



REPUBLIC OF KENYA



**Bob Morgan Services Limited v Ochieng (Appeal E058 of 2023)  
[2024] KEELRC 975 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 975 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E058 OF 2023  
CN BAARI, J  
APRIL 11, 2024**

**BETWEEN**

**BOB MORGAN SERVICES LIMITED ..... APPELLANT**

**AND**

**WYCLIFFE OCHIENG ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 31<sup>st</sup> October, 2023, brought pursuant to Rule 17 and 28(1) of the Employment and Labour Relations Court (Procedure) Rules, Sections 3, 12 and 20 of the *Employment and Labour Relations Court Act*, and Article 50 and 159 of *the Constitution*, the Applicant herein, Bob Morgan Services Limited, seeks the following reliefs:
  - i. Spent.
  - ii. Spent.
  - iii. That this Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered on 24<sup>th</sup> August, 2022, and the decree issued on 15<sup>th</sup> March, 2023, and all consequential orders thereof pending hearing and determination of the appeal filed herewith.
  - iv. That costs of this application be provided for.
2. The application is supported by the grounds on the face of the Motion, and an affidavit sworn by Denis Michieka on 31<sup>st</sup> October, 2023. The crux of the motion is that the trial court delivered a judgment allowing the Respondent's claim against the Appellant/Applicant, being a principal sum of Kshs. 46,518, while in a decree issued on 15<sup>th</sup> March, 2023, interest was calculated at the rate of 12% per month from 29<sup>th</sup> April, 2019, resulting in accumulative interest of Kshs. 377,726.16.



3. The Applicant being dissatisfied with the manner in which interest was calculated, filed an application for review on 8<sup>th</sup> August, 2023, seeking review of the interest rate from 12% per month to 12% per annum, but which application the trial court dismissed on 16<sup>th</sup> October, 2023.
4. The Applicant further avers that it is dissatisfied with the decision of the trial court in its ruling of 16<sup>th</sup> October, 2023, and has lodged an appeal dated 31<sup>st</sup> October, 2023, before this court.
5. It is the Applicant's assertion that it is apprehensive that the Respondent will move to execute the judgment and decree to its extreme detriment and which execution, will render the appeal filed herewith nugatory.
6. The Applicant/Appellant avers that it stands to suffer irreparably if the stay is not granted, and that it is ready to furnish security for both costs and the decretal sum as a condition for stay.
7. The Respondent opposed the motion vide a replying affidavit sworn on 10<sup>th</sup> November, 2023, wherein, the Respondent/Decree holder denies that interest in the impugned decree was calculated at 12% and further proceeds to wholly deny the averments in the Applicants supporting affidavit.
8. The motion was canvassed by way of written submissions and both parties filed submissions, and which have been dully considered.

### **Determination**

9. I have carefully appraised the application, the grounds in support, the replying affidavit in opposition and the submissions filed both parties. The legal principles that guide the court in determining an application for stay of execution of Judgment pending appeal, are as set out under Order 42 Rule 6 of the Civil Procedure Rules.
10. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, provides for stay of execution as follows:
  - “(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.”



11. The Court's exercise of discretion in staying execution of a Judgment, is further guided by the grounds set out in the case of *Stephen Wanjohi v Central Glass Industries Ltd Nbi HCCC No. 6726 of 1991* where the Court emphasized that:

“For the Court to grant stay of execution there must be:

- (a). Sufficient cause.
- (b). Substantial loss.
- (c). No unreasonable delay and security offered for due performance of the decree.”

12. It is the duty of the Applicant in such an application, being the burden bearer, to demonstrate to Court that her appeal is arguable. The award of the trial court compared with the interest charged is on the face of it, demonstration that should the orders sought herein not be granted, the Applicant/Appellant stands to suffer irreparably.

13. The court further notes that the Applicant/Appellant has expressed readiness to furnish security for both costs and the decretal sum if demanded by the court, which legally, is a condition precedent to the grant of orders of stay. Finally, the issues subject of the appeal filed herewith show that the appeal is arguable.

14. I conclude by holding that the motion is merited, and orders granted as follows: -

- a. That an order of stay of execution of the Judgment delivered on 24<sup>th</sup> August, 2022, and the decree issued on 15<sup>th</sup> March, 2023, and all consequential orders, be and is hereby issued pending hearing and determination of the appeal filed herewith.
- b. That the Appellant deposits the decretal sum minus interest (Kshs. 46,518) in court within 7 days of this order.
- c. That costs shall abide the appeal.

15. Orders accordingly.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Cheruiyot present for the Applicant

Ms. Onyango present for the Respondent

Erwin Ongor – C/A

