



**Macharia Njeru & Elijah M Njeru t/a Macharia-Mwangi & Njeru Advocates v
Kimani (Appeal E043 of 2023) [2023] KEELRC 2051 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2051 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E043 OF 2023
NJ ABUODHA, J
JULY 28, 2023**

BETWEEN

**MACHARIA NJERU & ELIJAH M NJERU T/A MACHARIA-MWANGI &
NJERU ADVOCATES APPELLANT**

AND

JOHN WM KIMANI RESPONDENT

RULING

1. By a motion dated 5th April, 2023 the applicant sought orders among others that;
 - a. That pending the hearing and determination of this application inter- parties, the Respondent be restrained from executing the Judgment and Decree in MC ELRC Number E.1397 of 2020 delivered on 09/03/2023.
 - b. That pending the hearing and determination of the appeal herein, the Respondent be restrained from executing the Judgment and Decree in MC ELRC Number 1397 of 2020 delivered on 09/03/2023.
2. The application was supported by the affidavit of Daniel Kimani Kanyagia who deponed among others that:
 - i. That I am an advocate of the High court of Kenya practicing as such in the firm of Macharia-Mwangi & Njeru Advocates, which firm has conduct of this matter on behalf of the Applicants/Appellants on whose authority I swear this affidavit.
 - ii. That the Notice of Motion of application dated 2023 filed herewith is urgent and requires to be heard during the current High Court vacation for the reasons THAT;
 - a. The Applicants and the Respondent had an employer and employee relationship.



- b. The Respondent absented and deserted himself from his duties after his resignation on the 29th October 2020 and thereafter filed a suit against the Appellants for compensation for unfair termination.
 - c. The Respondent obtained Judgement in his favour against the Appellants in the following terms; three months' salary in lieu of notice - Kshs. 135,000/=; compensation for unlawful dismissal in the remainder of the fixed term contract- Kshs. 540,000/= and costs of the suit
 - d. The Respondent has already applied for a decree vide a letter dated 17th March 2023 and execution is imminent.
 - e. The Applicants were during the delivery of the judgment in MCELRC No. El 397 of 2020 on 9th March 2023 granted a 30 days stay of execution which lapses on the 9th April 2023.
 - f. The Applicants herein have already preferred an appeal by filing a memorandum of appeal dated 3rd April 2023 which I verily believe has arguable grounds of appeal with great chances of success.
 - g. Unless there is stay of execution of the said judgment dated 9th March 2023 and the decree thereof, not only shall the Applicants herein suffer substantial and irreparable loss if execution proceeds but also have their Appeal rendered nugatory and an academic exercise.
3. The respondent opposed the application and filed a replying affidavit in which he deponed among others that:-
- a. That consequently, I have keenly read and understood and where necessary taken advice of my advocates on record M/s. Kiarie Joshua & Co. Advocates, the entire contents of the Appellants' Notice of Motion dated 05.04.2023 as well as the averments made in the supporting affidavit sworn by the 2nd Appellant (Elijah Mwangi Njenx) in support thereof and in response thereto, I wish to state as follows:
 - b. That from the outset, I am advised by my advocates on record and which advice I verily believe to be correct and sound that the instant Notice of Motion is incompetent for seeking in the main prayers "restraining (injunction orders" instead of "stay of execution of a court decree orders" pursuant to the clear provisions of order 42 rule 6 of the *Civil Procedure Rules* under which the subject application is anchored. Consequently, it therefore follows that the application fails on its own.
 - c. That further, I wish to state from the outset that the Appellants' instant application is unmerited and is in any event for dismissal as the Appellants have dismally failed to demonstrate the primary condition under which stay of execution orders pending appeal can be made by this honourable court under Order 42 rule 6 of the *Civil Procedure Rules* to wit; that substantial loss may result to the Appellants unless stay of execution orders are made by the court so as to engender/provoke the court's jurisdiction in making the said orders.
 - d. That for the record and contrary to what the Appellants contend at ground (9) of the Application and paragraph (11) of the supporting affidavit; I wish to state that I am a man of means living modestly and owning a motor vehicle registration number KAC 312X, Toyota Corolla and a Motorcycle registration number KMFD 258B, make Boxer Bajaj 150 whose



market and/or forced value can easily fetch a sum way above Kshs.792,020/-, the decretal sums under execution herein among other property.

“Annexed hereto and marked “JWMK-1” are true Photostat copies of the ownership documents in respect of the said motor vehicle and motor cycle respectively,”

- e. That I am advised by my advocates on record M/s. Kiarie Joshua & Co. advocates and which advice I verily believe to be correct and sound that the requirement on the part of the Appellants/Applicants to demonstrate substantial loss is the corner stone of the court’s jurisdiction to grant a stay of execution and a look at the Appellants’ application in contrast and/or against the annexure marked “JWMK-1” above do not reveal any evidence by the Appellants that I am a man of straw with financial disability and who may not be in a position to refund the decretal sums herein if the instant appeal by the Appellants was by any chance to be allowed by this honourable court.
 - f. That it is actually inconceivable and disingenuous on the part of the Appellants to allege without tendering any material evidence that I lack.
 - g. That in the results, I verily believe that no substantial loss would result to the Appellants as alleged in the instant application if the decretal sum of Kshs.792,020/- was paid out to me because I am financially stable with ability to easily refund the entire decretal sum in the unlikely event that the appeal herein eventually succeeds.
4. The court has reviewed and considered submission by both Counsel and is grateful to them for their well researched submissions.
 5. The principles that guide the court in an application for stay of execution are well set out under order 42 Rule 6(2) of the [Civil Procedure Rules](#). It provides as follows;
Order 42 Rule 6 (2):-
 - “2. No order of stay 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 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”.
 6. In granting stay order, the court exercises its judicial discretion. Such discretion must however be exercised with caution and fairness. The principal considerations being substantial loss and bringing of the application without undue delay. The court further considers whether the applicant has arguable appeal and the preparedness of the applicant to furnish security as provided under order 42 Rule 6(2).
 7. The applicant has indicated its willingness to abide by any order the court shall make concerning security for the performance of any order or decree the court may ultimately make. In the circumstances the court hereby orders that the applicant do deposit the decretal sum in a joint interest earning account in the name of both advocates within 30 days of this ruling.
 8. Costs shall abide the outcome of the appeal.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS DAY OF 28TH DAY OF JULY, 2023.

ABUODHA J. N.

JUDGE

In the presence of:-

..... for the Appellant

..... for the Respondent

