



Professional Clean Care v Fondo (Employment and Labour Relations Appeal E068 of 2024) [2024] KEELRC 2293 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2293 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E068 OF 2024**

**M MBARŪ, J
SEPTEMBER 26, 2024**

BETWEEN

PROFESSIONAL CLEAN CARE APPELLANT

AND

PETRONILAR KONDE FONDO RESPONDENT

RULING

1. The appellant filed an application dated 7 June 2024 seeking orders;
 1. There be a stay of execution of the Decree herein pending hearing and determination of the appeal herein;
 2. The Memorandum of Appeal and Record of Appeal filed herein be hereby deemed as properly filed.
2. The application is supported by the Affidavit of Fred Oballa and on the grounds that the respondent obtained judgment in Mombasa CMELRC No.514 of 2021 for Ksh.540, 380 as compensation for the alleged unfair termination of employment. Judgment issued on 6 December 2023 the appellant was not aware of the same and hence moved the court under ELRC Misc. Application [No.E030 of 2024](#) and was granted interim stay of execution and leave to file an appeal out of time subject to the deposit of the decretal sum in court. The appellant filed the Memorandum of Appeal and deposited the amount within the specified timelines.
3. In his Affidavit, Oballa aver that when the matter came up for hearing on 8 May 2024 the court allocated the ruling date on 6 June 2024. On the due date, the court deemed it to be functus officio ostensibly because the application for extension of time was to be issued under Misc. Application [E030 of 2024](#) while there was in place an appeal on the record. Currently, there is no stay of execution in place and if the respondent is allowed to proceed with execution the appeal herein will be rendered nugatory.



- The appellant has good appeal with high chances of success and to preserve the subject matter, it is only fair that the orders sought be allowed.
4. In reply, the respondent filed her Replying Affidavit, aver that the appellant previously filed Misc. Application [E030 of 2024](#) and sought for similar orders as herein and to appeal out of time. That matter was determined with finality by this court. The court dismissed the application and ordered the decretal sum to be released.
 5. The respondent aver that since the motion under Misc. Application [E030 of 2024](#) was dismissed, there is no proper appeal before the court that is capable of being prosecuted and the orders of stay of execution are already addressed. The appellant was directed to deposit the decretal sum within 21 days and to file a Record of Appeal within 14 days but there was no compliance. The orders sought are not capable of being issued and the application dated 7 June 2024 should be dismissed with costs.
 6. Parties attended and agreed to address the application by way of written submissions.
 7. The appellant submitted that in Misc. Application [E030 of 2024](#) the court allowed them to file an appeal out of time on condition that an appeal was filed within 14 days and a deposit of the decretal sum within 21 days. In a ruling dated 6 June 2024, the court dismissed the application because the court was functus officio. the respondent contends that the court dispensed with the matter herein and hence the decretal sum should be released but the appellant complied with the orders issued under Misc. Application [E030 of 2024](#) now seeks to preserve the subject of the appeal through an order of stay for execution pending the hearing of the appeal. The appellant has met the conditions necessary for the grant of orders of stay of execution. If the decretal sum is paid to the respondent she will not be able to refund upon a successful appeal.
 8. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKLR the court held that once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden shifts to that person. In the case of *Boniface Kariuki Wahome v Peter Nziki Nyamai & Another* [2019] eKLR the court held that it is upon the respondent to prove that she has means to repay the decretal sum and not an applicant who is seeking a stay of execution pending the hearing of an appeal.
 9. The respondent submitted that previously the appellant filed Misc. Application [No.E030 of 2024](#) and the court issued directions that an appeal be filed within 14 days and the decretal sum be deposited within 21 days. These orders were issued on 11 April 2024 and there was no compliance.
 10. On 30 April 2024 parties took hearing dates for Misc. Application [No.E030 of 2024](#) and hearing on 8 May 2024 and on 6 June 2024 the court dismissed the application and directed that the decretal sum be released to the respondent. The subject of Misc. Application [No.E030 of 2024](#) had been addressed and there was no compliance. To seek similar orders as herein sought, the application seeking a stay of execution is res judicata and should be dismissed with costs.
 11. In the case of *George W M Omondi & another v National Bank of Kenya Ltd & 2 others* [2001] eKLR the court held that litigation must come to an end. A court should not allow parties to re-litigate over the same subject matter as such would be contrary to the rules of res judicata. To allow a party to re-litigate matters severally would be an abuse of the court process. In the case of *Satya Bhama Gandhi v Director of Public Prosecutions & others*, the court held that abuse of court process is situations where the process of court is applied to the detriment of other parties. In this case, the instant application should be dismissed with costs and the respondent allowed to enjoy the fruits of her judgment.



Determination

12. Both parties agree there is Misc. Application [No.E030 of 2024](#) which the court determined with finality.
13. I have had a chance to retrieve this file Misc. Application [No.E030 of 2024](#) and indeed, the appellant herein was seeking for orders of stay and leave to appeal out of time.
14. On 11 April 2024, Under Misc. Application [No.E030 of 2024](#) the court allowed the appellant 14 days to file its appeal and 21 days to deposit the decretal sum.

The Memorandum of Appeal herein is filed on 23 April 2024.

15. These are 8 days within the provisions of Order 50 of the Civil Procedure Rules. See Keziah Stella Pyman & 2 others vs Paul Mwololo Mutevu & 8 others [2013] eKLR concerning tabulation of time. In the case of Maersk Kenya Limited v Murabu Chaka Tsuma [2017] eKLR the court recognized that in counting the days allocated by the court, weekends, public holidays, and court vacations are removed.

The appeal was filed in time as directed.

On the deposit of the decretal sum in court on 7 May 2024.

16. The deposit was done within 17 days. This is within 21 days as directed by the court.
17. The orders issued on 11 April 2024 were complied with by the appellant. On the ultimate orders issued by the court in Misc. Application [No.E030 of 2024](#) that the court was functus officio, upon the orders of 11 April 2024, indeed the purpose for which the court was moved ceased. Seeking stay of execution under such file where the sole purpose was to seek time extension to file an appeal, on the given conditions, the court was functus officio from 11 April 2024 under Misc. Application [E030 of 2024](#).
18. The stay orders sought herein are procedural and allowed under the provisions of Order 42 Rule 6. The appellant is seeking for orders of stay of execution pending the hearing and determination of the appeal herein.
19. Under Order 42 rule 6(2) of the Civil Procedure Rules, the conditions that the court should consider before granting an order of stay of execution are;

(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.
20. In this case, the appellant is seeking to appeal against the judgment delivered on 6 December 2023 in Mombasa CMELRC and that there is an arguable appeal with a high chance of success. The decretal sum is deposited in court to secure the appeal and is available whichever way the appeal is decided. There will be loss and damage if the decretal sum is released to the respondent.
 21. In the case of Jason Ngumba Kagu & 2 Others v Intra Africa Assurance Co. Limited [2014] eKLR held that;

The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that



substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether by asking the Applicant to do what the judgment requires, he will become a pious explorer in the judicial process.

22. Taking the above into account, pending the hearing of the appeal herein, the appellant has complied with orders issued in Misc.E030 of 2024, the appeal is secured.
23. Accordingly, the application dated 7 June 2024 is hereby allowed. An Order of stay of execution of the Decree in Mombasa CMELRC No.514 of 2021 is hereby issued pending a hearing and determination of the appeal. Costs to abide by the outcome of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

