



**Shree Sairam General Hardware v Omao (Appeal 005 of 2023)
[2024] KEELRC 852 (KLR) (3 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 852 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
APPEAL 005 OF 2023
DN NDERITU, J
APRIL 3, 2024**

BETWEEN

SHREE SAIRAM GENERAL HARDWARE CLAIMANT

AND

JOEL OMAO RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate’s court at Kericho (Hon. F. N. Nyakundi) delivered on 25th October, 2023 in Kericho CMCC ELRC No. 015 of 2022)

RULING

I. Introduction

1. In a judgment delivered on 25th October, 2023 the lower trial court found in favour of the respondent herein (the claimant in the lower trial court) and made the following orders –

1. Salary in lieu of one month notice ofKshs.12,522.70
2. House allowanceKshs.39,446.51
3. Unfair termination.....Kshs.150,0272.40
4. Unpaid working off days.....Kshs.150,072.00
5. Overtime.....Kshs.260,836.80
6. Rest days.....Kshs.50,4000
7. HolidaysKshs.9,600
8. Unpaid overtime.....Kshs.150,000
- Total.....Kshs.718,145.91



9. Court is allowed costs and interest of this suit to the Claimant
2. In a notice of motion dated 14th November, 2023 (the application) filed through Otwal & Manwa Associates Advocates the respondent is seeking the following –
 1. That the application be certified urgent and be heard ex-parte in the first instance.
 2. That pending inter parties hearing and determination of this Application this Honourable Court be pleased to grant and hereby grant a stay of execution of the Judgment dated and delivered on 25th October, 2023 by the Honourable F.M Nyakundi in CM ELRC No.015 of 2022; Joel Omas vs Shree Shairam General Hardware and all other consequential Orders.
 3. That pending interparties hearing and determination of this Appeal this Honourable Court be pleased to grant and hereby grants a Stay of Execution of the Judgment dated and delivered on 25th October, 2023 by this Honourable F.M. Nyakundi in CM ELRC E15 of 2022; Joel Omas vs Shree Shairam General Hardware and all consequential Orders.
 4. That costs of the application be provided for.
 5. That the court do grant any other order that this Honourable Court deems fit and just to grant in the circumstances.
3. The application is expressed to be brought under sections 1A, 3A, and 78 of the *Civil Procedure Act*, order 21 rule 12(2), Order 42 rule 6 & 7, Order 51 rule 1 of the Civil Procedure Rules, and Rule 32 of the Employment and Labour Relations Court (Procedure) rules, and all other enabling provisions of the law.
4. The application is based on the grounds on the face of it and supported with the affidavit of Miteshkumar Patel, a director of the appellant, sworn on 15th November, 2023, with several annexures thereto.
5. The application is opposed and the respondent through Owiti Mwallo Odhiambo & Associate Advocates filed a replying affidavit sworn by himself on 23rd November, 2023.
6. Without the leave of the court, the appellant filed a supplementary affidavit sworn by the same deponent mentioned above on 11th December, 2023. The same is hereby struck out for it is improperly on record.
7. Interim orders for stay of execution pending the hearing and determination of the application were issued on 14th December, 2023. On the same date, it was by consent agreed and directed that the application be canvassed by way of written submissions. Mr. Otwal for the appellant filed his submissions on 15th December, 2023, while Mr. Odhiambo for the respondent filed on 13th December, 2023.

II. Analysis

a. Affidavits

8. Essentially, the appellant is seeking for stay of execution of the decree in pursuance of the judgment delivered by the lower trial court on 25th October, 2023, pending the hearing and determination of the appeal. While a memorandum of appeal is annexed to the application, the court cannot discern from the materials placed before it as to how far the appellant has gone in filing and preparing the appeal for hearing and disposal. However, had any steps been taken it should have been evident in this file



that a record of appeal has been prepared and filed. For now, there is no such record and the court shall presume that beyond the filing of the memorandum of appeal no other or further steps have been taken towards having the appeal prepared for hearing and disposal.

9. In the supporting affidavit it is deposed that the trial lower court delivered a judgment on 25th October, 2023 wherein the respondent was awarded a total of Kshs.718,145.91 plus costs and interest as reproduced in the introductory part of this judgment.
10. The appellant was aggrieved by the judgment and hence lodged this appeal. The grounds of appeal are set out in the memorandum of appeal.
11. It is deposed that if execution is allowed to proceed the appeal shall be rendered nugatory. Further, it is deposed that the respondent is ready and willing to provide security and comply with such reasonable terms and or conditions as may be imposed by the court in due performance and settlement of the decretal sum and costs in case the appeal ultimately fails. However, it is deposed that the appeal raises good grounds of facts and law that are likely to succeed.
12. It is deposed that if the decretal sum is paid the appellant is unlikely to recover the same in case the appeal ultimately succeeds as the respondent is suggested to be a man of straw.
13. It is deposed that the application has been filed timeously without delay and appellant pledges to deposit Kshs.350,000/= as security. The court is asked to exercise its discretion in favour of the appellant and allow the application.
14. It is stated that if stay is not granted the respondent shall suffer irreparably and that the application has been filed without inordinate or unreasonable delay.
15. In the replying affidavit, the respondent deposes that the application is devoid of merits and the court is urged to dismiss the same with costs.
16. It is deposed that if the application is allowed the respondent will be prejudiced and denied the fruits of a lawful judgment. It is deposed that the respondent has suffered untold financial suffering and embarrassment since his termination and that the appellant has not demonstrated any prejudice or loss that it shall suffer if the application is denied.
17. It is deposed that in the contemporary economically uncertain times if the stay is granted there is a likelihood that the appellant may close shop and in perpetuity deny the respondent the fruits of the judgment.
18. The court is urged that if the application is allowed and execution stayed then the entire decretal sum plus costs should be deposited in court or in a joint interest earning account as security as that is the only way that the respondent shall be assured of the fruits of the judgment if the appeal ultimately fails.
19. In the supplementary affidavit, which has in any event been struck out for coming on record without leave, it is deposed that the appellant is not in a good financial position as to afford to deposit the entire decretal sum as security. However, the court notes that the statement attached is a personal statement of the deponent/director and not that of the appellant which is presumably a legal entity if the papers herein are anything to go by.

(b) Submissions by counsel

20. On the one hand, counsel for the appellant has asked the court to consider the merits of the application based on various aspects including - the substantial loss that may be occasioned to the appellant if the application is denied; whether the application and the appeal have been filed without unreasonable



delay; that the appellant is ready and willing to provide security in due performance of the decree, among other factors.

21. In a plea to the court not to render the appeal nugatory, counsel has cited *RWW V EKW (2019) eKLR* arguing that the respondent may not suffer loss or prejudice that may not be compensated by way of costs. It is submitted that if execution is allowed to proceed, and the appeal ultimately succeeds, the respondent has no means of reimbursing the monies paid and the loss and damage to the appellant shall be irreparable. Basing his argument on the decision of the Court of Appeal in *National Industrial Credit Bank Ltd V Aquinas Francis Wasike (2006) eKLR* and *Michael Ntouthi Mitheu V Abraham Kivondo Musau (2021) eKLR* the court is urged to allow the application as the respondent has not demonstrated his ability to refund the monies if the appeal ultimately succeeds.
22. On whether there has been delay, let alone unreasonable delay, in filing of the appeal and the application, it is submitted that the judgment of the lower court was delivered on 25th October, 2023 and the memorandum of appeal was filed on 15th November, 2023. Of course, the application was filed on 17th November, 2023. The court is urged to find and hold that there was no delay on the part of the appellant in undertaking the foregoing.
23. On provision of security the court is urged to exercise its judicial discretion and allow the appellant to deposit the proposed sum of Kshs.350,000/= as security. Counsel has cited *Focin Motorcycle Co. Limited V Ann Wambui Wangui & Another (2018) eKLR* on adequacy and sufficiency of security and the discretion of the court in that regard.
24. In conclusion, it is submitted that the appeal is based on good grounds with a high chance of succeeding and the court is thus urged to allow the application so that the appeal is not rendered nugatory.
25. On the other hand, counsel for the respondent submitted that the law applicable in this application is Order 42 Rule 6(2) of the Civil Procedure Rules. Relying on *James Wangalwa & Another V Agnes Naliaka Cheseto (2012) eKLR* it is submitted that execution is a lawful process as a judgment-debtor has an obligation to satisfy such a decree and hence execution does not inflict loss let alone a substantial loss on a judgment-debtor. It is submitted that substantial loss must be irreparable and that the appellant has not demonstrated the likelihood of such loss.
26. On security in due performance of the decree, it is submitted that following the lawful judgment by the trial lower court the appellant is legally indebted to the respondent in the decretal sum. Counsel has cited *Gianfranco Manenthi V African Merchant Assurance Co. Ltd (2019) eKLR* in laying emphasis that the respondent should not be hindered from realizing and enjoying the fruits of the judgment. The court is urged to dismiss the application with costs.

III. Determination

27. There is only one issue for determination in this application – Should the respondent be granted the stay of execution sought and on what terms?
28. 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.
29. Bearing the contents of the above paragraph 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.



30. However, Order 42 Rule 6(6) of the Civil Procedure Rules invokes the discretion of this court in an application for stay of execution in the following terms – “Notwithstanding anything contained in sub-rule (1) of this rule the High Court (ELRC) shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
31. In my considered view and opinion, the above provision allows this court to grant stay of execution in the interest of justice in consideration of 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 an 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.
32. It’s no brainer that the application herein was filed without undue delay. The judgment of the trial lower court was delivered on 25th October, 2023, the memorandum of appeal was filed on 15th November, 2023, and the application filed on 17th November, 2023. In all fairness, there was no inordinate or unreasonable delay.
33. The decretal sum of Kshs.718,145.91 plus costs said to have been assessed at Kshs.108,760/= or thereabout, is not a small amount of money by all means. The claimant has not demonstrated his means of repaying the money in the event that the appeal ultimately succeeds. This means that if the appeal ultimately succeeds and the respondent cannot recover the money, the appeal shall be merely academic and rendered nugatory.
34. The respondent is ready and willing to provide security but proposed at Kshs.350,000/= only.
35. The court has perused the memorandum of appeal but without the record of appeal the court may not comment on the chances of success of the same. In any event, the court is careful not to prejudice the appeal.
36. It is in the interest of justice that the lawful interests of both sides be catered for. The court has to make such orders as not to render the appeal nugatory or merely academic in case the appeal ultimately succeeds, but also secure the interests of the respondent in case the appeal fails.
37. In the entire circumstances of this application, considering the evidence availed, and the submissions made from both sides, it is in the interest of justice that an order for stay of execution be issued pending the hearing and determination of the appeal but on the terms stated hereunder.

IV. Costs

38. The costs of this application shall abide with the costs in the appeal.

V. Orders

39. For all the foregoing reasons, the notice of motion dated 14th November, 2023 by the appellant is allowed on the following terms -
 - a. Stay of execution be and is hereby granted pending the hearing and determination of the appeal.



- b. The respondent shall within 30 days of this ruling deposit a sum of Kshs.718,145.91 in a joint interest earning account to be opened in the names of the law-firms for both parties.
- c. In default of (b) above the stay of execution shall automatically lapse.
- d. The appellant shall prepare, file, and serve a record of appeal within 30 days of this ruling.
- e. Costs of the application shall be in the appeal.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 3RD DAY OF APRIL, 2024.

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DAVID NDERITU

JUDGE

