



Bollore Transport & Logistics Kenya Limited v Masha & another (Appeal E035 of 2023) [2023] KEELRC 1719 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1719 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E035 OF 2023
M MBARÚ, J
JUNE 29, 2023

BETWEEN

BOLLORE TRANSPORT & LOGISTICS KENYA LIMITED APPELLANT

AND

KARISA KALAMU MASHA 1ST RESPONDENT

SHEER LOGIC MANAGEMENT CONSULTANTS LIMITED 2ND RESPONDENT

RULING

1. The appellant filed application dated April 17, 2023 seeking for orders that pending the hearing and determination of this appeal, the court be pleased to order stay of execution of the judgment that was delivered by the trial court on March 23, 2023 and the consequential orders thereof especially the execution process flowing from the judgment.
2. The application is supported by the affidavit of Maurice Lugadiru the senior legal officer and on the grounds that in Mombasa CMELRC No 463 of 2018 – Karisa Kalamu Masha v Bollore Transport and Logistics Kenya Limited & Sheer Logic Management Consultants Limited, the trial court delivered judgment on March 23, 2023 and directed the appellant to pay service and costs to the 1st respondent herein. Aggrieved, the appellant has filed this appeal to challenge the order to pay service and unless the orders sought for stay of execution is allowed there shall be irreparable loss and damage. The appellant has filed Notice of Appeal and certified copies of typed proceedings which are pending and unless the orders sought are granted, the appellant will suffer loss and damage.
3. In reply, the 1st respondent filed his Replying Affidavit and aver that the appellant has not demonstrated what loss it shall suffer if the judgment of the trial court is executed and, in any case, such process has not commenced to justify the instant application. Under Order 42 rule 6 the principles therein require the applicant to demonstrate the loss to be suffered which the appellant as the applicant has failed



to address and further, there is no security for the due performance of the judgment which has been offered and the 1st respondent should be allowed to enjoy the fruits of his judgement.

4. The 2nd respondent filed the Replying Affidavit of Sylvanus Barasa, Regional manager, coast and aver that part of the trial court judgment is that the appellant should pay the 1st respondent service pay which is not based on evidence produced in court that the appellant and the 2nd respondent had a contract for outsourcing labour on June 1, 2016 to July 31, 2020 and thus cannot be held liable for the employment and contractual terms between the appellant and the 1st respondent prior to such period of June 1, 2016 and particularly with regard to payment of service pay. the trial court failed to take into account that the 1st respondent was registered with NSSF and there were remittances by the employer and hence service pay is not payable.
5. It is improper for the appellant to file an appeal to push the 2nd respondent to pay service pay going back to 1994 owing to the fact that it was not the employer prior to June 1st June 2016. The court should have considered the manner of employment. if the appeal is successful, the 2nd respondent will now bear the responsibility of notice pay, 6 months' compensation while it had piece rate employee with no constant salary and hence shall suffer loss and damage. The appellant has therefore not demonstrated why the orders sought should be issued and the application should be dismissed with costs.
6. The appellant submitted that section 17 of the *Employment and Labour Relations Court Act* give a right of appeal and Rule 32 of the *Court Rules* allow parties to apply the *Civil Procedure Act* and the rules thereto with regard to stay and execution processing. Under Order 42 rule 6 a party must show what substantial loss shall be suffered in an order of stay is not granted as held in *Jenny Luesby v Standard Group* [2016] eKLR. The trial court directed the appellant to pay the 1st respondent service pay despite the evidence submitted. The 1st respondent has since served the appellant with a decree and shall proceed with execution unless an order of stay is granted.
7. The 1st respondent submitted that the question of what substantial loss shall be suffered by an application if stay of execution is not granted must be addressed. There is no danger of execution as no decree has been issued or served upon the appellant. No security for costs has been offered and application should be dismissed with costs.
8. From the Memorandum of Appeal, what the court can discern at this stage is that the employment of the 1st respondent by the appellant is contested and the judgment directing for payment of service pay is challenged. The 2nd respondent too in the Replying Affidavit of Sylvanus Barasa has delved into the question of who the employer was and for what periods the service pay should be paid.
9. A party has a right to appeal secured under Section 17 of the *Employment and Labour Relations Court Act*, 2011 and a successful litigant has the right to enjoy the fruits of his judgment. a balance of these rights can be sourced from Order 42 rule 6 which requires an applicant seeking stay of execution to demonstrate what substantial loss shall be suffered if an order of stay of execution is not granted pending the hearing of an appeal.
10. In *Danros (K) Limited & another v Murtaza Adaamjee* [2021] eKLR the court defined substantial loss to mean that cornerstone of the jurisdiction under Order 42 Rule 6 of the *Civil Procedure Rules* and the decree holder should not be kept away from the fruits of his judgment without just cause. Without evidence of substantial loss, it is difficult to see why the decree holder should be kept out of his money. Equally, without a competent pledge of security by the Applicants for the eventual performance of the decree, no order of stay can be forthcoming.
11. In this case, the appellant has not given any evidence as to why the 1st respondent as the successful party before the trial court should be denied the fruits of his judgment pending the hearing of the instant



appeal save, to secure the substratum of the judgment, a conditional order of stay that secures each party is imperative where the appellant shall deposit 50% of the decretal sum in a joint interest earning bank account held in the names of the appellant and the 1st respondent within the next 30 days and failure to which, stay of execution orders herein shall automatically lapse.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

