



**Osire v Mega Pack (K) Limited (Cause 66 of 2018)
[2023] KEELRC 3160 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3160 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 66 OF 2018
DN NDERITU, J
NOVEMBER 30, 2023**

BETWEEN

MOHAMMED OCHIENG OSIRE CLAIMANT

AND

MEGA PACK (K) LIMITED RESPONDENT

RULING

I. Introduction

1. In a notice of motion dated 28th August, 2023 (the application), filed on 30th August, 2023 through its lawyers on record, Wachira Wanjiru & Company Advocates, under a certificate of urgency, the respondent prays for-
 1. Spent
 2. That this Honourable Court be pleased to stay execution of the Judgment dated 15th June, 2023 pending the hearing and determination of this Application.
 3. That this Honourable Court be pleased to stay execution of the Judgment dated 15th June, 2023 pending the hearing and determination of the Appeal.
 4. That the costs of the application be provided for.
2. The application is expressed to be brought under Section 10 of the *Judicature Act*, Rule 3 of the *High Court (Practice and Procedure Rules)*, Section 3 and 17(1) of the *Employment and Labour Relations Court Act*, rule 5(2)(b) of the *Court of Appeal Rules* 2022 and rule 17(1)(8) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
3. The application is based on the grounds on the face of it and supported with the affidavit of Akash Shah, a director of the respondent, sworn on even date, with several annexures thereto.



4. In opposition to the application the claimant filed and served a replying affidavit sworn on 6th September, 2023 with one annexure thereto.
5. On 21st September, 2023 when the application came up in court for directions it was agreed that the application be canvassed by way of written submissions. Interim orders for stay of execution were granted pending the hearing and determination of the application.
6. Counsel for the respondent filed written submissions on 26th September, 2023, while counsel for the claimant filed on 19th October, 2023.

II. Background

7. In a judgment dated and delivered on 15th June, 2023 this court awarded the claimant as follows –
 - a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was unfair and unlawful.
 - b) The Claimant is awarded a total of Kshs.127,722/= made up as follows –
 - i. Salary in lieu of notice Kshs. 18,246/=
 - ii. Compensation for unfair and unlawful termination Kshs.109,476/=Total Kshs.127,722/=
 - c) The Respondent is ordered to issue and deliver to the Claimant’s counsel a certificate of service in the name of the Claimant.
 - d) Costs and interest to the Claimant.
8. It is the against the above judgment, as expressed in a decree issued on 22nd August, 2023, that the respondent is seeking stay of execution pending the hearing and determination of an appeal to the court of appeal.

III. The Respondent’s Case & Submissions

9. In the supporting affidavit it is deposed that after delivery of the judgment on 15th June, 2023 the respondent filed a notice of appeal to the Court of Appeal (COA) as per the copy annexed dated 21st June, 2023 and filed in this court on 27th June, 2023.
10. It is further stated that a record of appeal has been prepared and filed in the COA and the same has been served upon the claimant. A copy of the memorandum of appeal is annexed.
11. It is deposed that if the stay of execution is not granted the respondent will suffer substantial loss and damage and that the appeal has high chances of success and the same may be rendered nugatory if execution is allowed to take place.
12. It is alleged that the claimant has no known source of income and that if the money is paid out to him, and the appeal subsequently succeeds, it will be difficult, nay impossible, to recover the paid out money.
13. It is deposed that the respondent is ready and willing to provide security for due performance of the decree or as may be ordered by the court.
14. In her submission, counsel for the respondent, Miss Wachira, has recited and reiterated the foregoing contents of the supporting affidavit and identified the single issue for determination as – whether



the application should be allowed and orders for stay of execution granted pending the hearing and determination of the appeal.

15. It is submitted that the respondent has an arguable appeal with a high probability and chances of success. Basing her arguments on *Joseph Gitabi & Another V Pioneers Holdings (A) Limited & 2 Others* (2009) eKLR and *Kenya Airways Limited V Kenya Aviation Workers Union* (2020) eKLR, it is submitted that the appeal is not idle and raises triable issues.
16. Further, it is submitted that the respondent will suffer substantial loss and damage if execution is allowed to proceed as the claimant may not be able to refund the money in case the appeal succeeds. It is submitted that in such an event the appeal shall be rendered nugatory. Counsel has cited *Stanley Karanja Wainaina & Another V Ridon Anyangu Mutubwa* (2016) eKLR and *International Laboratory for Research on Animal Diseases* (1990) KLR 403 in emphasizing that an applicant for stay of execution shall not be expected to know all or even some of the sources of the income of the decree-holder and as such where the pecuniary ability of the decree-holder is challenged, the burden of proof of the financial ability of such decree-holder shifts to him or her to indeed demonstrate that he or she has the requisite liquidity to refund the monies in the event of the appeal succeeding. It is submitted that the claimant has not demonstrated such financial ability.
17. It is submitted that the letter of employment annexed by the claimant to his replying affidavit, alleging that he is in employment earning Kshs.140,000/= a month is unsupported as no other evidence has been submitted confirming actual payment of salary by way of a pay-slip and or a bank statement.
18. Based on the old causa clasica of *Butt v Rent Restriction Tribunal* (1979) KLR it is submitted that it has been demonstrated that if stay is not granted there is a high likelihood of the appeal being rendered nugatory or a mere academic exercise.
19. Further, it is submitted that the application has been filed without undue delay. The notice of appeal was filed on 21st June, 2023 after the judgment was delivered on 15th June, 2023, and the application for stay filed on 30th August, 2023.
20. Finally, it is submitted that the respondent is ready and willing to furnish such security as may be ordered by the court for due performance of the decree. The respondent wishes to demonstrate goodwill and -faith in offering and or providing such security and that it has submitted to the jurisdiction of this court in complying with such orders as the court may make in securing the decretal sum and costs. Counsel has cited *Exclusive Mines Limited & Another V Ministry of Mining & 2 Others* (2015) eKLR in support of her arguments in that regard.
21. It is on the basis of the foregoing that the respondent pleads that the application be allowed as prayed.

IV. Claimant's Position & Submissions

22. In the replying affidavit the claimant views the application as an abuse of the court process intended to deny him the fruits of the judgment.
23. He deposes that he is not a man of straw and alleges that he is currently employed by Prime Concepts Packaging at a monthly salary of Kshs.140,000/=. He has annexed a copy of a letter from his alleged employer as evidence of such employment.
24. It is deposed that the application has been filed after undue delay as the judgment was delivered on 15th June, 2023 yet the application was filed on 30th August, 2023.



25. It is stated that the appeal does not raise triable issues and the application does not demonstrate exceptional circumstances that may render the appeal nugatory if the stay is denied.
26. In his written submission counsel for the claimant has recited and reiterated the foregoing contents of the replying affidavit and stated that the claimant is entitled to the fruits of the judgment.
27. It is submitted and emphasized that the claimant has proved his ability to refund the decretal sum in case the appeal succeeds based on the letter of employment that he has availed. It is submitted that the amount awarded in the judgment of Kshs.127,722/= is meagre and that the claimant should be able to refund the same if the appeal succeeds and that the payment of this amount, which is not colossal as alleged, shall not cripple operations of the respondent. In any event, the ability of the claimant to repay, in case the appeal succeeds, is only one of the several factors that need consideration by the court in arriving at a fair ruling.
28. On delay in filing the application, it is submitted that each cause must be considered on its peculiar circumstances and merits. It has been submitted that the period between the delivery of judgment on 15th June, 2015 and the filing of the application on 30th August, 2023 is long enough to be considered unreasonable in the circumstances of this cause.
29. It is on the basis of the foregoing averments in the replying affidavit and the submissions by his counsel that the claimant seeks that the application be dismissed with costs.

V. Issues For Determination

30. Flowing from the foregoing summary as read alongside the pleadings and submissions filed from both sides, the issues for determination by this court flow from the prayers in the application –
 - a. Should the court order a stay of execution pending the hearing and determination of the appeal?
 - b. What orders should issue? And,
 - c. Who should meet the costs of the application?

VI. Determination

31. The applicable law in an application for stay of execution in this court (ELRC) is Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides as follows –
 - (2) No order for stay of execution shall be made under subrule (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.
32. The above law is evidently different and distinguishable from the provisions of rule 5(2)(b) of the [Court of Appeal Rules](#) which apply in an application for stay of execution in the Court of Appeal.
33. For this court, the applicable principles are easy and straight-forward in accordance with the above provisions of order 42 rule 6 (2) of the [Civil Procedure Rules](#). The conditions that need to be satisfied are that, the application has to be made without undue delay; the applicant has to demonstrate that if the stay is denied it shall suffer substantial loss; and that the applicant has offered or supplied such security as the court may order for the due performance of the decree or order. Generally, there is always



the overriding duty for the court to serve justice at all times, and hence the court may order a stay of execution for any other sufficient cause based on the circumstances of the cause.

34. In regard to the first condition, it is the view and opinion of this court that the application herein was filed without undue delay. The judgment was delivered on 15th June, 2023, and the applicant has explained the steps taken towards filing of the appeal between the date of judgment and filing of the application on 30th August, 2023. Each cause shall be considered on own merits. This court finds and holds that there was no undue, inordinate, or unreasonable delay on the part of the respondent in filing of the application.
35. On substantial loss, settlement of a decretal sum in satisfaction of a lawful judgment or order of the court should not be viewed as a loss let alone substantial loss. It is an obligation and lawful duty and this aspect should be viewed in the context of the applicant satisfying the other aspects and or conditions. However, in this cause the decretal sum is neither colossal nor substantial.
36. Nonetheless, if the money is paid, and the appeal ultimately succeeds, it is incumbent upon this court to consider whether the claimant shall be in a position to refund the same. If the claimant shall not be able to refund, then the appeal shall be rendered nugatory and the outcome thereof shall amount to a mere academic exercise.
37. When challenged that he is not liquid, the claimant availed an alleged letter of employment from Prime Concepts Packaging based in Kampala, Uganda. However, the claimant did not avail a pay-slip or bank statement to confirm that he is indeed liquid and that he receives a monthly salary of Kshs.140,000/= as alleged. It is now settled that where it is alleged that the decree-holder is impecunious the burden of proof is shifted to the him or her to demonstrate his or her liquidity – See *Kenya Airways Limited V Kenya Aviation & Allied Workers Union* (Supra), *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another* (UR) Nairobi Civil Application No. 238 of 2005, and *Stanley Karanja Wainaina & Another V Ridon Anyangu Mutubwa* (Supra).
38. It is the view of this court that the claimant ought to have gone beyond the alleged letter of employment in demonstrating that he is indeed liquid and capable of refunding or repaying the decretal sum in case the appeal ultimately succeeds. This should have been done by way of a bank statement demonstrating that he regularly receives the alleged monthly salary or that he has reasonable cash-flow. The court is not satisfied that the alleged letter of employment is of itself proof of employment and income. Where is the contract of employment and evidence of monthly payment of the alleged salary?
39. On security for due performance of the decree, the respondent is categorical that it is ready and willing to comply with orders of this court in that regard. This, in the view of the court, demonstrates good-will and -faith.
40. For all the foregoing reasons, this court shall allow the application for stay of execution of the judgment delivered on and dated 15th June, 2023 on the following terms and conditions –
 - a. An order for stay of execution be and is hereby issued pending the hearing and determination of the appeal.
 - b. The respondent shall deposit the entire decretal sum plus costs in a joint interest earning account in the joint names of its lawyers and that of the lawyers for the claimant.
 - c. The account in (b) above shall be opened and the monies deposited within 30 days from the date of this ruling, failure of which the stay orders shall lapse.
 - d. The costs of the application shall abide with the outcome of the appeal.



DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 30TH DAY OF NOVEMBER, 2023.

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DAVID NDERITU

JUDGE

