



**Devyani Food Industries Kenya Limited v Mtsumi (Appeal E085 of 2024)
[2024] KEELRC 2769 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2769 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E085 OF 2024
AK NZEI, J
NOVEMBER 8, 2024**

**BETWEEN
DEVYANI FOOD INDUSTRIES KENYA LIMITED APPELLANT
AND
JUMA MWATSUMI MTSUMI RESPONDENT**

RULING

1. The application before me is the Appellant’s Notice of Motion dated 8th May, 2024. The Appellant/Applicant seeks the following orders:-
 - a. That the Court be pleased to order a stay of execution of the Judgment delivered by Honourable Nabibya, Principal Magistrate, in Mombasa Chief Magistrate’s Court Employment Cause No. E411 of 2020 on 11th April, 2024 pending hearing and determination of (the) appeal.
 - b. That costs of the application be in the intended appeal.
2. The application, expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 of the Civil Procedure Rules, is based on the supporting affidavit of Paul Maina, the Appellant/Applicant’s Legal Officer, filed together with the application. Documents annexed to the said application include a hand written copy of the trial court’s Judgment delivered on 11th April, 2024 and a copy of the memorandum of appeal filed herein.
3. The application was first presented to the Court under a certificate of urgency on 16th May, 2024, and finding no urgency in the same, I declined to either certify the same as urgent or to issue interim orders of stay of execution. I ordered service of the application and fixed the same for directions on 21st May, 2024.



4. Before the said date, however, the Appellant filed another (similar) application under a certificate of urgency dated 14th May, 2024, and annexing to the supporting affidavit sworn, on 14th May, 2024, copies of proclamation of attachment indicating that execution of the trial Court's decree had been levied against the Appellant/Applicant on 14th May, 2024. I granted interim stay of execution of the trial court's decree on 16th May, 2024 and directed service of the application on the Respondent.
5. On 21st May, 2024, the Appellant/Applicant withdrew the Notice of Motion dated 14th May, 2024 and retained the one dated 8th May, 2024. Interim Orders of stay of execution of the trial court's decree were issued on the latter application, which is now before me for determination.
6. The application is opposed by the Respondent vide his Replying Affidavit sworn on 28th May, 2024, in which it is deponed that the Application is an afterthought, that the applicant has not demonstrated how he stands to suffer substantial loss, has not satisfied the requisite conditions to warrant granting of stay pending appeal and that the application is an abuse of the Court's process.
7. The Appellant/Applicant filed a further affidavit sworn on 4th June, 2024, and annexed thereto copies of the aforesaid proclamation of attachment, the trial court's decree and certificate of costs, and a hand written copy of the trial court's Judgment delivered on 11th April, 2024.
8. Order 42 Rule 6(2) of the Civil Procedure Rules provides as follows:-

“(2) No order for stay of execution shall be made under sub-rule (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 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 made by the applicant.”

9. The trial court's decree is a money decree, and the Appellant/Applicant has appealed against the same. The appeal is a valid appeal, and the application herein was filed without unreasonable delay. If stay of execution of the trial court's decree is not ordered, the appeal will be rendered nugatory; and this will, in my view, occasion substantial loss on the part of the Appellant/Applicant. The Respondent has not demonstrated financial ability to refund the decreed sum if the same were to be paid over to him and the appeal herein were to succeed.
10. It was stated as follows in the case of Charles Mutethia Mutea & another – vs – Ibrahim Mutua (2009) eKLR:-

“But the critical consideration is whether the Applicants stand to suffer loss should they pay the decretal sum over to the Respondent and eventually the appeal were to succeed. It is this loss that must be prevented. How does this loss occur”. It will occur when the decretal sum is paid over to a party in whose favour Judgment has been passed, who has no means to refund the same in case the appeal is successful. In other words, if the person in whose favour a Judgment has been passed is capable of refunding the decretal sum, then courts will normally not stay execution.

The other consideration in balancing the interest of the parties is whether the payment of the decretal sum will have the effect of crippling the operations or business of the Applicant . . .”



11. I have noted from the documents annexed to the further affidavit of Paul Maina that the Respondent's appointed Auctioneer (Mbusera Auctioneers) proclaimed for attachment a total of ten (10) motor vehicles and assorted office furniture, which the said Paul Maina depones are the Appellant/Applicant's tools of trade and therefore exempted in law from attachment as their attachment will disrupt the Respondent's operations.
12. Having perused the trial court's Judgment, the decree therefrom and the proclamations of attachment, and having considered the affidavits sworn and filed for and against the application and written submissions filed by counsel for parties herein, I am convinced that the application herein is merited.
13. Consequently, the Notice of Motion dated 8th May, 2024 is hereby allowed in the following terms:-
 - a. There will be a stay of execution of the trial court's decree in Mombasa Chief Magistrate's Court ELR Case No. E411 of 2020 pending hearing and determination of the appeal herein, on condition the Appellant/Applicant deposits a sum of Kshs.500,000/= (five hundred thousand Kenya shillings) in this Court within thirty (30) days from the date of this Ruling.
 - b. The Appellant/Applicant shall compile and file a record of appeal within ninety (90) days from the date of this Ruling, failing which the stay herein granted shall automatically lapse.
 - c. Costs of the application shall be in the appeal.
14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

.....Appellant

.....Respondent

