



**Endmor Steel Millers Ltd v Mburu (Appeal E14 of 2022)
[2023] KEELRC 635 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 635 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E14 OF 2022
JK GAKERI, J
MARCH 16, 2023**

BETWEEN

ENDMOR STEEL MILLERS LTD APPELLANT

AND

JOHN NGOTHO MBURU RESPONDENT

*(Being an Appeal of the whole judgement of the Honourable
Stephen Jalang'o (MR) in Mavoko CMEL No. 98 of 2019)*

RULING

1. This is the determination of the notice of motion application dated September 8, 2022 filed under certificate of urgency by the appellant seeking orders that;
 1. Spent.
 2. Spent.
 3. The court be pleased to grant and/or extend stay of execution of the judgement and all consequential orders of Honourable Stephen Jalang'o (Mr) PM in Mavoko MCEL No. 98 of 2019 John Ngotho Mburu v Endmor Steel Millers Ltd pending hearing and determination of the appeal.
 4. Costs of application be provided for.
2. The application is expressed under section 79G, 95, 63(e), 1A, 1B and 3A of the [Civil Procedure Act](#), order 42 rule 6, order 51 rule 1 of the [Civil Procedure Rules, 2010](#) and is based on the grounds set out on its face and supported by the affidavit by Laban Waigwa dated September 8, 2022 who deposes that the respondent being dissatisfied with the judgement by the trial court in Mavoko CMEL, No 98 of 2019 delivered on August 4, 2022 had lodged an appeal against it and the appeal raised cogent points of law.



3. The affiant states that the decretal sum plus costs is a colossal sum and if paid, the respondent would not be in a position to refund the same and the appeal would be nugatory if it succeeded.
4. That typed proceedings of the trial court were yet to be finalised for purposes of filing the record of appeal and the applicant was likely to suffer irreparable prejudice, loss and damage unless the court intervened and the respondent stood to suffer no prejudice if the orders sought were granted.
5. The affiant states that the applicant has an arguable appeal and it was in the interest of justice to stay the execution pending the hearing of the application and appeal.
6. That the applicant was ready and willing to furnish security in due performance of its obligations and as a condition of stay of execution.
7. In its supplementary affidavit dated October 3, 2022, the applicant states that the threat of execution was imminent and the appeal was arguable and had since requested its counsel to apply for the suit to be transferred to Nairobi from Machakos as there was no judge at Machakos. That the Respondent stood to suffer substantial loss and damage if stay of execution pending appeal was not granted and the Respondent had not shown the prejudice he was likely to suffer if the stay of execution was granted.

Respondent's Case

8. In opposition to the application, the respondent filed a replying affidavit on December 5, 2022 sworn by Lemmy Regau Nyawade who deposes that the application is an abuse of the court process and is being used to delay justice for the respondent as no special or unique circumstances had been shown.
9. That the applicant had not demonstrated the substantial loss it stood to suffer if execution was not stayed or had an arguable appeal.
10. The affiant states that the respondent would suffer prejudice if the orders sought were granted as he had been waiting for judgement since April 2019 when he was dismissed from employment.
11. That if the court granted the orders, the applicant be directed to deposit the decretal amount of Kshs 574,140/= in a joint account as security.
12. The court was persuaded that the application lacked merit and ought to be dismissed.

Applicant's submissions

13. By the time the court retired to prepare this ruling, the applicant's Submissions had not been placed on the court file.

Respondent's Submissions

14. Counsel relied on the provisions of order 42 rule 6(2) of the *Civil Procedure Rules, 2010* to highlight the requirements for a stay of execution, namely; substantial loss may result, application was made without unreasonable delay and security for the due performance of the decree or order binding on the applicant.
15. Reliance was also made on the decisions in *James Wangalwa & another v Agnes Naliaka Cheseto* Misc. App No 42 of 2011 to highlight the requirements of substantial loss.
16. The decision in *Mwaura Karuga t/a Limit Enterprises V Kenya Bus Services Ltd & 4 others* (2015) eKLR was relied upon to emphasize the essence of security.



17. It was urged that since the application was made without undue delay, and the applicant had indicated its willingness and readiness to furnish security in due performance of its obligation, the applicant should deposit the decretal sum plus costs in a joint interest earning account.

Determination

18. The only issue for determination is whether the notice of motion application dated September 8, 2022 is merited.
19. The principles governing the grant of stay of execution pending appeal are clearly settled.
20. Order 42 rule 6(2) of the [Civil Procedure Rules, 2010](#) provides;
- No order for stay of execution shall be made under subrule (1) unless –
- a. The court is satisfied that substantial loss may result to the applicant unless the order is made that the application has been made without undue 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.
21. Evidently, the jurisdiction of the court to grant or refuse an application for stay of execution is discretionary.
22. The purpose of the application for stay of execution pending appeal was explained in [RWW v EKW](#) (2019) eKLR as follows;
- “The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of her/his judgement. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
23. To underscore the requirements for a stay of execution, in [Michael Ntouthi v Abraham Kivondo](#) (2021) eKLR, Odunga J. (as he then was) stated as follows;
- “In *Vishram Ravji Halai v Thornton & Turpin* (1990) KLR, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely; establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further, the application must be made without unreasonable delay . . .”
24. The court is guided accordingly.
25. In the instant case, the applicant urges that it stood to suffer substantial loss if the orders sought were not granted as execution by the respondent was imminent and the decretal sum would be irrecoverable if the appeal was successful as the respondent had neither adverted to his ability nor readiness to refund the amount and the appeal would be rendered nugatory.



26. This position finds support in the Court of Appeal decision in *National Industrial Credit Ltd v Francis Wasike & another* (2006) eKLR, where the court held;
- “ . . . Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – See for example section 112 of the *Evidence Act*, chapter 80, Laws of Kenya.”
27. In the instant case, the respondent has not demonstrated that he is in a position to repay the decretal amount if the appeal was successful as was the case in *Victor Ogola v Mary Waithe Kibiu* (2021) eKLR.
28. In the circumstances, the court is satisfied that the applicant has demonstrated that it stood to suffer substantial loss if the order of stay was not granted.
29. As regards security, the applicant has expressed its readiness and willingness to furnish security in due performance of its obligations as a condition for the stay.
30. Order 42 rule 6(2) of the *Civil Procedure Rules, 2010*, uses the phrases “as may ultimately be binding on him has been given.”
31. In *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* (supra), cited by the respondent, the court stated;
- “The rule does not, therefore, envisage any security. The words ultimately be binding are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore ultimate decree envisaged under order 42 rule 6(2)(b) includes costs and interest on the judgement sum unless the latter two were not granted which is seldom. The security to be given is measured on that yardstick.”
32. The respondent urged that since applicant was ready and willing to provide security, it be compelled to deposit the decretal sum in a joint interest earning account.
33. Order 42 rule 6(2)(b) of the *Civil Procedure Rules, 2010* confer upon the court discretion to determine the nature of security to be furnished in light of the circumstances of the case while balancing the respective rights of the parties.
34. Finally, on the timing of the application, it is evident that the judgement in *John Ngotho Mburu v Endmore Steel Millers Ltd* was delivered on August 4, 2022 and the instant application was filed on September 9, 2022, slightly over one (1) month later which in the court’s view was not unreasonable delay and the respondent submitted as much.
35. In sum, the court is satisfied and finds that the applicant has fulfilled the requirements of order 42 rule 6(2) of the *Civil Procedure Rules, 2010* for the grant of stay of execution.
36. In the upshot, the notice of motion application herein is merited and is accordingly granted in the following terms;
- a. The interim orders granted on September 16, 2022 are hereby affirmed and extended pending the hearing and determination of the appeal against the judgement in *Mavoko MCEL No 98 of 2019 John Ngotho Mburu v Endmor Steel Millers Ltd*.



- b. The applicant shall deposit the decretal amount in an interest earning account jointly held by counsels for the parties on record within 45 days of the date hereof.
- c. Applicant shall expedite the filing of the record of appeal and take steps to have the same listed for hearing within 45 days from the date hereof.
- d. Failure to observe (b) and (c) shall entitle the respondent to execute the judgement and decree unless the duration is extended by the court.
- e. Costs shall be in the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH DAY OF MARCH 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

