



**Otieno v Eldermann Company Limited (Employment and Labour Relations Cause 2177 of 2017) [2024] KEELRC 2539 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2539 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2177 OF 2017**

**MN NDUMA, J  
OCTOBER 17, 2024**

**BETWEEN**

**GEORGE OUMA OTIENO ..... CLAIMANT**

**AND**

**ELDERMANN COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. The respondent/applicant filed a notice of motion application dated 11/3/2024 seeking for an order in the following terms: -
  1. Spent
  2. Spent
  3. That this court be pleased to stay execution of the Decree dated 15/8/2023 arising from the default judgment dated 13/10/2022 pending the hearing of an appeal against the ruling of the court dated 29/2/2024.
2. The application is premised on grounds 1 to 10 set out on the face of the application and buttressed in the supporting affidavit of Beatrice Mumo the Principal Officer of the respondent/applicant the nub of which is that the ruling of the court sought to be appealed against was delivered on 29/2/2024 and the application was filed on 11/3/2024 and so is not visited by inordinate delay in terms of order 42 Rule 6 sub rule 2(a) of *Civil Procedure Rules*.
3. That the claimant/respondent will be unable to refund the decretal sum if the appeal succeeds and so same will be rendered nugatory and the applicant will suffer substantial loss.
4. That the respondent is able and willing to provide security for the decretal sum and costs pending hearing and determination of appeal.



5. That the court should exercise its discretion so as not to deny the applicant the right of appeal.
6. The respondent filed a replying affidavit of Advocate Namada Simoni dated 30/5/2024 who deposes that the intended appeal against the ruling of the court lacks merit and is an abuse of court process aimed at delaying justice for the claimant/respondent.
7. That the application does not meet the threshold required under order 45 Rule 1(b) of [\*Civil Procedure Rules\* 2020](#).
8. The respondent relies on the Court of Appeal decision in [\*Muchanga Investment Limited v Safaris Unlimited \(Africa\) Ltd and 2 others\*](#) to demonstrate that its application is an abuse of the court process and blatant abuse of precious time available to the court to dispense justice to the parties.
9. The respondent further relies on the court of Appeal decision in [\*Nyatane v Nyakundi\*](#) Civil E033 of 2022 [2023] KEHL 3086 (KLR) to counter the allegation by the applicant that it would suffer substantial loss if the court does not grant stay of execution of the judgment of the court. The court stated as follows:

“It is trite that the mere fact that the decree holder is not a man of means does not necessarily justify stopping him from benefitting from the fruits of the judgment. The general rule is that the court ought not to deny a successful litigant of the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher court. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicants to prove that the respondent will not be able to refund to the applicants any sums paid in satisfaction of the decree.”

10. The respondent states that the overriding objective under section 1A, 1B and 3A of the [\*Civil Procedure Act\*](#) demands that the court process and procedure should be just, expeditious, proportionate and affordable resolution of civil disputes. That the respondent/applicant squandered opportunity to be heard by the court and is bent on delaying the justice of the case by bringing numerous applications which lack merit.
11. That the matters raised here were well determined in the ruling of the court dated 29<sup>th</sup> February 2024.
12. The applicant has relied to the contrary on the case of [\*Antoine Ndiaye versus Africa Virtual University\*](#) a[2015] eKLR to insist that it stands to suffer substantial loss if stay of execution is not granted. The court cited the Court of Appeal in [\*Kenya Shell Ltd v Benjamin Karuga Kibigu and Ruth Wairimu Karuga\*](#)[1982-1988] I KAR 1018 as follows:

“It is usually a good rule to see if order 41 rule 4 of the [\*Civil Procedure Rule\*](#) can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal could be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdiction for quantity stay.”

13. The applicant submitted that “substantial loss does not represent any particular mathematical formula. That it is a qualitative concept. It refers to any loss, great or small that is of real worth or value as distinguished from a loss without value or a loss that is merely normal” citing the case of *Tropical Commodity Supplies Ltd* in which order 42 rule 6 was well elaborated.



**Determination.**

14. The court notes that this application was brought timeously after the ruling of the court was rendered and a notice of appeal dated 7/3/2024 filed before this court.
15. This court is however not satisfied that the scales of justice are in favour of granting stay pending the hearing and determination of the pending appeal in that the applicant has not demonstrated to the court that it would suffer substantial loss and/or the appeal would be rendered nugatory if the stay of execution is not granted in this matter.
16. The court reiterates that the claimant/respondent has awaited hearing and determination of the suit since the year 2018 until judgment was delivered on 3/10/2022. That the applicant has not demonstrated that it has an arguable appeal given the indolence it demonstrated from date of judgment till the time an application was filed on 6/9/2023 which the court dismissed in its ruling delivered on 29/2/2024.
17. The court in summary finds that the applicant has not met the threshold under order 42 Rule 6 of Civil Procedure Rules to warrant the court to exercise its discretion in favour of the applicant.
18. The applicant will to the contrary be gravely prejudiced by the delayed enjoyment of his fruits of judgment which in the court's finding is merited.
19. Accordingly, the application is dismissed with costs.

**DATED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024**

**MATHEWS NDERI NDUMA**

**JUDGE**

Appearance:

Mr. Namada for claimant/respondent

Mr. Miano for respondent/applicant

Mr. Kemboi – Court Assistant

