



Ken-Knit Kenya Limited v Nyegenye (Employment and Labour Relations Appeal E001 of 2024) [2024] KEELRC 2276 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2276 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2024
MA ONYANGO, J
SEPTEMBER 20, 2024**

BETWEEN

KEN-KNIT KENYA LIMITED APPLICANT

AND

MARTIN BARASA NYEGENYE RESPONDENT

RULING

1. Before the court for determination is the application dated 15th January 2024 brought under Sections 3 and 3A of the [Civil Procedure Act](#), Order 42 rule 6 and Order 51 rule 1 of the Civil Procedure Rules. It seeks for orders that:
 - i. This application be certified as urgent and be fixed for hearing on priority basis.
 - ii. Pending the hearing and determination of this application interparty, the Court be pleased to order a stay of execution and any further proceedings in Eldoret Cmcc Elrc Cause No. E111 of 2022 Martin Barasa Nyegenye Vs Ken Knit.
 - iii. Pending the hearing and determination of this application interparty, this Honorable court be pleased to grant leave to the Applicant to lodge an Appeal from judgment and decree of the Chief Magistrate in Eldoret ELRC No. E111 of 2022 Martin Barasa Nyegenye Vs Ken Knit out of time the same having been delivered by the trial court on 29th November 2023.
 - iv. The Court be pleased to order a stay of execution and any further proceedings in Eldoret CMCC ELRC Cause No. E111 of 2022 Martin Barasa Nyegenye Vs Ken Knit pending the hearing and determination of the intended appeal.
 - v. This Honorable court be pleased to grant leave to the Applicant to lodge an Appeal from judgment and decree of the Chief Magistrate in Eldoret ELRC No. E111 of 2022 Martin



Barasa Nyegenye Vs Ken Knit out of time the same having been delivered by the trial court on 29th November 2023.

- vi. Costs be provided for.
2. The application is premised on the grounds set out on the face thereof to wit; that the Applicant is aggrieved by the judgment of the Chief Magistrate in Eldoret ELRC No. E111 of 2022 delivered on 29th November 2023; that the Applicant's advocate was not aware of the judgment and only came to know of the same on 3rd January, 2024 when copies of the same were availed and by then the period for stay had lapsed; that upon receipt of the judgment, the advocates on record consulted the Applicant for further instructions and agreed that the Applicant's advocates seek leave to lodge an Appeal; that the Applicant is willing to abide by any conditions imposed by the honorable Court; that the failure by the Applicant to file the appeal within time was not deliberate; that presently the Applicant is exposed to the vagaries of execution and is desirous to have the appeal ventilated since it feels that its rights have been violated; that the Applicant has a good Appeal from the said judgement; that this Application is made in good faith and lastly, that it has been lodged expeditiously.
3. The application is supported by the annexed affidavit sworn on 11th January 2024 by the Applicant's counsel on record. The said affidavit reiterates the contents in the grounds set out in the application.
4. The application is opposed. The Respondent filed a replying affidavit dated 7th May 2024 in which he contended that the Applicant has not met the required threshold for granting stay of execution and further, that the appeal is incurably defective having been filed out of time without leave of this court. He also averred that the instant application is premature since taxation has not been done.
5. The application was canvassed by way of written submissions. Both parties filed their respective submissions.

Determination

6. I have considered the application, the rival affidavits as well as the submissions on record. In my view, the issues that fall for this court's determination are whether the Applicant has met the requirement for grant of orders of stay of execution pending the hearing and determination of the Appeal and if the applicant has adduced to the court sufficient basis to grant leave to appeal out of time.
7. Order 42 Rule 6 of the Civil Procedure Rules, 2010 provides for the circumstances when the court may order stay of execution of a decree pending an appeal. Under that rule the Applicant must establish that;
 - a. substantial loss may result to the applicant unless an order of stay is granted
 - b. the application has been made without undue delay and;
 - c. security as to costs has been given by the applicant.
8. In the case of RWW v EKW [2019] eKLR, the court observed as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.



Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

9. In this case, there is a judgment in favour of the Respondent. There is likelihood that should the orders of stay not issue, the Respondent may execute against the Applicant and thereby occasioning the Applicant substantial loss. I am therefore persuaded that substantial loss has been established.
10. The second issue for determination is whether the application has been filed without unreasonable delay. The Respondent in his Replying Affidavit has alleged that the instant application was filed out of time without leave of the court. The judgment which is the subject of the appeal was delivered on 29th November 2023. The instant application was filed one and a half months after judgment was delivered. I find that it was filed timeously.
11. With regard to the issue of security for due performance, this court has discretion to issue appropriate orders to meet the ends of justice.
12. Flowing from the above, I find that the Applicant has satisfied this court on the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.
13. On the second issue, counsel for the Applicant states that the Applicant did not hear the matter being called out in court for delivery of judgment although counsel was present in court. Further, that counsel did not obtain a copy of judgment until 3rd January 2024.
14. The Respondent did not contest the averments of the Applicant.
15. Consequently, I allow the application dated 15th January 2024 with an order that Applicant deposits the entire decretal sum in a joint interest earning account in the name counsel for both parties within 30 days.
16. The appeal filed herein is deemed to be properly on record subject to the deposit of the decretal sum as directed.
17. The costs of this application shall be borne by the Appellant/Applicant in any event.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 20TH DAY OF SEPTEMBER, 2024.

MAUREEN ONYANGO

JUDGE

