement delivered *ex parte* by the Court on the 23rd March, 2023 and has since lodged an Appeal and filed a memorandum of Appeal on 4th April, 2023, which he states raised triable issues, with high chances of success and failure to stay the execution therein, the appeal stands to be rendered nugatory.
4. The Applicant stated that prior to delivery of the judgement on 17th March, 2023, the Applicant herein filed an application to be allowed to cross examine the claimant but the said application was mysteriously dismissed and thus the Applicant was never granted a chance to express itself and also that a date for inter parte hearing was not given.
5. The affiant stated that the upon delivery of the judgement, the Respondents herein instructed MOCO Auctioneers who attempted to cart away with the Applicant's goods without following due procedure of issuing proclamation notice.
6. The Applicant also stated that the Respondent is a man of straws who will be unable to repay the decretal sum if the Appeal succeeds, as such stay should issue.
7. He also stated that the Appellant is willing to deposit a bank guarantee as security for due performance. Further that the Application has been filed timeously and that no prejudice will be visited on the Respondent if stay is granted.
8. In the affidavit, the Affiant stated that judgement was delivered on 23rd March, 2023 by Hon A.P Ndege and on 24th March, 2024, they requested for copies of certified judgement and typed proceedings, which the Court is yet to issue to enable the Applicant prepare a record of Appeal.
9. He urged this court, based on the circumstances raised to allow the application for stay.
10. The Application is opposed by the Respondent who filed a replying affidavit deposed upon on 4th September, 2023 stating that the stay of execution order sought is a ploy to delay the realization of full industrial justice.
11. He stated that the Application is dead on arrival as it does not consist of any substantive prayer for grant of stay of execution pending the hearing of the Appeal. Hence the Court should not grant prayers that have not been sought
12. The Respondent stated that he has not been served with any memorandum of Appeal as such, he is not privy to the existence of any Appeal in this matter. He also denied knowledge of the alleged application dated 17th March, 2023, which the Applicant stated was seeking to cross examine the claimant/ Respondent herein. Moreover, that the applicant has not annexed a copy of the ruling of the Application that was allegedly dismissed mysteriously.
13. The Respondent stated that contrary to the allegations by the Applicant, they were not denied audience rather that they ignored all hearing dates especially the hearing of 16th March, 2023 which was taken by mutual consent by the parties on the 25th August, 2022. Additionally, that no explanation was given for the non-attendance.
14. He stated that no reasonable security has been offered for due performance. Nonetheless, that in the event this Court allows this Application then order for payment of half of the decretal sum to the claimant/ Respondent and deposit of the balance in Court or a deposit of the entire sum in Court. He rejected the security offered of bank guarantee.



15. The Respondent stated that the Application herein has been filed after a considerable and unexplained delay, since the Judgement was delivered on 23rd March, 2023, while the Application herein was filed on 26th September, 2023, a period of more than Six (6) Months.
16. The Respondent also stated that the Application herein has only been filed when execution proceedings began, despite the Applicant purporting to have filed an Appeal on 6th April, 2023, which was not served on him.
17. He stated that the Application lacks merit as it stands and therefore the Court should dismiss it.
18. Directions were taken for the Application to be canvassed by written submission, with the Applicant filing submissions on the 6th October, 2023, but the Respondent opted to rely on his replying affidavit.

Applicant's Submissions.

19. The Applicant submitted that their application is based on Order 42 Rule 6 that provides for conditions to be satisfied before stay of execution Order is granted and argued that based on the facts laid before this Court, the Applicant has satisfied all the conditions pre-requisite to granting of stay Orders. He relied on the case of *Firoze Nurali Hirji v Housing Finance Company of Kenya Limited & Another* [2015] eKLR where the Court held that:-

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes a crucial issue. The court cannot shut its eyes where it appears the possibility of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal is doubtful. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal to ensure that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. In other words, the court should not only consider the interest of the applicant but has also to consider, in all fairness, the interest of the respondent who has been denied the fruits of her judgement.”

20. Accordingly, that the discretionary relief of stay is designed to ensure no one would be worse off by virtue of an order of the Court or that the order introduced any disadvantage but administers justice that the case deserves.
21. The Applicant submitted also that the application has been filed without unreasonable delay as the applicant is keen in expeditiously prosecuting its Appeal having already filed a Notice of Appeal.
22. On security for due performance, the Applicant maintained that it is willing to provide security in form of Bank guarantee. In support of this, the Applicant relied on the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR where the Court held that; -

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”



23. In conclusion, the Applicant submitted that it has established firstly, that substantial loss may result to the Applicant unless the order is made, Secondly, that the Application has been made without unreasonable delay and thirdly, has offered security for due performance of the decree, therefore that it has met all conditions required for issuance of stay of execution order and prayed for the Orders sought to be granted as prayed.
24. The application placed before this court is for stay pending hearing and determination of this application. Beyond this application, it appears that the court arrives at a dead end without any further action.
25. The applicants have not sought any orders pending an appeal they have filed. It is therefore apparent from the pleadings that no orders can be granted beyond this application.
26. A party is held by their pleadings and this court cannot amend the applicant's pleadings in this application.
27. Based on this understanding, there are no further orders of stay I can grant beyond this application.
28. The application lacks any feet to stand on and I find it unmerited and I dismiss it accordingly.
29. Execution may proceed.

RULING DELIVERED VIRTUALLY THIS 12TH DAY OF MARCH, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Mburu S.K for Respondent

Kwamboka for Appellant

Court Assistant - Fred

