



**Elian Security Limited v Chebet (Employment and Labour Relations
Appeal E003 of 2024) [2024] KEELRC 1318 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1318 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E003 OF 2024**

HS WASILWA, J

MAY 28, 2024

BETWEEN

ELIAN SECURITY LIMITED APPELLANT

AND

SHARON CHEBET RESPONDENT

RULING

1. Before me for determination, is the Appellant's Application Notice of Motion, dated 17th January, 2023, filed under certificate of urgency on 19th January, 2024, pursuant to section 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 of the *Civil Procedure Rules* and all other enabling provisions of Law, seeking for the following Orders;
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to grant stay of execution of the judgment entered on 19th December, 2023, and all consequential orders pending the hearing and determination of the intended appeal.
 4. That costs of this application be in the cause.
2. The application herein is based on the grounds on the face of the Application and the supporting affidavit sworn on 17th January, 2024, by Eliud Gachoka, the manager of the Applicant/Appellant.
3. The affiant stated that judgment in the subordinate Court, Nakuru CMELRC Case No. E318 of 2021, was delivered by the Honourable E. Soita on 19th December, 2023, in favour of the Claimant and against the Respondent for unlawful termination, termination without notice and underpayment. Consequently, the Applicant was directed to pay the Respondent decretal sum Kshs. 168,006.



4. He states that the Applicant being aggrieved by the said judgment has now preferred an appeal. But that in the intervening period, it is apprehensive that the Respondent will proceed with execution if the stay orders sought are not granted.
5. He stated that the Applicant intends to expedite the appeal without occasioning any delay to the Respondent. On the other hand, that it stands the risk of being subjected to immense substantial loss.
6. He contends that the intended appeal raises triable issues of fact and law that may be rendered nugatory unless stay of execution is granted.
7. He stated that the application is made in good faith. Further that the Respondent does not stand to suffer any prejudice.
8. The Application herein is opposed by the Respondent who filed a replying affidavit sworn on 16th February, 2024. She stated that the Application is misconceived, incompetent, without merit and an abuse of the court process and the same should be dismissed.
9. She states that the Applicant herein has perverted the course of Justice used to come to a just determination in a manner that shall indeed prejudice the Respondent greatly.
10. It is her case that the Application herein is an afterthought as the memorandum of appeal filed fails to portray any issue that may lead to a successful appeal. Moreover, that the memorandum of Appeal contains baseless generalizations that this Honourable Court shall be hard pressed to decipher.
11. Furthermore, that the Applicant has failed to offer any security for costs and only wish to extend these proceedings indefinitely.
12. The affiant stated that the application is based on speculation and indeed the applicant has failed to demonstrate how the appeal will be rendered nugatory if the orders sought are not granted.
13. She states that the Application at hand is a blatant attempt to prejudice the Respondent by denying her the fruits of the judgment issued on 19th December 2023. She urged this Court to disallow the Application for being an abuse of the court process.
14. In a rejoinder, filed by the Applicant's manager on 14th March, 2024, the affiant stated that being dissatisfied with the judgment entered against the Applicant on 19th December, 2023, the Applicant filed this appeal as a matter of right. Also that there was no unreasonable delay in filing the Application and Appeal.
15. He states that the grounds of appeal set therein are merited and the Appeal has a high probability of success, even though the Court is not obligated to determine that at this stage.
16. He maintained that the Applicant does not have any intention to prejudice and/ or deny the Respondent the fruits of her judgment in any way and that the application has been made within the provisions of the law. In any event that the Respondent has not demonstrated any prejudice she is likely to suffer in the event that the orders sought herein are allowed.
17. The Application was canvassed by written submissions with the Applicant filing on 3rd April, 2024 and the Respondent filed on 25th April, 2024.

Applicant's Submissions

18. The Applicant submitted on three issues, whether the Court should allow the Application herein, whether the Application is merited and who shall bear costs of the application.



19. On the first issue, it was submitted that the Appellant/ Applicant filed his application expeditiously within the time provided for under the law in line with section 79G of the Civil Procedure Act, that provides:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order...”

20. It was argued that the Applicant is desirous to appeal the judgment that ordered that the Applicant pays the Respondent a decretal sum of Kshs. 202,978.60/= being damages for unlawful termination, termination without notice of dismissal, underpayment and leave allowance. Further that the Appeal was filed expeditiously and that it has a high probability of success. He explained that the Applicant produced sufficient documentary evidence in support of his case, while the Respondent produced none contrary to section 109 of the Evidence Act that casts an evidential burden upon any party who alleges the existence of a fact to prove. In support of this, the Applicant relied on the case of Patrick Lumumba Kimuyu v Prime Fuels (K) Limited [2018] eKLR, where the Court of Appeal at Mombasa held that:

‘he who asserts must prove’

21. It was submitted that the Applicant has established sufficient cause to warrant the grant of the Orders sought. Furthermore, that it is the interest of justice to grant the orders sought as the appellant herein had been unjustly condemned. In support of this, the Applicant relied on the case of Mbogo & Another vs. Shah [1968] EA 93, the Court stated as follows:

“An appellate court will not interfere with the exercise of discretion by a trial court unless the decision was exercised in a manner that is clearly wrong because the Judge misdirected himself or acted on matters which the court should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

22. Additionally, the Applicant relied on the case of Selle v Associated Motor Boat Company Limited [1968] EA 123 the Court stated as follows:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that it has clearly failed on some point to take account of particular circumstances or probabilities..... or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

23. On whether the Application is merited, it was submitted that before granting an order for stay of execution, a Court has to be satisfied that the applicant had demonstrated the conditions that have been set out in Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, to wit:

- a. That substantial loss may result unless the order is made.
- b. That the application has been made without unreasonable delay.



- c. Such security as the court orders for the due performance of the decree has been given by the applicant.
24. Evidently, that the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the [Civil Procedure Rules](#), 2010 cannot be severed. The key word is “and” connotes that all the three conditions must be met simultaneously.
25. Similarly, that in this case the decretal sum herein was a sum of Kshs. 202,978.60, which the Respondent has not demonstrated to this Court that will be able to refund in the event the Appeal succeeds. In support of this, the Applicant relied on the case of [G. N. Muema p/a\(sic\) Mt View Maternity & Nursing Home vs Miriam Maalim Bisbar & Another](#) [2018] eKLR, this very court held as follows:
- “It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover 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.”
26. Accordingly, that the respondent has neither demonstrated any prejudice she is likely to suffer in the event the orders sought are granted, nor that she is a person of means who would be able to secure the decretal amount when required. Regardless of this, it was argued that the Applicant is willing and ready to comply with the terms of the court regarding the security. Additionally, that in the absence of proof that the Respondent would be able to refund the decretal sum without any hardship, this Honourable Court ought to make a finding that she is unlikely to suffer any substantial loss.
27. On costs, the Applicant submitted that section 27 of the [Civil Procedure Act](#) grants the Court the discretion to grant costs. However, it is trite that costs follow the events unless special circumstances present themselves. On that basis, it was argued that the Application is merited and no prejudice is likely to be suffered by the Respondent if the Application is allowed, and thus Respondent should bare costs therein.

Respondent’s Submissions.

28. The Respondent submitted on one main issue; whether the Order for stay of execution pending Appeal should issue. It was submitted that the relevant law governing applications for stay of execution pending appeal is Order 42 Rule 6 1(2) of the [Civil Procedure Rules](#).
29. He argued that in such an application, the Court should endeavour to balance the interests of both the successful party in litigation so as not to unnecessarily bar them from enjoying the fruits of judgment and that of the Appellant whose appeal may succeed and be rendered nugatory if stay of execution is not granted. On that basis, he implored this Court to weigh favourably for the Respondent, decree holder. In support of this, the Respondent relied on the case of [RWW vs EKW](#) 2019 eKLR and the case of [Awale Trasporters Ltd Vs Kelvin Perminus Kimanzi](#).
30. It was argued that the supporting affidavit by the Applicant does not either explained what losses shall be incurred, or how the financial standing of the company, Elian Security limited, is at risk if execution is carried out. He argued that such nature of losses has not been accounted and/or demonstrated. In this, the Respondent relied on the Court of Appeal case of case of [Kenya Shell Limited -Vs-Benjamin Karuga Kigibu & Ruth Wairimu Karuga](#) 1982-1988 KAR 1018.



31. The Respondent submitted that the mere fact that the Respondent's income is unknown is not by itself a justification for the grant of stay orders. The Applicant must show actual loss as was stated by the Court in the case of *Nyatera V Nyakundi* (Civil Appeal E033 of 2022) {2023} KEHC 3086 (KLR).
32. It was submitted further that the Applicant who alleged that the Respondent will not be able to refund the decretal sum in case the Appeal succeeds, is the one that must prove such failure as is required under section 107 of the *Evidence Act*.
33. On whether the Application was filed timeously, it was submitted that it is not in contention that indeed the application has been made before the lapse of the thirty (30) days stay period provided under the law.
34. On security for costs, it was argued that the Applicant has not stated a definite figure which it intends to deposit as a security. Instead we note that the Appellant/Applicant has only lifted Kshs 168,006 as a figure awarded in the judgment at trial which caters for the damages for underpayment and left out award of damages for compensation for unlawful termination, compensation in lieu of one-month notice, annual leave and costs of the suit.
35. Nevertheless, the Respondent submitted that the Applicant has not satisfied all grounds for grant of stay Orders as such, he urged this court to dismiss this application with costs to the Respondent and cited the case of *Machira T/A Machira & Co. Advocates v East African Standard No 2* [2002] KLR 63 where it was held that: -

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal. Of course, in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”

36. I have examined all the averments and submissions of the parties herein. The applicant seeks stay orders on the ground that the Respondents may proceed and execute against him yet he has preferred an appeal against the judgment of the lower court.
37. It is indeed true that the applicant has filed a Memorandum of Appeal dated 17/1/2024. It is apparent that the appeal was filed within the requisite period.
38. In order to avoid a miscarriage of justice that may lead to the appeal being rendered nugatory, I allow the application for stay on the ground that the entire decretal sum is deposited in court within 30 days. In default execution may issue.

RULING DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2024.

**HON. LADY JUSTICE HELLEN WASILWA
JUDGE**

In the presence of: -



Maina for Respondent – Present

Kairu Maina for Appellant – Absent

Court Assistant - Fred

