



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mewa Hospital v Khator (Appeal E090 of 2023)  
[2023] KEELRC 2706 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2706 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E090 OF 2023  
M MBARŪ, J  
OCTOBER 31, 2023**

**BETWEEN**

**MEWA HOSPITAL ..... APPLICANT**

**AND**

**ASMAR KHATOR ..... RESPONDENT**

**RULING**

1. The appellant filed application dated 13 September 2023 seeking for orders that a stay of execution be issued against the judgment delivered on 6 April 2023 in Mombasa CMELRC No. E093 of 2022 pending the hearing of the appeal herein.
2. The application is supported by the affidavit of Mohamed Hassan Mohamed a member of the Board of management of the appellant and on the grounds that on 6 April 2023 the Hon. Magistrate delivered judgment and being aggrieved, the appellant filed this appeal. to secure the appeal, an application dated 5 May 2023 was filed seeking to set aside the ex parte judgment and leave to defend the claim before the lower court and on 10 August 2023 a ruling was delivered and dismissed the application.
3. Mr Hassan aver in his Supporting affidavit that on 5 September 2023 the appellant was served with a proclamation notice and warrants of attachment of movable property and hence seek stay of execution pending the hearing of the appeal herein.
4. There is an arguable appeal, it has high chances of success and the instant application has been filed without delay and to ensure justice to the appellant who was condemned unheard.
5. In reply, the respondent filed the Replying Affidavit of Bosire Ryan Nyariki advocate who aver that the instant application is meant to delay the respondent from enjoying the fruits of his judgment delivered on 6 April 2023 by the lower court. the judgment delivered in his favour is yet to be realised and the stay of execution sought herein is meant to ensure further delays.



6. The appellant filed a similar application and ruling was delivered on 10 August 2023 following which warrants of execution issued. The appellant has not demonstrated what loss will be suffered if execution is allowed to proceed and there is no offer of security for the due performance of the judgment once the appeal is determined,
7. The sum awarded at Kshs. 188,640 is with costs and interests and to allow any stay will prejudice the respondent and where the court is to grant an order of stay of execution, the total decretal sum of Kshs. 1,048,000 should be deposited as security.
8. Both parties attended court and made oral submissions.
9. The appellant submitted that if an order of stay is not granted, the appeal herein shall be rendered nugatory. The appellant has since made a deposit of Kshs. 1,048,000 as security for the due performance of the judgment herein and unless an order of stay is granted the appellant shall suffer irreparable loss and damage. It is in the interests of justice that the orders sought be allowed.
10. The respondent submitted that the appellant has moved to occur therein in bad faith and only meant to delay access to justice and to keep the respondent from the fruits of his judgment. There is no loss demonstrated to be incurred if the orders sought are not issued. The appellant was directed by this court to deposit security of Kshs. 1,048,000 but failed to comply within the allocated timelines and its application should be dismissed with costs.

#### **Determination**

11. Judgment of the trial court in Mombasa MCELC No. E093 of 2022 was delivered on 6 April 2023 subsequent to which the appellant applied for the setting aside of the judgment through application dated 5 August 2023 which application was dismissed and subject of this appeal.
12. A party aggrieved by the judgment of the trial court has a right of appeal under Section 17 of the *Employment and Labour Relations Court Act*, 2011. Equally, a party with a valid judgment of the court has a legitimate expectation that he will enjoy the fruits of his judgment.
13. Both rights secured, the appellant having filed its appeal dated 8 September 2023, to allow the court hear it on the merits, a conditional stay of execution is justified.
14. On 13 September 2023 the appellant moved court seeking stay and the court issued interim orders directing there be a deposit of the Judgment sum within ten (10) days and to attend court on 28 September 2023 for further directions. On the due date, the appellant had not made the security deposit as directed. Subsequently, the appellant made a deposit of Kshs. 1,048,000.
15. The decree of the trial court is for the total sum of Kshs. 1,420,964. The appellant's case is that the respondent proclaimed two ambulances adding up to the total sum due from what is deposited in court at Kshs. 1,048,000.
16. To ensure both parties are given a hearing on the merits, the appellant having deposited the bulk of the judgment sum in court, a stay of execution is hereby found necessary to grant.
17. Accordingly, judgment delivered on 6 April 2023 in Mombasa MCELC No. E093 of 2022 and all consequential orders thereof is hereby stayed and the security deposit of Kshs. 1,048,000 shall apply pending the hearing and determination of the appeal herein. Costs shall abide the outcome of the appeal.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 31<sup>ST</sup> DAY OF OCTOBER 2023.**



**M. MBARŪ**  
**JUDGE**

