



**Chauvel v Charo (Employment and Labour Relations Appeal
E010 of 2023) [2023] KEELRC 1939 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1939 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E010 OF 2023**

M MBARŪ, J

JULY 27, 2023

BETWEEN

NINA CHAUVEL APPELLANT

AND

PURITY KADZO CHARO RESPONDENT

RULING

1. The ruling herein relates to application dated May 24, 2023 filed by the appellant seeking for orders of stay of execution of the judgment delivered on April 18, 2023 by Hon J Ongondo in Malindi CM ELRC No 33 of 2021 pending hearing and determination of the appeal herein.
2. The application is supported by the Supporting and Supplementary Affidavits of the appellant and on the grounds that upon delivery of judgment by the lower court, an appeal has been filed and it has high chances of success and to allow the same be heard on the merits, stay of execution is justified. The respondent is on the verge of execution and unless stopped by an order of stay of execution herein, the appeal herein shall be rendered nugatory. The appellant is willing to abide any condition given by the court.
3. In reply, the respondent filed her Replying Affidavit and aver that judgment of the lower court was delivered on April 18, 2023 and was awarded Kshs 259,000 together with costs. The respondent through her advocate wrote to the appellant to pay the decretal sum but refused to respond. The Certificate of Costs has not been issued since the matter is still pending this purpose before the lower court and the orders sought for stay of execution is hence premature.
4. The respondent also aver that the appellant has not satisfied the conditions for the grant of stay of execution pending appeal are required under Order 42 rule 6 of the *Civil Procedure Rules* as no substantive loss has been established or any offer to security been made and in this regard, the application before court is not justified and should be dismissed with costs.



5. Both parties attended corut and agreed to address the appcaition by way of written submisisons.
6. The appellat submitted that Order 42 rule 6(2) give the conditions necessary for the grant of stay of execution pending judgment and which conditions the appellat has satisfied. There is a Memorandum of Appeal filed herein to challenge the award of the trial court and which raise fundamental questions of law and if not addressed first, the appeal shall be rendered nugatory. The decree issued is in monetary terms and the respondent has no means of satisfying the same if there is payment before the appeal is heard and determined.
7. The appellat has offered to deposit half the decretal sum as security at Kshs 129,000 in good faith so as to secure the judgment as held in *Bana Auto Selection Limited v Lilian Osebe Moses [2021] eKLR*.
8. The respondent submitted that there is no substantial loss indicated by the appellat to justify the stay of execution and should be allowed to enjoy the fruits of the judgment as held in *James Wagalwa & another v Agnes Naliaka Cheseto [2012] eKLR*. A money decree cannot be rendered nugatory because if the appeal succeed, a refund is possible as held in *Pamela kinyi Opundo v Barclay's Bank of Kenya Limited [2011] eKLR*. The offer to deposit half the judgment sum is without the awarded costs which are yet to be taxed. The total decretal sum should be paid to the respondent and the application dismissed.

Determination

9. The application before court is for stay of execution pending hearing and determination of the appeal filed herein on the grounds that the appellat is dissatisfied with the Judgment of the lower court in Malindi CM ELRC No 33 of 2021 delivered on April 18, 2023. a Memorandum of Appeal setting out the grounds of appeal has been filed.
10. The application was filed immediately judgment of the lower court issued on May 18, 2023 as required under Rule 8 of the *Employment and Labour Relations Court Act, 2016*.
11. The right of appeal hence secured, and before the court can go into the merits, the respondent as a successful litigant before the lower court has a legitimate judgment and whose rights should also be secured to ensure that at the end of the appeal, the subject of the judgment is not frustrated.
12. On the balancing of each parties rights, one with a right of appeal and the other has a legitimate judgment, to allow the court to hear the appeal on the merits, conditional stay of execution is imperative.
13. Accordingly, application dated May 24, 2023 is hereby allowed and stay of execution allowed. The appellat shall deposit half the judgment sum of Kshs 129,000 in court within the next 30 days failure to which the order of stay shall automatically lapse.

Costs shall abide the outcome of the appeal.

Delivered in open court at Mombasa this July 27, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

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