



**Nguru v Buds and Blooms Limited (Cause 7 of 2018)  
[2023] KEELRC 1431 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1431 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 7 OF 2018  
HS WASILWA, J  
JUNE 13, 2023**

**BETWEEN**

**SAMUEL NGURU ..... CLAIMANT**

**AND**

**BUDS AND BLOOMS LIMITED ..... RESPONDENT**

**RULING**

1. This Ruling is in respect of the Respondent/ Applicant’s Notice of Motion dated March 23, 2023, filed under certificate of urgency and brought under Section 3 of the *Employment and Labour Relations Court Act*, Section 1A, 1B, 3A of the *Civil Procedure Act* (Cap 21 Laws of Kenya), Order 42 Rule 6 & Order 51 Rule 1 of the *Civil Procedure Rules*, rules 17 and 32 of *Employment and Labour Relations Court (Procedure) Rules, 2016* and all other enabling provisions of the law seeking for the following Orders;-
  1. Spent.
  2. Spent.
  3. This Honourable court be pleased to stay the execution of the judgment and decree pending the hearing and determination of Nakuru Court of Appeal Civil Appeal No. E015 of 2023: Buds and Blooms Limited –Versus- Samuel Nguru.
  4. That the costs of the application be provided for
2. The application is based on the following grounds; -
  - a. That judgement in this matter was delivered on September 20, 2022 in favour of the claimant. The Respondent/Applicant herein was aggrieved with the entire judgment and appealed to Court of Appeal under Appeal case number E015 of 2023; Buds and Blooms Limited V Samuel Nguru.



- b. After filling the Appeal, the claimant filed a Bill of costs that is to be taxed on March 28, 2023. The Applicant is apprehensive that the claimant will proceed with execution of the decree unless stay orders are granted.
  - c. He stated that the Appeal is arguable with immense chances of success. He Added that the application has been made timeously and unless the Application is allowed, the Appeal will be rendered nugatory.
  - d. The applicant also stated that it is willing to offer any security which the court may direct for the satisfaction of the the decree.
3. The Application herein is also supported by the affidavit of Fridah Inyanji, the Applicant's Account Clerk, deposed upon on March 23, 2023. The Affidavit basically reiterated the contents of the Application.
  4. The application is opposed by the Respondent who filed a replying affidavit sworn on April 4, 2023. He stated that when judgement was delivered in this matter on September 20, 2022, the Applicant did not seek for stay of execution orders that it is seeking now, therefore that this application is an afterthought.
  5. He contends that the Appeal is untenable because the award was granted on the basis that the Applicant had failed to show existence of any contract between the parties to avoid issuing notice of the contract coming to an end.
  6. He stated that the application herein is a delay tactic used by the Applicant to deny him his fruits of judgement. Moreover, that the Applicant had earlier filed a review application which was dismissed with costs.
  7. It is his case that the denial of the stay of execution orders will not render the appeal nugatory because his net worth is way higher than the awarded decretal sum and if the Appeal succeeds, he will be in a position to easily refund the decretal sum with a single cheque.
  8. The deponent stated that the Applicant relied on procedural rules that do not provide for stay of execution pending Appeal, therefore that this court lacks jurisdiction to hear and determine this Application.
  9. He stated that in the event that the Court is to allow the Application, then make an order for deposit of security of Kshs 150,000 to be deposited in an interest earning account in the name of advocates for the parties.
  10. The Application was canvassed by written submission with the Applicant filling on May 16, 2023 and the Respondent on April 24, 2023.

### **Applicant's Submissions.**

11. The Applicant submitted on two issues; Whether the Applicant has satisfied the conditions for grant of stay of execution pending the pending the hearing and determination of Nakuru Court of Appeal Civil Appeal No E015 of 2023: Buds and Blooms Limited –Versus- Samuel Nguru and who should bear the costs of the application.
12. On the first issues, he submitted that section 13 of the *Employment and Labour Relations Court Act* provides that a judgement, award, order or decree of the Court shall be enforceable in accordance with the rules made under the *Civil Procedure Act*. While Rule 32 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that the Registrar shall issue an order in execution of a decree



and the Rules on execution of an order or decree shall be enforceable in accordance Civil Procedure Rules.

13. Based on that, he argued that the principles governing the grant of stay pending appeal are well settled in our jurisdiction as provided for under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which anticipate that for an application for grant of stay to be successful, an applicant must prove the following conditions:

- a. That substantial loss may result unless the order is made.
- b. That the application has been brought without undue delay and lastly.
- c. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

14. To support this argument, the Applicant cited the case of *Housing Finance Company of Kenya v SharokKher Mohamed Ali Hirji & another* [2015] eKLR where the Court held that,

“We cannot over emphasize that at this stage we are not required to go to the merits of the case as tempting as it may be or consider whether the issues will be successful in favour of the appellant, lest we embarrass the trial judge. We therefore find that the applicant has discharged this requirement on the balance of probabilities. We are further guided by this Court’s decision in *Carter & Sons Ltd V Deposit Protection Fund Board & Two Others* – Civil Appeal No 291 of 1997, at Page 4 as follows: . . . the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay. . . the applicant must establish a sufficient cause; secondly the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security, and the application must, of course, be made without unreasonable delay.

15. He also relied on the case of *Butt v Rent Restriction Tribunal* [1979] eKLR, the Court of Appeal held as follows:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458: “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

Megarry J, as he then was, followed *Wilson* (supra) in *Erinford Properties Limited v Cheshire County Council* [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require, per Lopes LJ in the *Attorney General v Emerson and Others* 24 QBD (1889) 56 at p 59. The special circumstances in this case are that there is a large amount of rent in dispute between the parties and the appellant has an undoubted right of appeal.



16. To reinforce its argument, he relied on the case of *Philip Mutinda v Lady Lori (K) Limited* [2021] eKLR the Court held as follows: -
- “There is no doubt that this Court has powers to stay proceedings pending appeal and this jurisdiction is meant to avoid a waste of precious judicial time as well as prevent the court from duplication of efforts and prevent multiplicity of suits and motions being filed and where if the stay is not granted and defendant were to succeed it would render the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the matter proceeds and the appeal succeeds. Obviously, the application must be made without unreasonable delay. This power is discretionary hence the need to ascertain the promptness of the motion by the party intending to appeal.”
17. Accordingly, he argued that the Applicant was dissatisfied with the judgement of the Court and has lodged an appeal which is pending hearing and determination. That it has also served the record of appeal on February 27, 2023. However, that the Respondent herein aware of the pending appeal has proceeded with taxation with a view of executing the decretal sum which they are apprehensive will render their appeal nugatory.
18. On substantial loss, the Applicant submitted that the Respondent/Applicant is indeed likely to incur substantial loss unless the order of stay of execution is granted because the Respondent is a man of straw with no known source of income. Therefore, that any monies paid by the Applicant may not be recoverable in the event that the appeal succeeds. Furthermore, that, he has not demonstrated or provided evidentiary proof of any source income or employment. Thus, if the Respondent/Applicant appeal is successful then they are likely to go through hardships to recover the decretal sum. In this he relied on the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR and the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR,
19. On whether the application has been brought without undue delay, the Applicant submitted in the affirmative and added that the application was filed after the threat of execution of the decree before the costs had been assessed. Also that it has filed a record of appeal which contains a memorandum of appeal that raises triable issues that ought to be determined.
20. On security, it was submitted that it is willing and ready to abide by any condition and terms which this Honourable court may impose as security for the due performance of the decree that may eventually be found binding upon it. In this he relied on the case of *HGE v SM* [2020] eKLR and the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014] eKLR
21. On costs of this Application, the Applicant submitted that Section 12(4) of the *Employment and Labour Relations Court Act* gives the trial court discretionary powers to award costs as it considers just. In addition, costs in this kind of claims do not automatically follow the event unlike in other civil claims. Nonetheless, that having proved that they deserve the Orders sought, the costs in this case should be awarded to the Applicant.

### **Respondent's Submissions.**

22. The Respondent submitted on the three conditions to be met before stay of execution orders is granted. On substantial loss, it was submitted that the Respondent herein has indicated in its affidavit that he is a wealthy man that is capable of repaying the decretal sum with costs in the event the Appeal succeeds. On that not, it was argued that having demonstrated his financial worth, the Application should fall.



On this they relied on the case of *Michael Ntouthi Mitheu V Abraham Kivondo Musau* [2021] eKLR where the Court held that;

“Accordingly, while appreciating that the Applicant did not sufficiently disclose his basis for believing that the Respondents would not refund the decretal sum, the Respondent did not even attempt to dislodge that contention, speculative as it was. One would have expected the Respondent to aver that he can pay the same even if paid over to her in the event that the appeal succeeds.”

23. The Respondent also relied on the case of *RWW V EKW* [2019] eKLR where the Court reiterated the purposes of Application for stay pending Appeal and held that;-

“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 his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

24. Similarly, the Respondent urged this Court to balance his right to enjoy fruits of his judgment vis a vis, the right of the Applicant to Appeal the decision of the Court and disallow the Application.

25. On security, the Respondent relied on the case of *Gianfranco Manenthi & Another V Africa Merchant Assurance Company Ltd* [2019] eKLR where the Court held that; -

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.”

26. In light of the above, the Respondent submitted that the Applicant must meet payment of security for due performance of the Judgement. They proposed a sum of Kshs 150,000.

27. In conclusion, the Respondent urged this Court to only allow the Application herein on condition that the decretal sum and costs of Kshs 150,000 is deposited in an interest earning account in the name of the Advocates for the parties herein within 45 days’ failure to which execution proceedings ensues.

28. I have examined all the averments and submissions of the parties herein.

29. It is noted that the applicants have already filed an appeal which is currently pending in court.

30. If stay orders are not granted, the appeal will be rendered nugatory.

31. I therefore allow stay on condition that the entire decretal sum is deposited within 60 days in an interest earning account held in the joint names of counsels in record.

32. In default execution may proceed.

**RULING DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF JUNE, 2023.**

**HON LADY JUSTICE HELLEN WASILWA**



**JUDGE**

**In the presence of:-**

**Miss Ekesa holding brief for Konosi for Respondent – present**

**No appearance for claimant**

**Court Assistant - Edna**

