



**Njoka v Embu County Government (Appeal E003 of 2023)
[2024] KEELRC 13543 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13543 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
APPEAL E003 OF 2023
ON MAKAU, J
DECEMBER 20, 2024**

BETWEEN

CHARLES MURIITHI NJOKA APPELLANT

AND

EMBU COUNTY GOVERNMENT RESPONDENT

RULING

1. The applicant is the respondent in the suit. By a Notice of Motion dated 2nd July 2024, it seeks the following orders: -

SUBPARA a.

That this application be certified as urgent, and be heard ex-parte in the first instance.

SUBPARA b.

That the Honourable court be pleased to grant an order for stay of execution of the judgment and decree delivered in this matter on 8th March 2024 pending the hearing and determination of this application inter-parties.

SUBPARA c.

That the Honourable court be pleased to grant an order for stay of execution of the judgment and decree delivered in this matter on 8th March 2024 pending the hearing and determination of the Applicant's intended appeal.

SUBPARA d.

That costs of this application be provided for.



2. The motion is supported by an affidavit sworn on even date by the respondent's County Attorney, one Kenneth Ngari Githinji and a further affidavit sworn on 9th July 2024 by its counsel Jacinta Wairimu Rugaita. The Appellant has opposed the motion vide his Replying Affidavit sworn on 16th July 2024.
3. The applicant's case in brief is that the court delivered judgment against it on 8th March 2024 without notice and it only learned about the judgment on 14th June 2024 when the Appellant's counsel served a decree and certificate of costs; that it has since sought and obtained leave to appeal out of time; that it has already filed a notice of Appeal; that unless the court grants stay of execution, the intended appeal will be rendered nugatory after execution; that the respondent is willing to abide by any conditions the court deems fit; that the claimant will not suffer prejudice if the stay order is granted.
4. The Appellant's case is that the parties were notified of the judgment date vide email dated 1st March 2024; that the email was sent to the correct email for both counsel as indicated in documents filed in court; that the judgment was delivered on 8th March 2024 as notified in the said email; that the judgment was not complied with despite demand; that the applicant has not demonstrated any irreparable loss that it will suffer if stay is declined; and that the court should balance between the rights of the two parties by directing that the decretal sum plus costs and interest be deposited in a joint interest earning account as a condition for stay.
5. Both sides filed written submissions to dispose of the motion and I have considered the same plus the authorities cited.

Determination

6. The issues for determination is whether the application meets the legal threshold for granting stay of execution pending appeal. Order 42 Rule 6(2) of the Civil Procedure Rules, provides as follows: -
 - “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 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.”

unreasonable delay

7. The first issue to consider is whether the application for stay was made without unreasonable delay. The impugned judgment was passed on 8th March 2024 and the application was made on 28th June 2024. The delay in filing the motion was about three months. As at that time, a Bill of costs had been filed but not yet taxed. Since costs had not been determined before the application was made, the decree was not ripe for execution and therefore the delay in filing the application was not inordinate.



Substantial loss

8. The decree in issue involves reinstatement and payment of money to the appellant. In *Kenya Airways Ltd v Kenya Aviation & Allied Workers Union (2020)* eKLR the Court of Appeal held that:

“On the nugatory aspect, again we are in agreement with the applicant that if the grievant was to be re-engaged by the applicant, then the intended appeal will be rendered nugatory, as having gone back to her employment, the appeal will be rendered superfluous.”
9. Again, in *Teachers Service Commission another v Mutisya (Civil Application E091 of 2023 (2024) KECA 80 (KLR) (9 February 2024) (Ruling)* the Court of Appeal held:

“We are also alive to the consequences that a successful appeal will suffer if reinstatement takes place pending appeal. Taking all the above into account, we are satisfied that this is a deserving case for an order of stay of execution.”
10. Guided by the foregoing binding precedents, I find that reinstatement of the appellant will render the appeal nugatory. However, the applicant neither alleged nor proved that the appellant will not be able to refund the decretal sum if the appeal succeeds.
11. Nevertheless, both sides are agreeable to a conditional order of stay of execution pending appeal. The appellant has asked the court to order that the decretal sum plus costs be deposited in a joint account held by the counsel for both sides.
12. There can be no doubt that the reason for ordering a judgment debtor to provide security as condition for stay is to guarantee performance of the decree should the appeal fail to succeed. It is also for purposes of ensuring that a successful appellant gets back the judgment debt with ease. Accordingly, it is my holding that in order to strike a balance between the competing interests, security should be deposited by the respondent.

Conclusion

13. The court is satisfied that the application herein meets the legal threshold laid down in Order 42 Rule 6 (2) of the Civil Procedure Rules. Consequently, I allow the Notice of motion dated 2nd July 2024 in the following terms: -
 - a. Stay of execution of the judgment rendered herein on 8th March 2024 is granted on condition that the applicant deposits the whole decretal sum of Kshs.4,831,525 in an interest earning account jointly opened by the counsel for the two parties within 45 days of today.
 - b. Costs of the motion shall abide the outcome of the intended appeal.
 - c. If the applicant fails to comply with the condition for the stay as ordered above, the stay order shall lapse automatically.

DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER, 2024.

ONESMUS N MAKAU

JUDGE

Order



This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

