



**Molonket v East African Portland Cement Company (Cause 198 of 2019)
[2023] KEELRC 3439 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3439 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 198 OF 2019
NZIOKI WA MAKAU, J
NOVEMBER 23, 2023**

BETWEEN

LUCY RIMANTO MOLONKET CLAIMANT

AND

THE EAST AFRICAN PORTLAND CEMENT COMPANY RESPONDENT

RULING

1. The Respondent seeks through the notice of motion application dated 23rd October 2023 for stay pending appeal. In its motion, the Respondent asserts that unless stay is granted by this Court the Claimant will proceed and execute against it and the outcome of the Appeal rendered nugatory should the Respondent succeed at the Court of Appeal.
2. The Claimant is opposed and filed a replying affidavit sworn on 28th October 2023. The Claimant
3. The Respondent in its submissions asserts the sole issue for determination is whether the Applicant has satisfied the requirement for grant of stay of execution pending appeal. The Respondent submits that the application was made in a timeous fashion and that it would suffer irreparable loss should the Claimant proceed to execute against it. The Respondent submits that the Claimant in her unemployment state may be unable to refund the sum of Kshs. 15,165,782/- plus interest and costs should it be successful on appeal. The Respondent relied on the case of *Ann Wanjiru Waigwa & another v Joseph Kiragu Kibarua* [2009] eKLR and *Francis Kanyiri Wanjogu v Patrice Onsongo Osuba* [2015] eKLR on the issue of substantial loss and the inability of the respondent to refund the sums where the appellant eventually succeeds on appeal. The Respondent submits the evidential burden is upon the Claimant to demonstrate the ability to refund as held in the case of *Francis Kanyiri Wanjogu v Patrice Onsongo Osuba* (*supra*). The Respondent submits that it is prepared to furnish security by way of a bank guarantee to secure the Claimant's interests. The Respondent cites the cases of *Shanzu Beach Resort Limited v Crown Marble & Quartz Ltd* [2020] eKLR, *George Kilonzo Musyoka v Harun Mutanga Kitaka* [2021] eKLR and *Kamau Mucuba v Charles Munge* [2021] eKLR for



the proposition that courts have largely accepted bank guarantees as security. The Respondent thus submits that a bank guarantee from a reputable bank would be sufficient security in the present case. The Respondent cited the case of *New Solta Ltd v Naivasha Southlake Sacco Ltd* [2022] eKLR where the Court cited with approval the decision of the Court of Appeal in *Ndubiu Gitahi & another v Anna Wambui Warugongo* [1988] 2 KAR 621 where it was held that the process of giving security which arises constantly, so long as the opposite party can be adequately protected, it is right and proper that security be given in a way that is least disadvantageous to the party proffering security. The Respondent submitted that it had met the requirements by moving the court quickly and that the discretion of the court should be exercised in the favour of the Respondent so as to grant stay of execution pending appeal. The Respondent cited the case of *CFC Stanbic Bank Limited v John Kung'u Kiarie & Dyer & another* [2016] eKLR where it was held that courts are required to exercise discretion in a manner that ensures that an appeal if successful would not be rendered nugatory.

4. The Claimant/Respondent submitted that the Applicant had not laid out any good and/or reasonable basis for this Court to grant stay of execution orders. That the Applicant had further not offered any security deposit, a clear indication that the Application was made in bad faith and meant to deny the Claimant the fruits of justice. Further, that the Applicant does not have any appeal arguable or capable of succeeding since the same is an afterthought, misconceived and lacks merit. The Claimant further submitted that she had been ravaged by the harsh economic times prevailing in the country as a result of being rendered jobless after the unlawful termination of her employment and that to thus deny her the fruits of her judgment was a miscarriage of justice. She urged this Court to decline the Application of stay in view of the foregoing submissions further because the Applicant had not demonstrated to the Court that she was a woman of straw to render the appeal nugatory. She relied on the findings in the following cases:
 - a. *James Mogaka v Kenya Commercial Bank Limited* [2021] eKLR wherein the Court held that a mere notice of appeal is insufficient for purposes of grant of stay pending appeal as there should be some arguable ground upon which the intended appeal is premised. The Court further held that it was handicapped in determining whether there was an appeal being preferred, in the absence of the proposed actual memorandum of appeal and thus dismissed the application seeking stay of execution.
 - b. *Stephen Munene Njagi v Tharaka Nithi County Government & another* [2020] eKLR in which the Court dismissed the application for stay of execution on the basis that the same was not merited and ordered the respondent to pay costs of the application to the claimant.
5. The Respondent has satisfied much of the requirements for grant of stay as it has moved the court in short shrift, has shown that the sum in question if paid out and the Claimant is unable to refund would be a substantial loss to the Respondent. As the grant of stay is to ensure the parties are able to be returned to the position prior to the appeal whichever way the appeal is determined, in my considered view, the stay of execution is granted on condition that the sum of Kshs. 15,165,782/- is deposited in an interest earning account in the joint names of the advocates of the parties before me. As the Respondent intends to seek recourse in the Court of Appeal, the costs of this motion will abide the outcome in the Court of Appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

