



**Fadhil v Diamond Trust Bank [K] Ltd (Cause 489 of 2018)  
[2023] KEELRC 2405 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2405 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 489 OF 2018  
AK NZEI, J  
OCTOBER 5, 2023**

**BETWEEN**

**SUAD SALIM FADHIL ..... CLAIMANT**

**AND**

**DIAMOND TRUST BANK [K] LTD ..... RESPONDENT**

**RULING**

1. In its judgment delivered on October 27, 2022, this Court awarded the claimant a total sum of ksh 5,582,606, and ordered that the awarded sum be subjected to statutory deductions pursuant to section 49(2) of the *Employment Act*. The claimant was also awarded costs of the suit and interest at Court rates.
2. Aggrieved by the said judgment, the Respondent filed a Notice of Appeal on November 2, 2022, and subsequently (on 16/5/2023) filed an evenly dated urgent Notice of Motion seeking the following orders:-
  - a. that the Court be pleased to grant interim exparte orders of stay of execution of judgment and decree of the Court (Honourable Lady Justice Nzei) on October 27, 2022 (sic) pending hearing and determination of the application.
  - b. that the Court be pleased to grant interim exparte orders of stay of execution of the judgment and decree of this Honourable Court (Honourable Lady Justice Agnes Nzei) on October 27, 2022 (sic) pending the hearing and determination of Civil Appeal No E058 Of 2023: Diamond Trust Bak [k] Ltd -vs- Suad Salim Fadhil.
  - c. that costs of and incidental to the application be awarded to the defendant in any event.
3. The application, expressed to be brought under Sections 1A, 1B,& 94 of the *Civil Procedure Act*, Order 22 Rule 22 and Order 42 Rule 6 of the *Civil Procedure Rules*, is premised on a supporting affidavit



of Francis Kariuki sworn on May 16, 2023. It is deponed in the said supporting affidavit that without taxing her costs, the Claimant proceeded to take out warrants of attachment on May 10, 2023 in contravention of the provisions of Section 94 of the Civil Procedure Act, and without first seeking the Court's leave to execute before ascertainment of costs. That the appeal has prospects of success, that it would be in the interest of justice for orders to be issued to preserve the substratum of the proceedings before the Court of Appeal, and that the Respondent/Applicant would be ready and willing to abide by any conditions issued by the Court in granting the orders sought in the application.

4. The application is opposed by the Claimant vide a replying affidavit sworn by her on June 5, 2023 and filed herein on June 6, 2023. It is deponed in the said affidavit that the Respondent is not coming out clearly on whether it is seeking a stay of execution pending appeal or it is seeking to set aside warrants herein for want of taxation of the claimant's bill.
5. Counsel for both parties filed written submissions on the application, which I have considered. Proceedings in this Court are governed by provisions of both the Employment and Labour Relations Court Act and the Employment and Labour Relations Court (Procedure) Rules 2016. Section 13 of the Act provides that a judgment, award, order or decree of the Court shall be enforceable in accordance with the rules made under the Civil Procedure Act. Rule 32 of the Court's and said rules on the other hand provides that orders and decrees of this Court shall be enforceable in accordance with Civil Procedure Rules.
6. Under Order 42 Rule 6(2), an order for stay of execution pending hearing and determination of an appeal shall not be made under Rule 46(1) unless:-
  - a. the Court is satisfied that substantial loss may result to the Applicant unless the order is made, and that 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.
7. In the present case, the Respondent/Applicant did not state, and did not demonstrate that substantial loss may result to it unless the order sought is granted, but it stated willingness and ability to abide by any condition issued by the Court in granting the orders sought in the application.
8. The Court of Appeal (Madan, JA) stated as follows in Butt -vs- Rent Restriction Tribunal [1979] eKLR:-

“It is in the discretion of the Court to grant or refuse stay, but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general rule, ought to exercise its best discretion in away so as to prevent the appeal, if successful, from being nugatory, per Brett LJ in Wilson -vs- Church (No 2) 12 Ch D(1870) 454 at P459. In the same case, Colton LJ, said at P 458:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court has to see that the appeal if successful, is not nugatory.”
9. This Court's decree that the Claimant/Respondent is in the process of executing is a money decree, and the decretal sum is quite substantial. If stay is not ordered and execution of the decree proceeds, the appeal will be rendered nugatory. This is a fact that this Court cannot close its mind to. Despite the fact that the claimant has not alleged ability to refund the judgment and/or decretal sum if the appeal succeeds. Indeed, the Claimant/Applicant's Counsel submitted that if the Court, in exercise of its discretion, allows the application for stay pending appeal, then the stay should be conditional to furnishing of security in form of the judgment sum.



10. Having said that, it is my finding that the Respondent's Notice of Motion dated May 16, 2023 is merited, and I allow the same in the following terms:-

- a. there will be a stay of execution of this Court's decree pending hearing and determination of Civil Appeal No E058 of 2023; Diamond Trust Bank (K) Ltd -vs- Suaad Salim Fadhil on condition that the Respondent/Applicant deposits the entire judgment sum of ksh 5,582,606 into this Court within (14) days of this Ruling, failing which the stay herein granted shall lapse. The Respondent/Applicant shall furnish the Claimant with a copy of the deposit slip and/or deposit receipt.
- b. the Respondent/Applicant shall pay the stated Auctioneer's charges within 14 days of this Ruling.
- c. costs of the application are awarded to the claimant.

11. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> OCTOBER 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

..... for Applicant

..... Respondent

