



**Njuguna v Lochar Transport Ltd (Employment and Labour Relations Cause 613 of 2017) [2023] KEELRC 1818 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1818 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 613 OF 2017**

**AN MWAURE, J**

**JULY 14, 2023**

**BETWEEN**

**ELIUD KIARIE NJUGUNA ..... CLAIMANT**

**AND**

**LOCHAR TRANSPORT LTD ..... RESPONDENT**

**RULING**

1. The applicant filed an application vide a notice of motion dated February 15, 2023 where he makes the following prayers:-
  1. That this application be certified urgent and service thereof be dispensed with in the first instance.
  2. That this honourable court be pleased to order that there be a temporary stay of execution of the judgment and decree delivered on January 19, 2023 in Nairobi ELRC Cause No 613 of 2017 pending the inter partes hearing of this application.
  3. That this honourable court be pleased to order that there be a stay of execution of the judgment delivered on January 19, 2023 pending the hearing and determination of the intended appeal arising from Nairobi ELRC Cause No 613 of 2017.
  4. That the honourable court be pleased to grant such further orders as it may deem in the interests of justice.
  5. That costs of the application be in the intended appeal.
2. The application is supported by the supporting affidavit deponed by Derek Mwema an advocate on behalf of the respondent.



3. He depones that the respondent was aggrieved by the judgment of this honourable court delivered on January 19, 2023. They intend to appeal against the whole judgment. He says the appeal has arguable issues and so has high chance of success. Furthermore he depones that the ability of the claimant/respondent to refund the decretal sum should they execute the same and judgment succeeds is unknown.
4. He says the grant for stay of execution will not cost the respondent any prejudice or damage that cannot be compensated should appeal be unsuccessful.
5. He however avers the respondent may suffer irreparable loss if execution takes place. He further depones the application was filed without any delay.
6. Claimant/respondent oppose the application and states the ingredients for stay of execution have not been satisfied and further the applicant did not depone his affidavit but instead was deponed by his advocate which he should not have done so since he is not the litigant.
7. The court considered the written submissions by the respondents/claimants dated March 10, 2023. The claimant/respondents submission dated March 21, 2023 were also considered by the court.

#### **Determination.**

8. The application is for interim stay of execution of the judgment delivered on January 19, 2023. The application was filed on February 15, 2023. The claimant/respondent is opposed to the application since the supporting affidavit was deponed not by the respondent but by his counsel one Derek Mwema.
9. As far as an advocate deponing to facts known to him is concerned the same is provided in statute law and authorities. Indeed section 19 Rule 3(1) of the Civil Procedure act provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove provided that in interlocutory proceedings or by leave of the court an affidavit may contain statement of information and belief showing the services and grounds thereof.
10. In the case of *Magnolia PVT Limited v Syermed Pharmaceutical (K) Lt* [2018] eKLR cited by the claimant the court held in part that:

“whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases where matters deposed to are agreed or on purely legal positions, advocate should refrain from the temptation of being an avenue through which disputed facts are proclaimed.”
11. Similarly in the authority cited by the respondent Court of Appeal CA 10 of 2015 *Hakika Transporter Service Ltd v Albert Chulab* the court held that Mr Munyithya deponed only on matters within his personal knowledge as a counsel acting in this matter both in the High court and in this court.”
12. Similarly in this case the counsel deponed only to the matters known to him and on points of law.
13. The court finds there are no matters deponed by the applicant counsel that can cause him embarrassment should he be called upon to give evidence.
14. The requirement in granting of stay of execution is of course a matter of court’s discretion depending on circumstances of each case.



15. The court is satisfied the applicant filed this application and draft memorandum of appeal both dated 15<sup>th</sup> February 2023 in good time. This satisfies the court that the application was filed with diligence and without undue delay.
16. The claimant also has not tendered evidence to prove that if he executes for the decretal sum and the appeal succeeds he would be able to refund the decretal sum.
17. The purpose of granting a stay of execution is to ensure that if the appeal succeeds it is not rendered nugatory.
18. The court is satisfied the applicant deserves to be granted the orders for stay of execution as per his application. The same is granted in accordance to prayers 3 of the said notice of motion pending the hearing and determination of appeal arising from ERLC No 613 of 2017.
19. However the applicant is ordered to deposit kshs 325,000 in a joint interest earning account in the names of the respective counsels within 45 days from today's date. Also the appeal should be filed within 45 days from today's date.
20. If the above orders are not complied with in the given timelines the order for stay of execution will lapse and execution will proceed.
21. Costs of this application will be in the intended appeal.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14<sup>TH</sup> DAY OF JULY 2023.**

**ANNA NGIBUINI MWAURE**

**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> March 2020 and subsequent directions of 21<sup>st</sup> 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.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

