



REPUBLIC OF KENYA



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High-Tech Cylinder Manufacturing Company Limited v Wamukota (Appeal E012 of 2023) [2024] KEELRC 13377 (KLR) (11 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13377 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E012 OF 2023
JW KELI, J
DECEMBER 11, 2024

BETWEEN

HIGH-TECH CYLINDER MANUFACTURING COMPANY LIMITED APPELLANT

AND

CHRISTOPHER WANYAMA WAMUKOTA RESPONDENT

RULING

1. The applicant moved the court by way of a Notice of Motion application dated 6th November 2023 seeking the following Orders:-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. Pending the hearing and determination of the appeal the applicant be granted a stay of execution of the judgment delivered on 1st of December 2023 before Honourable E.K Suter in Mavoko Chief Magistrates Employment and Labour Relations Court Case No. E027 of 2022.
 - f. The costs of the application herein be provided for.
2. The application was premised on the grounds that:- A judgment was delivered on the 5th of October 2023 by the trial magistrate in favour of the respondent; The applicant, aggrieved with the decision, filed a memorandum of appeal against the entire judgment; The appeal raised serious issues with high chances of success; In the event that the judgment is not stayed the appeal if successful will be a mere academic exercise and would thereby be rendered nugatory.



3. The application was further supported by the affidavit of Abdullahi M. Yarrow who stated he was the applicant's Chief Executive Officer. In support of the application he annexed as AMY-1 a copy of the judgment appealed against, AMY-2 a copy of the memorandum of appeal, AMY -3 was a copy of a letter dated 2nd November 2023 addressed to the trial magistrate court seeking typed proceedings, and certified copies of the judgment and decree. The deponent averred that the Decree-holder was likely to execute against the applicant having applied for the Decree (AMY-4 was a copy of the receipt of payment for assessed costs of the Decree by the respondent).
4. The applicant contended that the application came up for directions on the 20th of November 2023 wherein no interim order of stay was granted and instead the application was listed for hearing on the 5th of February 2024. In the intervening period, the Respondent served the applicant with a proclamation notice vide WhatsApp prompting the filing of the subsequent application dated 15th January 2024 seeking for interim orders of stay pending the hearing and determination of the application. On the 17th of January 2024, Hon Lady Justice Linnet Ndolo certified the application as urgent and issued an Order of Temporary stay of execution pending interpartes hearing of the application. It was the opinion of this Court that the prayers in the application dated 15th January 2024 are spent.
5. The Respondent submits that they filed grounds of opposition dated 18th January 2024 on even date, concerning the application dated 15th January 2024. The same was not placed on the court file. There was no response to the application dated 6th November 2023.
6. The application was canvassed by way of written submissions. The applicant's written submissions were drawn by Murangasia & associates Advocates and dated 21st February 2024. The respondent's written submissions were drawn by Eboso & Company advocates and dated 26th February 2024.

Decision

7. The application was brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010, which specifies the circumstances under which the Court may order a stay of execution of a Decree or Order pending an Appeal. It provides that an Applicant must demonstrate the following: -
 - a) Substantial loss may result to the applicant unless the order was made;
 - b) The application was made without unreasonable delay; and
 - c) 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.”
8. From the above provision of the law, it is clear that the Court must be satisfied that there is “sufficient cause” to grant a Stay. Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be met simultaneously.
9. The Court ought to ensure that the appeal is not rendered nugatory as held in Court of Appeal in Rhoda Mukuma v John Abuoga[1988] eKLR, held that “It was laid down in *Butt v The Rent Restriction Tribunal, Civil Application No Nai 6 of 1979*, (following *Wilson v Church (No 2) (1879)* 12 Ch 454 at p 488) that in the case of a party appealing, exercising his undoubted right of appeal, the court ought to see that the appeal is not rendered nugatory. It should therefore preserve the status quo until the appeal is heard.

Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the



application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore it is necessary to preserve the status quo.”(Emphasis added).

10. Applying the foregoing law and case precedents, the Court finds that in the instant case the impugned judgment was delivered on the 5th October 2023 and the memorandum of appeal was filed on the 23rd October 2023 well within the 30 days as required under Rule 12 of the Court Rules 2024 to wit:-¹² (1) Where a written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified under that written law.¹³; The written law being section 79G of the Civil Procedure Act which states:- “Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

11. On the issue of substantial loss that could be suffered by the applicant, there was evidence before the Court, a threat of execution while the appeal is pending (AMY-4a and b). The Respondent did not provide proof of financial capacity to refund the decretal amount in the event the appeal is successful. In *Benisa Limited v John Ngotho Maina*(2022) e KLR the court emphasised that once an applicant expresses concern about the Respondent’s financial ability to meet the decretal sum, the evidential burden shifts to the respondent to disclose their financial resources.
12. On the requirement of security for the decretal amount, the applicant vide affidavit of Abdullahi Yarro of 6th November 2023 at paragraph 13 stated it was ready to offer security. The respondent submits that the warrants annexed by the applicant as AMY-4b disclose the decretal sum as Kshs. 358,429.30. The respondent submits that the Court ought to order the entire decretal amount to be deposited in a joint interest-earning bank account in the names of both parties’ advocates within 30 days in default they be at liberty to execute.
13. The memorandum of appeal must disclose arguable points of facts and/or law. The Court, on the issue of whether the memorandum of appeal disclosed an arguable appeal, is guided by the Court of Appeal in *Cabinet Secretary Ministry of Health v Aura & 13 others (Civil Application E583 of 2023)* [2024] KECA 2 (KLR) (19 January 2024) (Ruling) where it was held that: “An arguable appeal is not one that must succeed and an applicant need not proffer a multiplicity of arguable points. One is sufficient. For a point to be arguable it needs merely to raise a bona fide point of law or fact sufficient to call for an answer from the respondent and is worthy of the court’s consideration. 33. Moreover, whereas such arguable points should ideally and conveniently be expressed in the form of a draft memorandum of appeal, there is no rule that it must be so. One can raise such grounds on the face of the motion and even in the supporting affidavit, as happened in this case.” In the instant case the applicant submits that the judgment was not supported by evidence and that their submissions were not considered. They further challenged the finding on employer-employee relationship among other grounds. The court finds arguable points have been raised in the appeal.
14. In the upshot the Court holds the application dated 6th November 2023 as merited and grants the following orders:-



- a. Pending the hearing and determination of the appeal, the court hereby grants an Order stay of execution of the judgment and decree delivered on 1st of December 2023 before Honourable E.K. Suter in Mavoko Chief Magistrates Employment and Labour Relations Court Case No. E027 of 2022 and all consequential orders.
 - b. The decretal amount of Kshs, 358,429.30 be deposited in joint interest earning bank account in the names of both parties advocates within 30 days of this ruling in default the Respondent be at liberty to execute.
 - c. Costs in the cause.
15. The Court orders the application dated 15th February 2024 is determined by the above orders.
 16. The appellant is further ordered steps to file record of appeal and submissions in 30 days. Mention on 5th February 2025 for further directions in the matter.
 17. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF DECEMBER, 2024.

**JEMIMAH KELI,
JUDGE.**

In the presence of:

Court Assistant: Caleb

Applicant/appellant : - Ms. Waliaula

Respondent: absent

