



Apex Vision Limited v Mutiso & 3 others (Employment and Labour Relations Appeal E163 of 2022) [2023] KEELRC 2287 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2287 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E163 OF 2022
MN NDUMA, J
SEPTEMBER 28, 2023**

BETWEEN

APEX VISION LIMITED APPELLANT

AND

CAROLINE MUTISO 1ST RESPONDENT

MILDRED ROBINA OSEBE NYANGERI 2ND RESPONDENT

GLADYS WANGARI 3RD RESPONDENT

ESTHER WANGUI MUTURI 4TH RESPONDENT

(Being an Appeal from the Judgment/Order and/or Decree of the Chief Magistrate's Court at Nairobi in ELRC Cause No. 262 of 2019 (Honourable E. Wanjala (Miss) Principal Magistrate dated the 26th of August, 2022)

RULING

1. The applicant vide Notice of Motion dated 17/10/2022 seeks an Order in the following terms:-
 - (1) Spent
 - (2) Spent
 - (3) That the Honourable Court be pleased to grant stay of execution of the Decree and/or further execution of the whole of the Decision and/or orders and/or judgment given by the Honourable Court (by Hon. E. Wanjala (Miss) (PM) on the 26th August, 2022 in Nairobi Chief Magistrate's Court, ELRC Cause No. 262 of 2019 pending the hearing and determination of an Intended Appeal therefrom, on any terms that may be deemed fair and just in the circumstances.



- (4) That the Honourable Court be pleased to grant any further directions, orders and/or any further relief that may be deemed incidental, fair and just in the circumstances hereof.
- (5) That the costs of this application be provided for.”
2. The premise of the application is set out in grounds (a) to (m) on the face of the application and buttressed in the supporting affidavit of Kyalo Muoki Mutuku, Technical Manager of the respondent.
 3. The applicant states that being aggrieved by the judgment of Hon. E. Wanjala (Miss) Principal Magistrate, delivered on 26.8.2022 has filed an Appeal. That the appeal raises arguable points with high chances of success; that the appeal would be rendered nugatory if the stay is not granted as the applicant has no knowledge of any assets/properties of the respondent nor their habitual residences should the appeal be successful after payment has been done.
 4. That the respondent will not be prejudiced if stay orders are granted.
 5. The application is opposed vide a replying affidavit of Caroline Mutiso the 1st respondent who deposes that the applicant has not met the legal threshold required under Order 42, rule 6(1) and (2) of the [Civil Procedure Rules](#) for grant of stay of execution pending appeal.
 6. That execution has not commenced and the prayers sought are unwarranted. That the applicant has not demonstrated that it will suffer substantial loss if the order for stay of execution is not granted. That the applicant is just employing delaying tactics it applied during the trial to prevent the respondents from enjoying the fruits of their judgment.
 7. That filing of an appeal does not lead to automatic stay of execution. The Court must exercise its discretion judiciously based on the strict requirements for grant of stay. That the applicant company has shareholders who are foreigners and there is indication that the applicant has since closed its business. That the respondents stand to suffer substantial loss if stay is granted and the appeal is eventually not successful since they will be unable to execute the decree.
 8. That in the event the stay is granted, the applicants be ordered to pay half of the decretal sum and half to be deposited in a joint account held by the parties’ advocates. That the application lacks merit and it be dismissed.
 9. In [Michael Ntouthi Mithu -vs- Abraham Kivondo Musau](#) [2021] eKLR, the Court cited the case of [Suleiman -vs- Amboseli Resort Limited](#) [2004] 2KLR 589, where the Court stated:-

“.....A stay would be overwhelming hindrance to the exercise of the discretionary powers of the Court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant.”



10. In *James Wangalwa & Another -vs- Agnes Naliaka Cheseto* - Miscellaneous Application No. 42 of 2011 [2002] eKLR, Gikonyo J. stated:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.”

11. The applicant has not rebutted the deposition by the respondents that execution has not commenced in the present case and that the respondents have information that, the applicant company is owned by foreigners and that they have since closed business and any further delay in realizing the fruits of their judgment will cause the respondents substantial loss.
12. The applicant lay emphasis on the case of Judicial Commission of Inquiry into the *Goldenberg Affair & 30 Others -vs- Kilach* [2003] KLR where it was said:-

“There may or may not be other arguable points but as we have said before even one arguable point is sufficient for the purposes of rule 5(2); there need not be a chain of arguable points to sustain an application.”

13. The applicant further rely on the decision in the *Dennis Mogambi Mang'are -vs- Attorney General and 3 Others*, - Civil Application No. NAI 265 of 2011 [UR 175/2011] where the Honourable Court held that:-

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the Court’s consideration.”

14. The applicant states that it has a right to have its appeal considered and not be rendered nugatory.
15. The Court has weighed all the arguments, facts and factors in the present matter and is satisfied that the applicant has not demonstrated that it would suffer substantial loss if stay is not granted. On the contrary, the respondents are at a greater risk of not realizing the fruits of their judgment if further delay is caused by unwarranted order for stay of execution.
16. However, to balance the scales of the parties herein, the Court exercises its discretion to grant conditional stay of execution in the following terms:-
- (a) Stay of execution of the Decree/Judgment of Hon. E. Wanjala (Miss) delivered on 26/8/2022 is granted on condition that the applicant pays half of the decretal sum to each of the respondents and deposit the balance of the decretal sum in a joint interest earning account held in the names of the advocates for the parties within forty five (45) days of this Ruling, failing which, the Order for stay of execution shall lapse and execution to follow.

17. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 28TH DAY OF SEPTEMBER, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance



Mr. Kihara for Appellant
M/s Njagi for Respondents
Ekale – Court Assistant

