



**Muiiri v East Africa Cables Limited (Cause 154 of 2019)
[2024] KEELRC 1122 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 154 OF 2019
K OCHARO, J
APRIL 26, 2024**

BETWEEN

KIRAGU KIAI MUIRI CLAIMANT

AND

EAST AFRICA CABLES LIMITED RESPONDENT

RULING

1. The Respondent/Appellant herein moved this Court *vide* a Notice of Motion dated 19th January 2024 seeking the following orders: -
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Pending the hearing and determination of the Respondent's intended appeal there be an Order staying any further proceedings in Nairobi ELRC No. 272 of 2018 (Jason Marigi Njiru vs East Africa Cables Limited).
 - e. This Honourable Court be pleased to grant an Order for a stay of execution of the Judgment delivered by Honourable Justice Ocharo Kebira on 20th December 2023 and the resultant Decree pending the hearing and determination of the intended appeal by the Respondent/Appellant.
 - f. Costs of this application be in the cause.
2. The Notice of Motion application is based on the Grounds on the face thereof and the Supporting Affidavit of one Esther Lulonde sworn on 19th January 2024.



3. The Claimant/Respondent challenged the application through a Replying Affidavit sworn on 5th February 2024.
4. The parties elected not to file submissions for and against the Application but rely on their respective Affidavits.
5. The Respondent/Applicant's application is brought under Section 12 of the *Employment and Labour Relations Court Act* and Rule 28 of the *Employment and Labour Relations Court (Procedure) Rules*; and all the inherent powers of the Court.
6. The Grounds upon which the Notice of Motion dated 19th January 2024 is brought are that:
 - i. Judgment was delivered by this Court on 20th December 2023 in favour of the Claimant and against the Respondent/Applicant awarding the Claimant the sum of Kenya Shillings Four Million Nine Hundred and Sixteen Thousand Five Hundred and Fifteen (Kshs. 4,916,515.00) plus interest and costs of the suit.
 - ii. The Respondent/Applicant filed a Notice of Appeal dated 20th December 2023 and is intent on filing an Appeal against the entirety of the Court's said judgment.
 - iii. Unless an order for stay of execution is granted, the Claimant/Respondent will commence execution for the decretal sum, as a result, the Respondent/Applicant shall suffer irreparable substantial loss as the Claimant/Respondent will be unable to reimburse the decretal amount once the same is paid out to him, in case the appeal succeeds, since he does not have known assets.
 - iv. The instant application has been filed without unreasonable delay and it is in the interest of justice for the orders sought to be granted.
7. The Claimant/Respondent opposes the application on the premise that the appeal has no chance of success since the subject judgment is sound; execution proceedings have not commenced so a stay of execution is not warranted; and the application is intended to prevent him from enjoying the fruits of his judgment. However, it is the Claimant/Respondent's position that if the court is inclined to grant a stay of execution, it should order the Respondent/Applicant to pay him the sum of Kshs. 1,695,350.00 being his severance pay, and to deposit the balance in a joint interest-earning account in the names of the Advocates for the parties. Further, the Respondent/Applicant will not suffer loss if the said amount is paid to him.
8. In the alternative, the Respondent/Applicant should be ordered to deposit the entire decretal sum in a joint interest-earning account, as security for due performance of the decree.

Analysis and Determination

9. I have carefully considered the Notice of Motion dated 19th January 2024, the Grounds thereof and Affidavit in Support thereof; the Replying Affidavit sworn by Kiragu Kiai Muiri on 5TH February 2024. I return that the only issue for determination is as follows: -
 - a. Whether this Court should grant a stay of execution pending Appeal.

Whether this Court should grant a stay of execution pending Appeal

10. The intended appeal shall seek to assail the Judgment of this Court delivered herein on 20th December 2023. The intended challenge is a right to the Respondent/Applicant, and the Judgment is appealable of right.



11. Under Rules 75 (1) and (2) of the *Court of Appeal Rules* 2010, an Intended Appellant must give notice in writing of their intention to appeal within 14 days of the decision which they intend to appeal against. I am satisfied that the Respondent/Appellant herein has indeed filed a Notice of Appeal dated 20th December 2023, thus within the requisite period and in accord with the provision of Rules 75 (1) and (2) of the *Court of Appeal Rules*.

12. Order 42 Rule 6 (1) and (2) of the *Civil Procedure* 2010 speaks to stay of execution pending appeal. It provides:

“Stay in case of appeal

(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 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.”

13. There is no doubt whatsoever that this Court entered judgment in favour of the Claimant/Respondent on 20th December 2023 in the sum of Kshs. 4,916,515.00 plus interest and costs of the suit.

14. The Respondent/Applicant has argued that execution is imminent in the absence of stay of execution orders, and the Respondent/Applicant will suffer a substantial loss if the execution of the decree is allowed to proceed against it, as the Claimant/Respondent is an individual with no known assets to an extent that the Applicant will be unable to recover the decretal sum if the appeal is successful and the Claimant called upon to refund the sum of the decree or part thereof.

15. The Court in *Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani)* HCMCA No. 1561 of 2007, in defining substantial loss, 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 an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not



rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

16. Once the Decree Holder’s financial ability is called into question, the duty lies on him to demonstrate satisfactorily that he or she is a person of means and able to refund the sum paid out to him or her in satisfaction of the subject decree, should it become necessary upon the success of an appeal challenging the decree. The Court in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike and Another* [2006] eKLR stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.”

17. In the present case, the Respondent/Applicant has expressed a reasonable fear that the Claimant/Respondent will be unable to repay the decretal sum if the appeal succeeds. Conversely, the Respondent has not produced any evidence before this Court to demonstrate that he has sufficient resources to refund the decretal sum. In fact, he has not addressed this issue in his Replying Affidavit sworn on 5th February 2024. As such, this Court can only conclude that the Respondent/Appellant will indeed suffer a substantial loss as the Claimant/Respondent will be unable to refund the decretal sum if execution ensues.
18. For the foregoing premises, and in line with the powers of this Court donated by Order 42 Rule 6 (2) (b), I hereby grant a stay of execution of the Judgment of this Court delivered and issued on 20th December 2023, and the decree flowing therefrom on condition that the Respondent/Applicant shall deposit the entire decretal sum of Kshs. 4,916,515.00 in an interest-earning account in the names of both Counsel for the parties within 30 days of this Ruling, as security for due performance of the Decree.
19. In the upshot, I allow prayers 4 and 5 of the Notice of Motion dated 19th January, 2024.
20. It is so ordered.

READ, DELIVERED, AND SIGNED THIS 26th DAY OF APRIL, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms. Gachinga for the Claimant/Respondent

Ms. Musau for the Respondent/Applicant

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 15th March 2020 and subsequent directions of 21st 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

