



**Cerapack Products Limited v Kamuya (Appeal E020 of 2023)
[2023] KEELRC 2090 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2090 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E020 OF 2023
K OCHARO, J
JUNE 19, 2023**

BETWEEN

CERAPACK PRODUCTS LIMITED APPELLANT

AND

LUCIA WAYUA KAMUYA RESPONDENT

RULING

1. By a Notice of Motion Application dated May 5, 2023, the Applicant seeks the following orders:
 1. That this Application be certified urgent and be heard *ex parte* in the first instance.
 2. That pending the hearing and determination of this application this Honourable Court be pleased to issue an order of stay of execution of the Judgment delivered by the Principal Magistrates court, Milimani in MCELRC Cause No E1676 of 2021
 3. That pending the hearing and determination of the appeal herein this Honourable Court be pleased to issue an order of stay of execution of the Judgment delivered by the Principal Magistrates court, Milimani in MCELRC Cause No E1676 of 2021.
 4. That the costs of the application be in the cause.
2. The Application is anchored on the grounds obtaining on the face of the Application, and the supporting affidavit sworn by Muturi Kamande, the Advocate representing the Appellant.
3. The Respondent opposed the application by way of a replying Affidavit that she swore on May 15, 2023.
4. Outstanding for determination in the Application is limb [3] and [4] of the Application. This Court directed that the application be canvassed by way of written submissions, which submissions have been filed.



The Application

5. The Applicant states that a judgment was delivered on February 24, 2023 by the trial Court, and being dissatisfied by the judgment, she lodged the appeal herein challenging the award therein.
6. The Applicant further stated that on May 3, 2023 MS/ High Class Auctioneers, in execution of the decree flowing from the judgment, proclaimed the Applicant's goods and gave a 7 days' notice of attachment.
7. The Applicant asserts that if the execution process is allowed to flow to the end, the appeal herein shall be rendered nugatory. The Applicant shall have no way of recovering the decretal sum if paid out to the Respondent. The appeal has high chances of success.

The Respondent's case

8. The Respondent states that the judgement was delivered on February 24, 2023 and the trial Magistrate allowed her claim for unfair dismissal, consequentially awarding her KShs 392,212. Upon delivery of the judgement, the Applicant was granted a stay of execution of the judgment for 30 days.
9. The Respondent states that the application is incompetent as it is not anchored on o the provisions of Order 42 Rule 6 of the Civil Procedure Rules which provides for stay of execution pending Appeal. Further that the Appellant hasn't furnished any security for the performance of the decree as required by the law.
10. The Respondent states that should the court allow the application, the Applicant should be ordered to deposit the entire Decretal sum plus interest and costs as security in a joint interest earning Account in the names of both counsel on record.
11. The Respondent also seeks that the Appellant be ordered to pay the auctioneers fees of Kshs 111,948.

Determination

12. From the material placed before this Court, I distil one broad issue for determination; whether the Applicant has met the prerequisites for a grant of stay of execution pending appeal.
13. The conditions required of an Applicant to satisfy in order to attract a grant of stay of execution pending appeal are well settled. Order 42 Rule 6 of the Civil Procedure Rules provides:

“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 referred 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 make such order thereon as may to it seem just and any person aggrieved by the order of stay may apply to the Appellate Court to have such orders set aside.

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 the decree or order as may ultimately be binding on him has been given by the Applicant.
14. The Court in the case of *Butt v. Rent Restriction Tribunal* [1979] E.A., elaborately and aptly captured the principles for a grant of stay of execution pending appeal, thus; -
 - a. The power of the Court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the Judge's discretion.
 - c. Thirdly, a Judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion a better remedy may become available to the Applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of each case and its unique requirements. The Court exercising its powers under order XL1 Rule 4 [2] [b] of the Civil Procedure Rules, can order for security upon application by either party or its own motion. Failure to put security of costs as ordered will cause the order of stay of execution to lapse.
15. In order to attract a favourable exercise of the Court's discretion, the Applicant must clearly demonstrate what loss, if any it stands to suffer, if the Court were to exercise the discretion against him or her. This principle was elaborated in *Shell Limited vs. Kibiru and another* [1986] KRR 410.
16. On the loss that the Applicant could suffer if the order sought is not granted, the Applicant in its supporting affidavit stated: -
 - [5]. That execution of the said Lower Court judgment will also render the appeal nugatory as the Appellant would have no way of recovering from the Respondent."

It is not enough for the Applicant to allege that it will suffer substantial loss or that the appeal shall be rendered nugatory, if the order of stay pending appeal is not granted, he or she must proceed further and demonstrate what the substantial loss will be, and the reason why it is thought that there could be the loss. For instance, in the instant application the Applicant was required to state why it holds that it will not be able to recover the sum of the decree from the Respondent, if the same is paid out to the him, and eventually a refund thereof be required.

17. What the Applicant has done is to just make a general statement, statement which in my view has not sufficiently or at all established the substantial loss that it is likely to suffer if the orders sought are not granted.
18. I have carefully considered the affidavit in support of the Applicant's application and the grounds on the face of the application, and noted that the Applicant doesn't at all offer security for the due performance of the decree should the appeal herein fail as required of an Applicant like it seeking for a stay of execution pending appeal, by the provisions of Order 42 Rule 6.
19. It should be pointed out that as regards what security shall suffice pursuant to the provisions of order 42 Rule [6] is at the discretion of the Court to determine. The parties can only propose. In *Arun C.*



Sharma vs. Ashana Raikurdalia c/a Rairundalia & Co. Advocates & 2 others 2014 eKLR, the Court stated:

“The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the Judgment Debtor Civil Process is quite different because in Civil Process the Judgment is like a debt hence the Applicants become and are Judgment Debtors. That is why any security given under order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

20. Hereinabove this Court has found that the Applicant has not satisfactorily demonstrated the substantial loss it is likely to suffer should the Court decline to grant his application, further that it has not offered security as required by the provisions of the law stated hereinabove. Consequently, the Applicant’s application herein doesn’t satisfy the conditions necessary for a favourable exercise of the Courts discretion. It is hereby dismissed.

READ SIGNED AND DELIVERED THIS 19TH DAY OF JUNE, 2023.

OCHARO KEBIRA

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 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.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE

