



Oyuga & 46 others v Kenya Airways Company Limited (Employment and Labour Relations Cause 2390 of 2017) [2024] KEELRC 762 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 762 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2390 OF 2017**

BOM MANANI, J

APRIL 11, 2024

BETWEEN

JOSEPH OTIENO OYUGA 1ST CLAIMANT
GERRY PHILIP RAJORO 2ND CLAIMANT
DANIEL KIPLANGAT NG'ETICH 3RD CLAIMANT
KEVIN ARIANDA MUJIMBA 4TH CLAIMANT
JOSEPH NJOROGE NDUNG'U 5TH CLAIMANT
ALEX KILONZO MUTHUI 6TH CLAIMANT
PAULINE WAMBUI NJOROGE 7TH CLAIMANT
EUTHYCHUS NJOROGE KOIGI 8TH CLAIMANT
STEVE MUNGATIA 9TH CLAIMANT
CHARLES KIPLANGAT RONO 10TH CLAIMANT
TABITHA WANJA WAMBUGU 11TH CLAIMANT
ANNASTACIA TATU RANDU 12TH CLAIMANT
BERNARD MBIJA OOKO 13TH CLAIMANT
GEORGE MUTUKU KYENGO 14TH CLAIMANT
ERIC HEZRON MAKOKHA 15TH CLAIMANT
CHRISTINE KAVATA KILONZO 16TH CLAIMANT
DAMARIS NDUNGE SILVANA 17TH CLAIMANT
GEOFFRY RONO 18TH CLAIMANT
MATHEW IRUNGU NJOROGE 19TH CLAIMANT



DANIEL MWANGI MURAGE	20 TH CLAIMANT
ABNER SAUL MOYWAYWA	21 ST CLAIMANT
CHARLES OMBENG OULO	22 ND CLAIMANT
CORNELIUSCHERUIYOT KORIR	23 RD CLAIMANT
JACOB OGADO ONYANGO	24 TH CLAIMANT
MILLICENT AUMA SULWE	25 TH CLAIMANT
KURIA JAMES KIHUNGI	26 TH CLAIMANT
JOEL SHEM ONYANGO	27 TH CLAIMANT
PAUL M MUTHINI WANGA	28 TH CLAIMANT
MUCHAI SAMUEL KINOTI	29 TH CLAIMANT
JULIUS MULI NGUMBI	30 TH CLAIMANT
STEPHEN ONYANGO WERE	31 ST CLAIMANT
ELPHAS OJWANG	32 ND CLAIMANT
CHARLES AYAGA	33 RD CLAIMANT
MOSES HOMBE	34 TH CLAIMANT
FAITH GACHERI KAMANDI	35 TH CLAIMANT
MARTIN NJAU	36 TH CLAIMANT
SAMSON MARAGE	37 TH CLAIMANT
LEMMY NJENGA	38 TH CLAIMANT
MORRIS MWENDA MURITHI	39 TH CLAIMANT
FRANCIS MASIBO WELLE	40 TH CLAIMANT
EVANS MIKE MBITHI	41 ST CLAIMANT
AUGUSTINE MUSYOKA MWATHANI	42 ND CLAIMANT
DANIEL MATHENGE MUTHONDIO	43 RD CLAIMANT
PHILIP OUMA ODHIAMBO	44 TH CLAIMANT
PAUL THAIRU MUGI	45 TH CLAIMANT
TEDDY MUTUKU	46 TH CLAIMANT
GEROGE IRUNGU WANGOO	47 TH CLAIMANT

AND

KENYA AIRWAYS COMPANY LIMITED RESPONDENT



RULING

1. The instant application seeks to stay the execution of the decree that emanated from this court's judgment that was delivered on 16th November 2023 pending the hearing and determination of Civil Appeal No. COACA/E986 of 2023 before the Court of Appeal. The application is brought under section 12 (3) (i) & (viii) of the *Employment and Labour Relations Court Act*, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Order 42 Rule 6 (2) of the *Civil Procedure Rules, 2010*
2. The Respondent/Applicant contends that it has an arguable appeal which has high chances of success. Further, it contends that it will suffer substantial loss should the impugned decree be executed only for the appeal to succeed.
3. The Applicant/Respondent avers that it is ready to provide security for the performance of the decree should the appeal fail. It contends that it has filed the instant application expeditiously thereby meeting all the conditions for the grant of an order for stay of execution pending appeal.
4. The application is opposed. According to the Claimants, the Applicant/Respondent has no arguable appeal. Therefore, the request for stay of execution pending determination of the appeal should be declined.
5. The Claimants argue that stay of execution pending appeal should not be granted as a matter of course. Before the orders can issue, the Applicant must demonstrate that he meets all the conditions that are set out under Order 42 rule 6 of the *Civil Procedure Rules*.
6. According to the Claimants, the aforesaid conditions are cumulative in nature. Therefore, the court can only order stay of execution if the Applicant has met all of them.
7. The Claimants argue that the Applicant's/Respondent's offer for security in the form of a bank guarantee is not the most suitable security for the performance of the impugned decree. According to them, bank guarantees have a limited lifespan. As such, if and when they lapse, the person to whom they were issued stands exposed.
8. The Claimants contend that they are in a position to refund the decretal sum should the appeal succeed after they have accessed the judgment amounts. To support this contention, they have provided copies of title deeds, logbooks and pay slips for some of their properties. They have also provided records for mobile money businesses that are run by some of them.
9. The Claimants contend that the properties they have disclosed are not all that they own. They are worth more than that. However and according to them, what they have disclosed is sufficient to demonstrate their financial muscle to refund the decretal sum.
10. In response, the Applicant/Respondent states that the records which the Claimants have provided are not conclusive evidence of the status and value of the assets in question. It is contended that some of the properties could be encumbered or of very little value.
11. The Applicant/Respondent submits that if the Claimants intended to rely on the properties in question to demonstrate their financial muscle, they ought to have provided official searches to show that they (the properties) are unencumbered. Further, they ought to have provided the latest valuations of the assets to disclose their market value.



12. The Applicant/Respondent reiterates that a bank guarantee is among the best securities that can be offered as security for performance of a financial obligation. Further, the guarantee can be renewed to serve specific needs.
13. The Applicant/Respondent contends that if execution of the impugned decree is allowed to proceed, this will unnecessarily expose it to the risk of substantial loss. To support this averment, the Applicant/Respondent argues that of the 47 Claimants, only a few of them have provided evidence of property ownership. Yet, the decretal sum, standing at slightly over Ksh. 164,400,000.00, is by all standards substantial. It is the Applicant's/Respondent's submission that should the Claimants execute for the amount without clear evidence of how it (the sum) will be refunded in the event of the appeal succeeding, this will result in significant loss to it.
14. The Respondent reiterates the fact that the Claimants confirmed on oath that they are unemployed. As such, the guarantee for recovery of the decretal sum in the event that the appeal succeeds is substantially diminished.

Analysis

15. It is not in doubt that before a court can issue an order for stay of execution of a decree pending appeal under Order 42 rule 6 of the *Civil Procedure Rules*, the Applicant must demonstrate that substantial loss is likely to occur if the order is not granted. However, what remains fluid is what constitutes "substantial loss".
16. It has been suggested that the term does not necessarily denote loss that is enormous although that kind of loss is also contemplated. Rather, it denotes loss that ensues as a result of the difficulty in reversing the consequences of the execution process for a decree or court order which is ultimately reversed on appeal.
17. In the case of *Kenya Power and Lighting Company Ltd v Samuel Gathiari Cherere [2019]* eKLR, the court commended on the matter as follows:-

"The question that arises in light of the provisions of Order 42 Rule 6 is: what is substantial loss? This question was dealt with in the cases of *Kiplagat Kotut v Rose Jebor Kipngok [2015]* eKLR and *Kenya Commercial Bank Limited v Sun City Properties Limited & 5 Others [2012]* eKLR. In those cases, the court held that substantial loss does not have to be a lot of money. It is sufficient that an applicant seeking a stay of execution demonstrates that it would have to go through hardship such as instituting legal proceedings to re-cover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful."
18. In the instant case, the Applicant/Respondent has underscored the fact that the financial ability of the Claimants to refund the decretal sum should the pending appeal succeed is questionable. The Applicant/Respondent has emphasized that the Claimants confirmed their financial instability when their representative stated on oath that they had difficulties securing employment due to the adverse publications that had been made against them.
19. The Respondent further states that not all the Claimants have provided evidence of their means to refund the decretal sum should the appeal succeed after execution has been levied. Besides, there is no evidence to demonstrate the value of the properties which some of the Claimants indicate that they own.



20. I have also taken note of the Claimants' counsel's submissions that withholding the decretal sum from the Claimants will expose them to continued cash flow challenges. In my view, this corroborates the Applicant's/Respondent's fears that recovery of the decretal sum could pause a challenge to it in the event that the appeal succeeds.
21. The Applicant's/Respondent's counsel submits that the fact that most of the Claimants have no known asset base only means that should the appeal succeed, the parties will have to go through protracted recovery proceedings to recoup the decretal sum with little guarantee of full recovery. In my view, this reality exposes the Applicant/Respondent to the risk of substantial loss. As a result, I reach the conclusion that the Applicant/Respondent has sufficiently demonstrated that should execution of the decree proceed only for the appeal to succeed, there is the possibility that it will suffer substantial loss.
22. The second requirement for stay of execution pending appeal is that the application for stay of execution must be presented without unreasonable delay. In the instant case, the application was filed on 7th February 2024, approximately two months after delivery of the impugned judgment. Having regard to the fact that there was a Christmas break (when time does not run) between the time of delivery of the decision and the time that the application was filed, I do not think that there was unreasonable delay in presenting the application.
23. With regard to the requirement for security for the performance of the decree, the Applicant/Respondent has offered to provide a bank guarantee from a suitable financial institution. On the other hand, the Claimants are opposed to this mode of security. It is the Claimants' position that bank guarantees often lapse thus exposing those to whom they are issued to the risk of loss.
24. I have considered the varying positions by the parties on this issue. I agree with the Applicant's/Respondent's submission that a bank guarantee can be renewed in order to meet the needs for which it was issued. This reality should put the Claimants' fears to rest.
25. I have also taken into account the large amount that is in controversy. In my view, the interests of the parties to the appeal will be best secured if there is a bank guarantee which warrants the availability of the decretal sum to the successful party in the appeal. As such, I arrive at the conclusion that the security that the Applicant/Respondent has offered is sufficient to guarantee the performance of the decree should the appeal fail.

Determination

26. Having regard to the foregoing, I make the following orders: -
 - a. That the application for stay of execution of this court's decree pending the hearing and determination of Civil Appeal No. E986 of 2023 at the Court of Appeal of Kenya is granted subject to the following conditions: -
 - i. That the Applicant/Respondent procures and causes to be issued to the Claimants, through their counsel on record, a suitable bank guarantee for performance of the decree should the appeal fail.
 - ii. That the bank guarantee shall be issued by a reputable financial institution that is acceptable to the Claimants. Provided that this condition shall not obligate the Applicant/Respondent to procure this service from a financial institution which is not on the list of its pre-qualified financial service providers. Provided further that the Claimants' concurrence in this respect shall not be unreasonably withheld.



- iii. The bank guarantee aforesaid shall be procured and issued to the Claimants' counsel within thirty (30) working days from the date of this order.
 - iv. In the event of disagreement between the parties on the import of the above requirements, they are at liberty to appear before the Deputy Registrar of the court for resolution of the disagreement failing which, the matter may be escalated to this court.
 - v. In the event of default to issue the bank guarantee within the timelines hereinabove provided, the stay orders on record shall automatically lapse with the consequence that the Claimants shall be at liberty to execute the decree subject to the applicable rules.
- b. Costs of the application are granted to the Claimants.

DATED, SIGNED AND DELIVERED ON THE 11TH DAY OF APRIL, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimants

.....for the Applicant/Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

