



**Sunset Management and Rental Limited v Maharia (Appeal
E130 of 2023) [2024] KEELRC 1533 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1533 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E130 OF 2023**

**AK NZEI, J
JUNE 13, 2024**

**BETWEEN
SUNSET MANAGEMENT AND RENTAL LIMITED APPELLANT
AND
TERESIA WAIRIMU MAHARIA RESPONDENT**

*(Being an appeal from the judgment of Hon. M. L. Nabibya – PM
delivered on 26th October 2023 in Mombasa -CM -ELR No. 65 of 2021)*

RULING

1. The application before me is the Appellant’s Notice of Motion dated 24th November 2023 and expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 Rule 6 (1) & (2) of the *Civil Procedure Rules*. The Appellant/Applicant seeks the following orders:-
 - a. that pending hearing and determination of the application, the Court be pleased to stay execution of the judgment delivered herein on 26th October 2023.
 - b. that pending hearing and determination of the appeal filed herein against the judgment delivered on 26th October 2023, the Court be pleased to stay the execution of the said judgment.
 - c. that costs of the application be provided for.
2. The application is based on the supporting affidavit of Malik Makori, the Appellant/Applicant’s Operations Manager, sworn on 24th November 2024. It is deponed in the said affidavit:-
 - a. that being dissatisfied with the trial Court’s judgment delivered on 26th October 2023, the Appellant preferred the appeal herein, which has a good chance of success.
 - b. that the Respondent’s current source of income is unknown, and there is no guarantee that she will pay back the decreed sum if it is paid to her and the appeal succeeds.



- c. that the Appellant/Applicant is willing to abide by any reasonable condition that this Court may impose in granting the stay orders sought.
3. Documents annexed to the supporting affidavit include a copy of the trial Court's impugned judgment delivered on 26th October 2023. I have noted from the said judgment that the Respondent was awarded a total sum of kshs. 256,666, costs of the suit and interest. The Appellant/Applicant was also ordered to issue a certificate of service to the Respondent.
4. The application is opposed by the Respondent *vide* her replying affidavit sworn on 14th December 2023. Both parties filed written submissions on the application, which I have considered.
5. Section 13 of the *Employment and Labour Relations Court Act* provides that this Court's decrees and orders are enforceable in accordance with the Rules made under the *Civil Procedure Act*. The lower Court's decrees and orders are also enforceable in accordance with the *said Rules*. The Appellant/Applicant is seeking a stay of execution of the trial Court's decree pending hearing and determination of the appeal herein. Order 42 Rule 6(1) & (2) is the provision of the *Civil Procedure Rules* which provides for stay of execution pending appeal, and it provides as follows:-
- “(1) (1) No appeal or second appeal shall operate as a stay of execution of 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 if preferred may apply to the appellate Court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (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 by the Applicant.”
6. There is a valid memorandum of appeal on record herein, filed on 24th November 2023. The application herein was filed on 25th November 2023, and was therefore filed without unreasonable delay.
7. The application was placed before me on 27th November 2023 under a certificate of urgency, and I ordered that there be a stay of execution of the trial Court's decree in Mombasa CM ELR Case No. 65 of 2021 in the interim. The interim order of stay has been extended as parties herein filed their respective documents regarding the application, which is now before me for determination. The single issue for determination in the application is whether the stay order sought is merited.



8. The Court of Appeal (Madan, JA) stated as follows in *Butt -vs- Rent Restriction Tribunal* [1979] eKLR:-

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful, may not be nugatory. A stay that would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be better remedy, will become available to the Applicant at the conclusion of the proceedings. It is in the discretion of the Court to grant or refuse stay, but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general rule, ought to exercise its best discretion in a way so as to prevent the appeal, if successful, from being nugatory, per Brett LJ in *Wilson -vs- Church* (No. 2) 12 Ch D(1870) 454 at P459. In the same case, Colton LJ, said at P.458:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court has to see that the appeal if successful, is not nugatory.”

9. The trial Court’s decree sought to be stayed is a money decree, and if execution is not stayed pending hearing and determination of the appeal herein, execution will proceed and the appeal will be rendered nugatory. The Respondent has not demonstrated ability to refund the decreed sum to the Appellant/Applicant if the appeal succeeds.

10. In *Bii v National Union Of Nurses* [2022] KEERC 3864 KLR] 27 July 2022 (Ruling), the Court stated as follows:-

“31. The legal burden still remains on the Applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid unto him and the appeal was to succeed. The evidential burden would be very easy for the Respondent to discharge. He can simply show what assets he has such as land, cash in bank and so on.”

11. I find and hold that the Appellant’s Notice of Motion dated 24th November 2023 is merited, and I allow it in the following terms:-

- a. there will be a stay of execution of the trial Court’s decree in Mombasa Chief Magistrate’s Court Employment Case No. 65 of 2021 pending hearing and determination of the application herein, on condition that the Appellant/Applicant deposits the judgment sum of kshs. 256,666 in this court within thirty (30) days of this Ruling.
- b. costs of the application shall be in the appeal.
- c. the Appellant/Applicant shall file and serve a complete record of appeal within 45 days of this Ruling.
- d. orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH JUNE 2024

AGNES KITIKU NZEI

JUDGE

ORDER



This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant/Applicant

.....Respondent

