



Kenya Union of Domestic Workers, Hotels, Educational Institutions and Hospital Workers Union (KUDHEIHA) v Kima Mission Hospital (Employment and Labour Relations Cause E004 of 2023) [2024] KEELRC 2240 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2240 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E004 OF 2023**

**JW KELL, J
SEPTEMBER 20, 2024**

BETWEEN

**KENYA UNION OF DOMESTIC WORKERS, HOTELS,
EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS UNION
(KUDHEIHA) CLAIMANT**

AND

KIMA MISSION HOSPITAL RESPONDENT

RULING

For Claimant – Mr. Kamuye, a representative of the Claimant

For Respondent- Bruce Odeny & Company Advocates

(on Notice of Motion application dated 22nd August 2024 consolidated with Notice of Motion application dated 13th September 2024.)

1. The Applicant was the respondent in the suit. On the 6th June 2024 the Court entered judgment for the Claimant’s members (now respondent to the application) for unfair termination and salary arrears against the respondent as follows:-
 - a. Evans Chibinda Kshs. 1,258,138/-
 - b. Ruphers Lumumba Kshs. 234,335/-
 - c. Fred Andanje Kshs. 218,929/-
 - d. Costs of Kshs. 50000 to the Claimant.

(The judgment stated that the amounts were payable in 90 days failing which the amounts were to attract interest at court rates from the date of judgment until payment in full.)



2. The Applicant/ Respondent lodged notice of appeal dated 24th June 2024.
3. The Applicant on the 28th August 2024 while the court was in recess, filed a Notice of Motion date 22nd August 2024 under certificate of urgency seeking the following orders:-
 - a. That this application be certified urgent and the same be heard ex parte in the 1st instance in respect to prayer 2 below.
 - b. That this Honorable Court be pleased to grant a stay of execution of the judgment and Decree Kakamega ELRC Cause No. E004 of 2023 Kenya Union of Domestic Workers Hotels, Education Institutions and Hospital Workers Union (KUDHEIHA) V KIMA Mission Hospital pending the hearing and determination of the application.
 - c. That this Honorable Court be pleased to grant a stay of execution of the judgment and Decree Kakamega ELRC Cause No. E004 of 2023 Kenya Union of Domestic Workers Hotels, Education Institutions and Hospital Workers Union (KUDHEIHA) V KIMA Mission Hospital pending the hearing and determination of the intended appeal.
 - d. That a date for interpartes hearing of this application be given.
 - e. That the costs of this application be provided for.
4. The application was premised on the grounds that the applicant had sought to appeal against the whole judgment, that the stay period granted by court of 90 days was about to lapse hence risk of execution, their intended appeal would be rendered nugatory if stay of execution is not granted, the application had been done without delay and that the applicant was willing to furnish such security as the Court may order as a pre-condition for granting orders sought herein.
5. This court while on recess considered the application and on the 29th August 2024 issued the following orders ex parte:-
 - a. That a temporary order of stay is granted pending the hearing of the application interpartes on the 19th September 2024 . The decretal amount be deposited in court within 15 days of this order .
 - b. That the application be heard interpartes on the 19th September 2024.
6. The claimant through its representative Mr. Kamuye informed the court that they had been served with the first application only 2 days earlier hence had no time to file response. They informed the court that the ex parte order had not been complied with on the decretal amount deposit. That was true.
7. On the 19th September 2024 when the application was listed for hearing the applicant informed the court that they had filed another application following the ex parte order. The Decree holder informed the court that they had not been served with the said application. They left the matter to the court to decide. The court then directed it would consider the two applications and make a ruling on the stay.
8. The subsequent application was dated 13th September 2024 and received in court on even date. The application sought the following order:- that this Honorable court be pleased to review , its orders dated 29th August 2024 by substituting the directive that the respondent/ applicant to deposit to court the decretal sum with an order that the respondent/ applicant to deposit Kshs. 500,000/- to court pending the hearing and determination of the application of 22. 08.2024.
9. It is the finding of this court that the application of 13th September 2024 is overtaken by events as it was pending the hearing of the application. The order was temporary.



10. The court then proceeds to consider the merit of the substantive application.
11. The application was brought under order 42 Rule 6 (1) of the Civil Procedure Rules which states:-“(1) No appeal or second appeal shall operate as a stay of execution or 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 is preferred may apply to the appellate court to have such order set aside.”
12. The above is read together with Order 42(6)(2) of the Civil Procedure Rules to wit:-
 - “(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 given by the applicant.”
10. The court in its judgment gave stay of 90 days for compliance which had not been met. The conditions for stay of execution as are as stated in the Order 42(6)(2) of the Civil Procedure Rules. The court is satisfied there was no unreasonable delay in filing the application and it was brought within the 90-day stay. The other condition which must be met by the applicant is furnish of security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant (Order 42(6)(2) (b) of the Civil Procedure Rules). The Applicant is yet to furnish the Court with the security for due performance of the Decree.
11. The Applicant vide the supporting affidavit sworn by Moses Abulwa of 22nd august 2024 stated under paragraph 7 - “ that the respondent / applicant is willing to furnish such security as the Honorable Court may deem fit to order as a precondition for grant of stay order sought herein.”
13. The Court of Appeal in Butt v Rent Restriction Tribunal [1982] KLR 417 gave guidance on how a court should exercise discretion in application for stay of execution pending appeal and held that:
 - “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."
14. Applying the provisions of Order 42(6)(2) of the Civil Procedure Rules and the above decision (Butt v Rent Restriction Tribunal [1982] KLR 417), the Court finds that a stay ought to be granted so that the intended appeal is not rendered nugatory. Further the interest of the judgment holder must be protected by ensuring that their fruits of the judgment of the court are secured. The Applicant informed the court it is willing to furnish security as precondition for the grant of stay. The Court notes that it had already granted a generous amount of time of 90 days for the performance of the Decree of which the Applicant did not comply. The Court must balance the interest of the Applicant with the right of the judgment holder to enjoy the fruits of their judgment. The Court rejects the proposal of Kshs. 500,000 for being insufficient security of performance of the Decree.
15. Taking into account all the foregoing this Honorable Court is pleased to grant a stay of execution of the judgment and Decree Kakamega ELRC Cause No. E004 OF 32023 Kenya Union of Domestic Workers Hotels, Education Institutions and Hospital Workers Union (KUDHEIHA) V KIMA Mission Hospital pending the hearing and determination of the intended appeal subject to deposit of security of performance of the decree in court of the entire decretal sum awarded to the 3 grievants of the Claimant within 30 days of this Ruling failing which the stay Order will stand automatically vacated.
16. The application dated 13th September 2024 is held to have been overtaken by events and determined under the instant application of 22nd August 2024.
17. Costs of the application to the claimant.
18. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 20TH SEPTEMBER 2024

J.W. KELI

JUDGE

In the presence of

C/A Macheso

For Claimant: Kamuye

For Respondent: Odeny

