



**Macharia v Registered Trustees, Franciscan Sisters of Immaculate Nyeri;  
Chador Auctioneers (Auctioneer) (Employment and Labour Relations  
Appeal E017 of 2021) [2023] KEELRC 1529 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1529 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E017 OF 2021  
ON MAKAU, J  
JUNE 16, 2023**

**BETWEEN**

**ESTHER WAHURA MACHARIA ..... APPELLANT**

**AND**

**THE REGISTERED TRUSTEES, FRANCISCAN SISTERS OF IMMACULATE  
NYERI ..... RESPONDENT**

**AND**

**CHADOR AUCTIONEERS ..... AUCTIONEER**

**RULING**

1. The Respondent (herein after called the Applicant) brought the Notice of Motion dated December 19, 2022 under Section 1A and 1B of the [Civil Procedure Act](#), Order 42 Rule 6 and order 51 of the [Civil Procedure Rules 2010](#), Article 159 of the [Constitution](#) of Kenya. The application seeks the following the orders:
  - a. That pending the hearing and determination of the intended Appeal the Honourable Court do issue stay of execution of the judgment and the resultant decree.
  - b. That the cost of this Application be provided for.
2. The application is supported by the Affidavit of one Gitonga Muthee sworn on December 19, 2022 and is premised on the grounds set out on the body of the motion. In brief, the applicant contend that it was dissatisfied with the judgments rendered by the court on October 31, 2022 and filed a Notice of Appeal on November 9, 2022 to challenge the whole judgment; that the appeal is strong and has high chances of success; that the claimant has commenced execution and the Auctioneer has already



proclaimed its assets; that it is apprehensive that if stay order is denied, execution will proceed and it will suffer substantial loss.

3. In response to the Application, the Claimant has filed Replying Affidavit sworn on January 11, 2023. In brief, he contends that the applicant has not shown that it has an appeal with high chances of success; that the trial court rightfully established that she was unlawfully and unfairly dismissed from employment; that substantial loss has not been demonstrated as there is evidence that she is a person of straw who is unable to repay the decretal sum should the appeal succeed; and that security for due performance has not been offered.
4. The application was disposed of by written submissions. I have considered the materials presented and the only issue for determination is whether the Applicant has fulfilled the legal threshold for the grant of an order of stay pending appeal.
5. Order 42 Rule 6(2) of the Civil Procedure Rules, as follows:-

' 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 such decree or order as may ultimately be binding on him has been given by the applicant.'

### **Undue delay**

6. It is not in doubt that the Application herein was filed timeously because the Judgement was delivered on October 31, 2022 and the Application was filed on December 19, 2022, about one and half months thereafter. The costs of the suit had not been determined by then and therefore the said delay cannot be described as unreasonable.
7. I gather support from *Eldoret Grains Limited vs National Cereals Produce Board [2014] eKLR* where Fred Ochieng J held that: -

' In my considered view, the period to be taken into account when determining whether or not there had been inordinate delay is the period from when the Defendant became aware of the Ruling on taxation.

The reason for that is that although the Judgment was delivered on May 8, 2012, execution could not issue immediately thereafter. Execution of a decree can only proceed after the Bill of costs had been taxed or after the Decree-Holder has obtained the leave of the court to proceed with execution prior to taxation.

Therefore, had the Defendant sought an order for stay of execution prior to the issuance of Certificate of Taxation, it could have been premature. In the circumstances, there is no inordinate delay by the Defendant, in seeking the order of stay of execution.'

### **Substantial loss**

8. In *Butt vs Rent Restriction Tribunal [1979] EA*, the Court of Appeal observed that the power of the court to grant or refuse an application for a stay of execution is discretionary, and it should be exercised in such a way as not to prevent an appeal or render it nugatory. With respect to a trial court an appeal is rendered nugatory if the appellant is exposed to substantial loss.



9. The Applicants' case is that they would suffer substantial loss should the application be denied because the claimant has not demonstrated her capacity to repay the decretal sum should the appeal succeed after the execution. It was further argued that if the attached vehicle is auctioned, the institution will lack alternative means of transport.
10. In the case of *National Industrial Credit Bank Ltd V Aquinas Francis Wasike and Another (2006) eKLR* the Court of Appeal stated that:
- ' This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. 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'.
11. The above principle was further stated in *ABN Amro Bank Vs Lemond Foods Limited Civil Application No 15 Of 2002* where the Court of Appeal held that:
- ' The legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in bank and so on.'
12. The Claimant has tendered no evidence of means with which to repay the decretal sum should the appeal succeed. All she said is that the applicant has not demonstrated that she is a person of straw with no ability to repay the money. Consequently, I find that the applicant has satisfied the court that substantial loss may be suffered if the stay is withheld. The claimant only depended on the employment by the respondent and the same has since been terminated. She has not shown whether she has any other gainful employment or occupation.

## Security

13. The Applicant has not demonstrated their willingness to furnish security as a condition for stay as the court may direct. The purpose of security is to protect the right of the decree-holder to access his judgment debt promptly if the appeal fails. It also protects the appellant from total loss of the decretal sum or difficulty in recovering the same upon the appeal succeeding.
14. I gather support from the case of *Arun C Sharma Vs Ashana Raikundalia T/A Raikundalia & Co Advocates & 2 Others (2014) eKLR* where Gikonyo J held that: -
- ' 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 in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants.'



## **Conclusion**

15. Having found that the applicant has satisfied the court that it may suffer substantial loss if stay is withheld, I allow the application dated December 19, 2022 by granting stay of execution pending the intended appeal, on conditions that the applicant deposits Kshs 250,000 as security for due performance of the decree should the appeal fail. The said amount shall be deposited in court or in an interest earning account jointly opened by the counsel for the two parties within 21 days of today. Costs shall be in the cause. In default by the Applicant to deposit the above security, the stay orders shall lapse automatically.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 16<sup>TH</sup> DAY OF JUNE, 2023.**

**ONESMUS N. MAKAU**

**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 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

