



**Ochieng v Jambojet Limited (Cause 555 of 2018)
[2024] KEELRC 1239 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1239 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 555 OF 2018**

**L NDOLO, J
MAY 23, 2024**

BETWEEN

WALTER OMONDI OCHIENG CLAIMANT

AND

JAMBOJET LIMITED RESPONDENT

RULING

1. On 27th July 2023, I delivered judgment in favour of the Claimant as against the Respondent, in the sum of Kshs 2,115,000.
2. The Respondent subsequently moved the Court by Notice of Motion dated 10th August 2023, seeking stay of execution of the judgment, pending the hearing and determination of its appeal before the Court of Appeal.
3. The Motion is supported by an affidavit sworn by the Respondent’s Counsel, Lillian Opondo and is based on the following grounds:
 - a. Judgment was delivered on 27th July 2023, against the Respondent in the sum of Kshs 2,115,000;
 - b. The Court declined to grant stay of execution without a formal application;
 - c. The Respondent is dissatisfied with the Judgment and has filed a Notice of Appeal;
 - d. The Respondent seeks stay pending appeal as it has an appeal with a good chance of success, which will be rendered nugatory if the order sought is not granted;
 - e. The Respondent is willing to abide by any conditions that this Court may impose as a condition for stay;
 - f. It is in the interest of justice that the order sought is granted.



4. The Claimant filed his replying affidavit sworn on 30th August 2023. He terms the Respondent's application as premature, pointing out that costs are yet to be assessed and no decree has been extracted.
5. According to the Claimant, the Respondent's appeal is aimed at frustrating him from enjoying the fruits of his judgment. He states that the Respondent does not have an arguable appeal against the judgment. He points out that he filed his claim in the year 2018 and had waited for 5 years to have his day in court.
6. The Claimant depones that he is not a person of straw; he states that he would be in a position to pay back the entire decretal sum in the event the appeal succeeds.
7. The Respondent's application is brought under Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules*, which sets the following conditions for grant of orders of stay of execution, pending appeal:
 - a. That the court is satisfied that substantial loss may result to the applicant unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. That such security as the court orders for the performance of such decree or order as may ultimately be binding on the applicant has been given.
8. In its written submissions dated 30th April 2024, the Respondent cites the decision in *Butt v Rent Restriction Tribunal* [1982] KLR 417 where it was held that in considering an application for stay of execution pending appeal, the Court should exercise its discretion so as not to prevent an appeal or render it nugatory.
9. The Respondent submits that it filed its application without delay having lodged a Notice of Appeal dated 7th August 2023 and thereafter preferred an appeal at the Court of Appeal being; Civil Appeal No E913 of 2023.
10. The Respondent further submits that it has an arguable appeal, citing the decision in *Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union* [2012] eKLR where it was held that an arguable appeal is not necessarily one that will ultimately succeed; it is adequate that the applicant demonstrates at least one issue upon which the appellate court should pronounce itself.
11. On the issue of substantial loss, the Respondent submits that the Claimant will not be in a position to refund the decretal sum if it is released to him and the appeal succeeds.
12. The Respondent relies on the decision in *National Industrial Credit Bank v Aquinas Francis Wasike & another* [2006] eKLR where the Court of Appeal held as follows:

“...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 an 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.”
13. All the Claimant states is that he is not a person of straw; he however does not disclose his source of income.



14. In the circumstances and balancing the rights of the parties, I will grant a conditional stay of execution by which the Respondent is directed to deposit the entire decretal sum in an interest earning account in the joint names of the parties Advocates, within the next thirty (30) days from the date of this ruling.
15. Failure to comply with the foregoing condition will lead to an automatic lapse of the stay of execution hereby granted.
16. The costs of the application will be costs in the appeal.
17. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF MAY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyamwaro h/b for Mr. Change for the Claimant

Ms. Aluoch for the Respondent

