



**Berlin Equipment Limited v Ojwang (Appeal E083 of 2024)
[2024] KEELRC 2625 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2625 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E083 OF 2024
M MBARŪ, J
OCTOBER 24, 2024**

BETWEEN

BERLIN EQUIPMENT LIMITED APPELLANT

AND

JOSEPH SHIKUKU OJWANG RESPONDENT

RULING

1. The appellant filed an application dated 11 July 2024 under the provisions of Order 42 Rule 6 of the Civil Procedure Rules and seeking orders that there be a stay of execution of the judgment in Mombasa CM ELRC E439 of 2021 delivered on 4 April 2024. The stay be allowed pending the hearing and determination of the pending appeal.
2. The application I supported by the affidavit of James Otieno the human resources manager of the appellant and on the grounds that judgment in Mombasa CM ELRC E439 of 2021 was delivered on 4 April 2024 in favour of the respondent for the sum of Ksh.1, 306,941. Aggrieved, the appellant filed the Memorandum of Appeal and unless the court grants an order of stay of execution, the respondent will proceed and execute and render the appeal nugatory.
3. In his Supporting Affidavit, Otieno aver that unless the orders sought are issued, the appellant will suffer irreparable loss and damage. The decree is for a substantial amount and the appellant is not aware of the financial status of the respondent and is thus apprehensive that once the decretal sum is paid, the respondent will not be able to recover upon a successful appeal. The appeal raises key arguable grounds with high chances of success and has been filed without delay and only fair that the same be allowed.
4. In reply, the respondent filed Grounds of Opposition and aver that he should be allowed to enjoy the fruits of his judgment. The appellant has not offered any security to warrant the stay of execution are required under Order 42 Rule 6 of the Civil Procedure Rules. The appellant has not demonstrated



what substantial loss will be suffered if an order of stay is not allowed. There is no demonstration that the respondent is unable to refund the decretal sum.

5. The respondent also aver that the appellant has not moved the court that delivered the judgment which had jurisdiction to determine an application for a stay of execution pending appeal in the first instance. The application has been filed with inordinate delay, judgment was delivered on 4 April 2024 and this application was only filed way after the four (4) months had lapsed.
6. Both parties attended and filed written submissions which are analyzed and the issue for determination is whether an order of stay of execution of the judgment delivered on 4 April 2024 in Mombasa CM ELRC 439 of 2021 should be issued.
7. The ordinary practice is to seek a stay of execution before the court that issued the subject orders sought to be stayed. This would give the court the context and purpose for such an application. To sit back and wait until the matter is on appeal is not diligent.
8. The rationale is under Order 42 rule 6 which gives the conditions necessary for grant of stay of the judgment pending appeal. An applicant must address without delay, demonstrate the substantial loss to be suffered and fundamentally, offer security for the due performance of the judgment.
9. Inherently, an applicant must demonstrate to the court that the orders sought are deserved and that the court should exercise its discretion judicially and based on the conditions under Order 42 Rule 6 and the material before it.
10. On 2 July 2024, the court directed the appellant to file the Record of Appeal within 60 days. This was done on 29 August 2024 which is within time save, for an applicant seeking a stay of execution, the condition precedent must be met.
11. As correctly submitted by the respondent, the purpose of Order 42 rule 6(1) of the Civil Procedure Rules is to allow an applicant to move the court of first instance with an application seeking a stay of execution. Indeed, Order Rule 6(1) requires that;

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. [Emphasis and underline added].

12. The essence is to move the court of first instance immediately to preserve the substance of the matter pending appeal. The appellant has not addressed whether there was an effort to move the trial court for an order of stay of execution.
13. The principles upon which the court exercises discretion under Order 42 Rule 6 of the Civil Procedure Rules are firmly settled. The discretion under Order 42 rule 6 is on its terms unfettered but the aggrieved party must satisfy the court on a well set of conditions precedent to be made before such exercise of discretion in his or her favour.
14. The application under this Order 42 rule 6 is to be viewed in reference to the following factors:
 - 1) That the application has been filed without undue delay.



- 2) That the applicant had demonstrated that substantial loss may result unless stay orders are granted.
 - 3) That the applicant is ready to give security for the due performance of the decree or order as may ultimately be binding on him at the end of the determination of the appeal.
15. In this case, the delay is apparent. The time from April to July 2024 is not accounted for.
16. The other foundational matter that an applicant must establish is the loss to be suffered if the orders sought are not issued. These principles are well outlined in the case of Gianfranco Manenthi & Antonietta Farinato v Africa Merchant Assurance Company Ltd [2019] KEHC 7586 (KLR), the case of Antoine Ndiaye v African Virtual University [2015] KEHC 6783 (KLR), and the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, the court held that;
- No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.
17. The other pillar is the offer of security for the decree's due performance. None is offered in this case.
18. Ultimately, on all grounds, there is no matter for the court to apply itself. Application dated 11 July 2024 is dismissed with costs to the respondent. The record of Appeal is filed and hearing directions to issue.

Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 24 DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

