



Deloraine Estates Limited v Shikuku (Employment and Labour Relations Appeal E020 of 2022) [2023] KEELRC 1250 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1250 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E020 OF 2022
DN NDERITU, J
MAY 18, 2023**

BETWEEN

DELORAINE ESTATES LIMITED APPELLANT

AND

JOHN KIDIGA SHIKUKU RESPONDENT

(Being an Appeal from the Judgment of (Honourable B. Ochieng), Chief Magistrate at Nakuru delivered on 18th August, 2022 in ELRC No. 316 of 2019)

RULING

I. Introduction

1. In an amended memorandum of appeal dated September 15, 2022 the Appellant (Applicant), through P Sang & Co Advocates, prays for setting aside of the entire judgment of the trial court (Hon B Ochieng, CM) delivered on August 18, 2022 in Nakuru ELRC Cause No 316 of 2019.
2. In a notice of motion dated September 15, 2022 (the application) the Applicant prays for the following orders –
 1. Spent
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 3. That there be a stay of execution of the judgment delivered by the Honourable trial Court on August 18, 2022 pending the hearing and determination of the intended appeal.
 4. That the costs of this application be provided for.
3. The application is expressed to be brought under the provisions of Sections 1A, 1B, and 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and all enabling provisions of the



- law. It is based on the grounds on the face of it and supported with the affidavit of Joseph Nkirimpai, the farm Manager of the Applicant, sworn on September 15, 2022 with several annexures thereto.
4. The Applicant has exhibited a letter dated August 26, 2022 from the Respondent's Advocates, Kipruto Gitau & Co Advocates, demanding settlement of the sum of Kshs 625,965/= being the sum due and payable as of that date based on a decree issued by court on August 25, 2022 a copy whereof is also annexed to the affidavit.
 5. The deponent has exhibited a copy of the amended memorandum of appeal arguing that the Applicant has an arguable appeal which will be rendered nugatory if the stay sought for is denied. He states that the Applicant has approached the court without undue delay and that it is ready and willing to offer and deposit such security on the decretal sum and costs as may be ordered by this court.
 6. It is in the foregoing circumstances that the Applicant pleads with this court that the application be allowed. The written submissions by Counsel for the Applicant shall be considered alongside those by Counsel for the Respondent in the succeeding parts of this ruling.
 7. On September 16, 2022 this court granted an interim order of stay pending further and or other orders of the court. On September 21, 2022 the said interim orders for stay were extended pending the hearing and determination of the application inter partes.
 8. In response to the application the Respondent filed a replying affidavit sworn by himself on September 29, 2022 annexing a copy of the decree issued from the trial court indicating that as at August 25, 2022 the amount due and payable was Kshs 625,965/=.
 9. The Respondent views this application as an attempt by the Appellant to delay settlement of the decretal sum plus costs arguing that the application does not meet the threshold for granting of the orders sought for.
 10. He states that he is entitled to the fruits of the judgment and he will suffer irreparably if the stay is granted. He states that if this court be inclined to grant the stay then the Applicant should be ordered to deposit the decretal sum plus costs in an interest earning account in the joint names of the advocates for the parties. Otherwise, he argues that the application should be dismissed with costs.
 11. In response to the replying affidavit, the Applicant filed a supplementary affidavit sworn by Joseph Nkirimpai on October 14, 2022. He argues that the application meets the threshold for granting of the orders sought and that if the same is disallowed the appeal may be rendered nugatory.
 12. He argues that the Respondent is unemployed, without any known or disclosed source of income, and hence if the decretal sum is paid and the appeal ultimately succeeds the Respondent shall not be in a good financial position to refund the same. He argues that such a scenario shall occasion irreparable and substantial loss to the Applicant.
 13. When the application came up in court for inter partes hearing on September 21, 2022 the court, with concurrence of Counsel for both parties, directed that the same be heard by way of written submissions. Counsel for the Applicant filed his submissions on October 17, 2022 while Counsel for the Respondent filed on October 25, 2022.

II. Issues For Determination

14. The court has gone through the application, the affidavits filed, and the submissions by counsel for the parties. Counsel for both parties agree that there is only one main issue for determination – Should the court issue an order of stay of execution of the decree issued by the trial court pending the hearing and determination of the appeal? There is also the issue of costs of the application.



III. Determination

15. Ordinarily, in any cause, an application for stay of execution of a decree brings into sharp contest the interests of a decree-holder and those of a judgment-debtor. On the one hand, where the judgment-debtor files or intends to file an appeal, there is an eminent danger that if the execution goes ahead unabated the appeal may be rendered nugatory or a mere academic adventure in case the appeal ultimately succeeds. On the other hand, the decree-holder argues that he is entitled to the fruits of the judgment arising from a trial on merit. That is the nature of the terrain that any court considering an application for stay of execution has to travel, protecting and balancing the competing, and in most instances contrasting, interests of the parties.
16. An order for stay of execution is a discretionary remedy but the court has to be guided by the interests of justice and peculiar circumstances of each case on own merits. The court has to exercise that discretion in a judicious manner and avoid being whimsical or capricious.
17. Order 42 Rule 6 of the Civil Procedure Rules provides that –
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) 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 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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
 - (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
 - (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
 - (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
18. The above law is somewhat straightforward, yet applications for stay of execution are some of the most contested in our courts. An Applicant for stay of execution has to demonstrate that if the stay is denied it is likely to suffer substantial loss or damage, that the application was filed without delay, and it is offering or has offered security for due performance of the decree.



19. Counsel for both parties agree on the issue for determination as identified by the court above and also on the factors to be considered by the court in determining this application as delineated above based on the provisions of Order 42 of the Civil Procedure Rules cited above.
20. A plethora of precedents has developed overtime in the jurisprudence on stay of execution flowing from *Butt V Rent Restriction Tribunal* (1982) KLR, 417. It is the duty of the court to do justice in such applications based on the general principle of sufficient cause and the specific ingredients isolated above.
21. The Applicant argues that it has an arguable appeal that is likely to succeed in fullness of time. It further argues that even after challenging the Respondent to disclose his ability to refund the decretal sum in case the appeal succeeds, the Respondent has failed to demonstrate that he has a reliable source of income or financial means to refund the decretal sum in case the appeal ultimately succeeds. According to the Applicant, this demonstrates the danger that if stay is not granted and the decretal sum is paid the appeal shall be merely academic even if it ultimately succeeds as it is unlikely to recover the money.
22. The source(s) of income of an individual are to a large extent private affair of the individual. It would be illogical and unreasonable to expect the Applicant to be familiar with the Respondent's sources of income or his financial standing. Once the Applicant raised that issue the burden of proof on that specific issue rested with the Respondent to demonstrate and illustrate that he is capable of refunding the decretal sum if paid in case the appeal ultimately succeeded. No such attempt was made on the part of the Respondent who unreasonably and illogically, as per the submissions from his Counsel, assumed that it was the burden of the Applicant to prove that he has no means of making such refund. In those circumstances, the Claimant has made out a case that it is likely to suffer substantial loss and or the appeal rendered nugatory if the stay of execution is not granted pending the hearing and determination of the appeal.
23. On the second issue of unreasonable delay, the judgment was delivered on August 18, 2022 whereupon a stay of execution was granted for 28 days, as per the parties, which stay was to expire around mid-September. The application for stay was filed on September 15, 2022. A memorandum of appeal has been annexed and an application for typed proceedings of the lower court copy has been made. It is in the considered view of this court that the Applicant has acted with the necessary dispatch in this matter and there has not been any unreasonable delay.
24. On the third issue of offering of security for due performance of the decree plus costs, the Applicant has again and again stated that it is ready to abide by any conditions that this court may impose.
25. In the circumstances and in view of all the above, this court takes the view that the Applicant has shown sufficient cause and met the conditions upon which a stay of execution may be granted in this matter.
26. The application for stay of execution as sought in the notice of motion dated September 15, 2022 is hence granted in the following terms –
 - a. That pending the hearing and determination of the appeal the Applicant shall deposit the entire decretal sum plus costs in the sum of Kshs 625,965/= in an interest earning account in the joint names of the advocates for both parties within 30 days of this ruling.
 - b. That in default of (a) above the stay shall automatically lapse and the decree-holder shall be free to execute.
 - c. That the costs of this application shall abide by the outcome of the appeal.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 18TH DAY OF MAY 2023



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DAVID NDERITU

JUDGE

