



REPUBLIC OF KENYA



KENYA LAW
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**Kema Investment Limited v Oricho (Appeal E176 of 2023)
[2023] KEELRC 3106 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3106 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E176 OF 2023
K OCHARO, J
NOVEMBER 23, 2023**

BETWEEN

KEMA INVESTMENT LIMITED APPELLANT

AND

ENOCH OMULO ORICHO RESPONDENT

RULING

BACKGROUND

1. Through a Notice of Motion dated 18th September 2023 expressed to have been brought under Order 51 Rue 1 and Order 42 Rule 6 of the Civil Procedure Rules 2010, the Appellant/Applicant has sought the following orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That pending the hearing and determination of the Appeal herein, the Honourable Court does grant a stay of execution of the judgment and orders made on 25th August 2023 in CMEL No. 210 of 2020 (Milimani).
 - e. That the costs of the Application be provided for.
2. The application is premised on the grounds on the face of it, and buttressed by those in the Supporting Affidavit sworn by one Elizabeth K. Muturi on 18th September, 2023.
3. The Applicant states that the trial Court entered judgment against it on 25th August 2023 in the sum of Kshs. 131,967/-, interest and costs of the suit. Aggrieved by the said judgment, it filed the instant



appeal. In its view, the appeal has a high chance of success. It shall be rendered nugatory if the stay of execution is not granted. Further, it has made this application without delay.

4. The Appellant/Applicant contends that it will suffer substantial loss if the orders sought herein are not granted. The decretal sum is substantial and if paid out to the Respondent, the same will not be recoverable in the event the appeal succeeds, as he has no the Respondent's income and assets are unknown to the Appellant/Applicant.
5. The Applicant also confirms that they are willing to deposit security equivalent to the entire decretal sum in a joint interest-earning account in the names of the Advocates for the parties, within 30 days of any order to do so, in compliance with the requirements of the Civil Procedure Rules 2010.
6. The Respondent opposed the Notice of Motion through a Replying Affidavit sworn on 29th September, 2023. The Respondent argues that the Applicant has not met the threshold for the grant of an order of stay of execution. It has not demonstrated the substantial loss that they are likely to suffer in the event the stay of execution is not granted. On that basis, the Respondent urges this Court to dismiss the application dated 18th September, 2023 with costs. In the alternative and without prejudice to his initial argument, the Respondent prays that the Applicant be ordered to deposit the decretal sum in Court within 30 days.
7. The parties elected not to file submissions for and against the Application but relied on their respective Affidavits.

Analysis and determination

8. The relevant provisions of the law in relation to stay of execution are Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* 2010 which provide:

“Stay in case of appeal [Order 42, rule 6.]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for a stay of execution shall be made under sub-rule (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.”
9. I have carefully considered the material placed before this Court by the Respondent, in my view, the same is too sketchy. In the circumstances, discerning the nature of the matter that was before the learned



trial magistrate isn't possible. This Court is unable therefore to gauge whether the appeal herein is arguable as contended by the Applicant.

10. Further, the Respondent contends that it will suffer substantial loss if the orders sought aren't granted, as the Respondent will be unable to refund the sum of the decree in the lower court. I have noted the sum. It is not substantial. The material presented by the Applicant doesn't reveal a ground persuasive enough to attract this Court's conclusion that the Respondent will not be able to refund the sum.
11. Applicants in matters stay of execution pending appeal should take heed, it is not enough to assert generally the fear that the sum of the decree would not be recovered as and when required to, upon the success of the appeal. The evidential burden can only shift to the Respondent to demonstrate his means if the assertion by the Applicant is backed by sufficient material. This position is aligned with the principle enunciated in the case of *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another* [2006] eKLR where the Court of Appeal stated that:

“This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove the allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such Applicant to know in detail the resources owned by a Respondent or the lack of them. Once an Applicant expresses a reasonable fear that a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example Section 112 of the *Evidence Act*, Chapter 80 Laws of Kenya.” (Emphasis Mine)

12. By reason of the foregoing premises, I come to an inescapable conclusion that the Applicant's application hasn't met the legal threshold for a grant of stay of execution orders pending appeal. The application is hereby dismissed with costs.
13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF NOVEMBER, 2023.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Manyara for the Appellant/Applicant

Mr. Kibet holding brief for Mideva for Respondent

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 15th March 2020 and subsequent directions of 21st 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.

OCHARO KEBIRA

JUDGE

