



**East Africa Eagle Kenya Ltd v Shivachi (Employment and Labour Relations Appeal E073 of 2023) [2023] KEELRC 3012 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3012 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E073 OF 2023**

**K OCHARO, J  
NOVEMBER 21, 2023**

**BETWEEN**

**EAST AFRICA EAGLE KENYA LTD ..... APPLICANT**

**AND**

**KIZITO SHILIBWA SHIVACHI ..... RESPONDENT**

**RULING**

**Background**

1. Through a Notice of Motion dated 15<sup>th</sup> May 2023 expressed to be brought under Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010, and Sections 1A, 1B, 3, 3A, and 63 (e) of the *Civil Procedure Act* 2020, the Appellant/Applicant has sought for the following orders:
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That this Honourable Court grants and Order of stay of execution of the Judgment and Decree dated 25<sup>th</sup> April 2023 and all the consequential subsequent proceedings in Nairobi MCELRC Cause No. E2218 OF 2021 Kizito Shilibwa Shivachi Vs East Africa Eagle Kenya Limited pending the hearing and determination of the Appeal.
  - 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 Geraldine Boutique on 15<sup>th</sup> May 2023.
3. The Applicant states that judgment was entered on 25<sup>th</sup> April 2023 against the Applicant for the sum of Kshs. 685,250/-. The Applicant was particularly aggrieved by the said judgment, hence necessitating



- this appeal. They explain that the Respondent worked as a guard at the Applicant's Managing Director's premises, until August 2019, when the Managing Director moved to a gated community that provided private security.
4. The Managing Director maintained the Respondent's services and his full salary despite the fact that he was in effect redundant in case a job opportunity opened up in the Respondent company. That the charitable arrangement continued for Nine (9) months until April 2020 when the Applicant's tours and travel company began struggling owing to the Covid-19 pandemic. Due to financial pressures, the Respondent was declared redundant after working from home and receiving a salary for over 11 months.
  5. The Applicant states that the Respondent will commence execution proceedings for the judgment sum at any time. Further, if the execution were to be allowed to proceed, it would suffer substantial and irreparable loss as the Respondent would be unable to refund the sum of Kshs. 685,250/- if called upon to after the success of the appeal herein. The appeal shall be rendered nugatory, therefore.
  6. The Applicant undertakes to deposit security for the performance of such Orders as may ultimately be binding upon them; and states that the application has been made expeditiously without any undue delay.
  7. The Respondent opposed the Notice of Motion dated 15<sup>th</sup> May 2023 through a Replying Affidavit sworn on 21<sup>st</sup> August 2023. The Respondent argues that the Applicant's appeal appears to be based on the fact that a security guard like him ought not to have been awarded Kshs. 685,250/-, yet he was earning only Kshs. 24,000/- per month. To him, this position taken by the Applicant is offensive.
  8. He avers that the Applicant has not met the conditions for the grant of an order of stay of execution, especially as they have not shown that they will suffer substantial loss if the stay of execution is not granted. He states that he is a person of means, married, with several children and owns a parcel of land valued at more than Kshs. 1.5 Million. Should the appeal overturn the verdict, he will be able to refund the decretal sum. The Respondent insists that the trial court was correct in making the award.
  9. On that basis, the Respondent urges this Court to dismiss the application dated 15<sup>th</sup> May 2023 with costs. However, if the Court is inclined to grant the orders, the Applicant should be ordered to deposit half of the decretal sum together with costs in a joint interest-earning account in the names of the Advocates and release the other half to him.
  10. The Applicant filed submissions dated 15<sup>th</sup> June 2023 and Authorities, while the Respondent filed his dated 21<sup>st</sup> August 2023.
  11. I have considered the Notice of Motion dated 15<sup>th</sup> May 2023 and Affidavit in Support thereof; the Replying Affidavit sworn on 21<sup>st</sup> August 2023; the parties' submission and authorities that they rely on. The issue for determination is as follows: -
    - a. Whether this Court should grant the Applicant the orders sought.

### **Analysis and Determination**

#### **Whether This Court Should Grant The Applicant The Orders Sought.**

12. 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 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.”

13. No doubt that there is obtaining a judgment against the Applicant in MCELRC Cause No. E2218 of 2021 – Kizito Shilibwa Shivachi vs East Africa Eagle Kenya Limited entered judgment against it on 25<sup>th</sup> April 2023, for the sum of Kshs. 685, 250/-.Further, the judgment has been assailed through the instant appeal.

14. This Court is faced with the task of analyzing whether the Appellant/Applicant has met the conditions for grant of an order of stay of execution, pursuant to Order 42 Rule 6 (2).

15. In the pursuit of discharging the task this Court should first answer the question, has the Appellant/Applicant proved that it will suffer substantial loss if the orders are not granted? On how the Court should interrogate the question, the Court in *Century Oil Trading Company Ltd vs. Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007, gave an apt approach, thus:

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer a substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

16. As regards on which party the burden of proving the Respondent’s financial ability falls, the Court of Appeal in *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike and Another* [2006] eKLR 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)

17. In the present case, the Appellant/Applicant has averred that the Respondent will at any time proceed and execute against it for the sum of the decree of the lower court. Further, the sum is colossal. Considering the earnings of the Respondent as a security guard, about Kshs. 24,000/- per month, he will not have the capacity to refund the decretal sum once paid out to him, if called upon to once the appeal succeeds.
18. In line with the above authorities, once the Applicant expressed a reasonable fear that the Respondent would be unable to repay the decretal sum if the appeal succeeds, the Respondent became under an obligation to prove that he possessed the means to refund the money as and when called upon to.
19. In his Replying Affidavit, paragraph 13 thereof, the Respondent avers that he is a man of means, married, with several children and has a parcel of land valued at more than Kshs. 1.5 Million, hence he will be able to refund the decretal sum if the appeal succeeds. However, the Respondent has not produced any evidence before this Court to demonstrate the foregoing. It would have only been prudent for the Respondent to produce a copy of a title and a valuation report to demonstrate the existence of the alleged parcel of land, and its value. As such, he has not proved that he has sufficient resources to refund the decretal sum if required.
20. There is no doubt in my mind that the decretal sum, the subject matter of the appeal herein, is substantial, being Kshs. 685,250.
21. In the circumstances, I am persuaded that the Appellant/Applicant has indeed shown that they will suffer substantial loss if the order for stay of execution is not granted.
22. Secondly, has this application been made without unreasonable delay? I also answer this question in the affirmative. The application was filed on 15<sup>th</sup> May 2023, less than 30 days after the delivery of the judgment on 25<sup>th</sup> April 2023.
23. The Appellant/Applicant has expressed its willingness to deposit security for the performance of any decree or order that may ultimately become binding on it. The Respondent agrees that the Appellant/Applicant should be ordered to deposit the decretal sum in a joint interest earning account in the name of the Advocates, if this Court is inclined to grant the order of stay of execution.
24. In the case of *Michael Ntouthi Mithen vs Kivondo Musau* [2021] eKLR, the Honourable Court pronounced itself as follows on the reason why security should be given: -

“22. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event, it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See *Nduhiu Gitahi vs. Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.”



25. By reason of the premises foregoing, and in line with the powers of this Court donated by Order 42 Rule 6, I hereby grant a stay of execution of the judgment and decree issued by the Court in MCELRC Cause No. E2218 OF 2021 – Kizito Shilibwa Shivachi vs East Africa Eagle Kenya Limited pending the hearing and determination of the Appeal herein.
26. In the upshot, the Applicant’s application for a stay of execution pending appeal is granted on the condition that:
- a. The judgment sum of Kshs. 685,250/- be deposited in a joint interest-earning account in the names of the Advocates for the parties within 30 days of today.
  - b. In default, execution to issue forthwith.
  - c. The Applicant/Appellant is to file and serve its Record of Appeal contemporaneously with submissions on the appeal within 65 days of today.
  - d. The Respondent is to file and serve its submissions within 21 days of service.
  - e. Mention on 5<sup>th</sup> March 2024 to confirm compliance and fix the matter for judgment.
27. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2023.**

**OCHARO KEBIRA**

**JUDGE**

In the presence of:

Mr. Odhiambo for the Appellant

Mr. Khalwale for the 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

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**OCHARO KEBIRA**

**JUDGE**

