



**Kibet v Family Bank Limited (Cause 486 of 2017)  
[2024] KEELRC 521 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 521 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 486 OF 2017  
DN NDERITU, J  
MARCH 7, 2024**

**BETWEEN**

**MAUREEN J KIBET ..... CLAIMANT**

**AND**

**FAMILY BANK LIMITED ..... RESPONDENT**

**RULING**

**I. Introduction**

1. In a judgment delivered on 19<sup>th</sup> October, 2023, this court found in favour of the claimant and made the following orders –
  - a) A declaration be and is hereby issued that the dismissal of the claimant by the respondent was wrongful, unfair, and unlawful.
  - b) The claimant is awarded a total of Kshs.716,300/= made up as follows –
    - i. One month’s salary in lieu of notice.. Kshs.55,100/=
    - ii. Compensation for unfair and unlawful dismissal .....Kshs.661,200/=

Total .....Kshs.716,300/=
  - c) The respondent is hereby ordered to issue and deliver a certificate of service to the claimant within 30 days of this judgment.
  - d) Costs of the cause to the claimant.
2. In a notice of motion dated 6<sup>th</sup> November, 2023 (the application) filed through Murimi, Ndumia, Mbago & Muchela Advocates the respondent is seeking the following –



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  2. Spent
  3. That pending the hearing and determination of this application this honourable court be pleased to grant stay of execution of the judgment dated 19<sup>th</sup> October, 2023.
  4. That pending the hearing and determination of the intended Appeal in the Court of Appeal against the court's judgment dated 19<sup>th</sup> October, 2023 this honourable court be pleased to grant stay of execution of the court's judgment dated 19<sup>th</sup> October, 2023.
  5. That costs hereof be in the cause.
3. The application is expressed to be brought under sections 1A, 1B, and 3A of the [Civil Procedure Act](#), order 42 rule 6, and order 51 rule 1 of the Civil Procedure Rules.
  4. The application is based on the grounds on the face of it and supported with the affidavit of Stephen Kimani Ngaru, head of human resources management, sworn on even date with several annexures thereto.
  5. The application is opposed and the claimant through Ochieng' Gai & Co Advocates filed a replying affidavit sworn by herself on 20<sup>th</sup> November, 2023.
  6. Interim orders for stay of execution pending the hearing and determination of the said application were issued on 21<sup>st</sup> November, 2023. On the same date, it was, by consent, agreed that the application be canvassed by way of written submissions. Mr. Murimi for the respondent/applicant filed his submissions on 8<sup>th</sup> December, 2023, while Mr. Ochieng' Gai for the claimant filed his on 8<sup>th</sup> December, 2023.

## **II. Analysis & Determination**

### **(A) Affidavits**

7. Essentially, the applicant is seeking for stay of execution of the judgment delivered on 19<sup>th</sup> October, 2019, pending the hearing and determination of an intended appeal against the same.
8. In the supporting affidavit it is deposed that the awarded sum is substantial and if paid the ability of the claimant, the decree-holder, to refund the money in case the appeal ultimately succeeds is questioned. In that regard, it is deposed that the respondent shall suffer substantial loss.
9. It is deposed that the respondent is ready and willing to provide security, and comply with such other conditions as the court may impose, in due performance of the decree.
10. It is deposed that the respondent has moved the court timeously and that the intended appeal has appreciable chances of success. A notice of appeal is annexed to the application.
11. In the replying affidavit, the claimant has deposed that judgment was delivered on 19<sup>th</sup> October, 2023, yet the application was filed on 6<sup>th</sup> November, 2023, and the same was served on 16<sup>th</sup> November, 2023. It is the claimant's view that the above delay is inordinate and not explained and that the same is intended to delay settlement of the matter and deny her the fruits of a lawful judgment.
12. It is deposed that no substantial loss has been demonstrated in case the respondent settled the decretal sum. It is vehemently denied that the decretal sum is substantial.



13. It is deposed that no memorandum of appeal has been filed with the application and as such there are no grounds upon which the respondent may argue that the appeal is arguable or has high chances of success.
14. It is deposed that any further delay in settlement of the decretal sum shall highly prejudice the claimant who lost her job unfairly and that the settlement of this matter should help her secure another job.

**(B) Submissions by Counsel**

15. On the one hand, counsel for the respondent has asked the court to consider the merits of the application based on various aspects including - the law applicable, whether there has been inordinate delay, substantial loss, security offered, prejudice to respondent if stay not granted, among other factors.
16. It is submitted that the applicable law is as cited and expressed in the application. It is submitted that the stay sought is in regard to the entire judgment of the court. It is further submitted that the application was filed on 8<sup>th</sup> November, 2023, after the judgment was delivered on 19<sup>th</sup> October, 2023. It is stated that the notice of appeal was filed on the same day that the judgment was delivered. It is therefore submitted that there was neither inordinate nor unreasonable delay in filing of the application.
17. It is submitted that the claimant has not demonstrated her ability to refund the money, if paid, in case the appeal ultimately succeeds. It is submitted that this situation renders the respondent vulnerable to suffering substantial loss. It is submitted that the claimant is unemployed and has not displayed any liquid or fixed assets at her disposal to assure the court of her ability to refund the money in case the appeal ultimately succeeds. It is argued that in those circumstances, if the money is paid the intended shall be rendered nugatory and merely academic. In this regard counsel has cited *Mukuma V Abuoga* (1988) KLR 645, *Antoine Ndiaye V African Virtual University* (2015) eKLR, inter alia, in support of those arguments.
18. Further, it is submitted that once the issue of the claimant's ability to repay the money was raised by the respondent, the burden of proof of such ability shifted to the claimant. Among other decisions, counsel for the respondent has cited *Alhyder Trading Company Limited V Lucy Jepng'etich Mibei* (2016) eKLR in support of that proposition.
19. In regard to security, it is submitted that the respondent is willing to deposit the entire decretal sum in a joint interest earning account in the names of the lawyers for the parties within 60 days of such an order. It is submitted that in case of such a deposit both parties shall be secure whichever way the appeal ultimately goes. Counsel has cited *Vista Holdings International Limited V Span Image (K) Limited* (2014) eKLR and *Nduhiu Gitahi V Warugongo* (1988) KLR 621.
20. In conclusion, counsel has asked the court to follow the reasoning in the old case of *Butt V Rent Restriction Tribunal* in that the court should not exercise its discretion in an application for stay of execution as to prevent an appeal or to render the same superfluous, nugatory, or merely academic.
21. On the other hand, counsel for the claimant, in his submissions erroneously headed as "Respondent's submissions", submits that the inordinate and unreasonable delay in filing of the application, from 19<sup>th</sup> October, 2023, the date of delivery of the judgment, to 16<sup>th</sup> November, 2023, the date of filing of the application, has not been explained at all. It is submitted that while the respondent was granted a stay of execution for 30 days upon delivery of the judgment, the application is intended to delay the settlement of the matter.
22. It is submitted that the amount awarded in the judgment is not substantial and the respondent, a financial institution, cannot allege that it shall suffer substantial loss in settlement of such a little sum



which was, in any event, awarded in a lawful judgment that has not been set aside. It is submitted that if at all there is any loss that the respondent may incur the same is quantifiable and recoverable in monetary terms.

23. It is submitted that no memorandum of appeal has been filed and as such the court cannot ascertain that indeed the respondent is serious in filing and prosecuting the intended appeal.
24. It is submitted that this is a money decree for which the court should not order a stay of execution. Counsel has cited *Madhupaper V Crescent Construction (1990)* and *Stephen Wanjohi V Central Glass Industries Ltd (1991)* insisting that no sufficient cause has been demonstrated as for the respondent to deserve an order for stay of execution. It is submitted that the respondent has not met the basic and minimum requirements and prerequisites for issuance of an order for stay of execution. It is therefore urged that the application be dismissed with costs.

### III. Determination

25. There is only one issue for determination in this application – Should the respondent be granted the stay of execution sought 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 above in mind, the applicable law in this application is Order 42 Rule 6(2) of the Civil Procedure Rules. 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. 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.
29. In my considered view, the respondent has met the three basic requirements for grant of stay of execution. When the judgment was delivered on 19<sup>th</sup> October, 2023, the respondent sought and was granted a stay for 30 days. Before the expiry of the said period, the respondent filed this application on 8<sup>th</sup> November, 2023. On the issue of substantial loss, the claimant was challenged in the application to demonstrate that she has the means to refund monies to be paid to her pursuant to the decree in the event that the appeal ultimately succeeds. She did not take up that challenge.
30. While the decretal sum is not substantial, by the standards of the respondent, a financial institution, the same may be substantial to the claimant who is currently unemployed and has failed to disclose or demonstrate her ability to refund the monies in case the appeal succeeds. If the claimant has no ability to refund the money if paid, and the appeal ultimately succeeds, the same shall have been rendered nugatory or merely academic.
31. On a positive note, the respondent is ready and willing to provide security in due performance of the decree and comply with such orders or directions as the court may order or impose.



32. While the claimant is legally entitled to the fruits of the judgment, the court is equally mindful that both parties are secured against any unnecessary loss or prejudice. It is those competing and at time conflicting interests between the parties that the court has to balance in an application for stay of execution.
33. It has not been disclosed to this court whether the respondent has actually filed an appeal besides the intention expressed in the notice of appeal. This court, either way, has no business considering the probability of success of an appeal against its own judgment. It is not one of the elementary factors that this court should consider based on the law cited above.
34. In my considered view, the court needs to secure the decretal sum so that depending on the outcome of the intended appeal the successful party shall be assured of assessing the same. That can only be achieved by the court ordering that the decretal sum be deposited in a joint interest earning account to be opened with a reputable bank in the names of both law-firms representing the parties herein.

#### **IV. Costs**

35. The costs in this application shall abide with the outcome of the intended appeal.

#### **V. Orders**

36. For all the foregoing reasons, the notice of motion dated 6<sup>th</sup> November, 2023 by the respondent is allowed on the following terms -
  - a. Stay of execution be and is hereby granted pending the hearing and determination of the intended appeal on the following terms and conditions.
  - b. This order for stay does not affect taxation of costs which may go ahead as a bill of costs has already been filed.
  - c. The respondent shall deposit the amount awarded in the judgment in the sum of Kshs.716,300/= into a joint interest earning account with a reputable bank in the names of the two law-firms representing the parties within 30 days of this ruling.
  - d. In default of (c) above the stay of execution shall automatically lapse.
  - e. Costs of the application shall be in the intended appeal.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 7<sup>TH</sup> DAY OF MARCH, 2024.**

.....

**DAVID NDERITU**

**JUDGE**

