



Chauvel v Hazizi (Appeal E012 of 2023)
[2023] KEELRC 2850 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2850 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E012 OF 2023
AK NZEI, J
NOVEMBER 9, 2023

BETWEEN

NINA CHAUVEL APPELLANT

AND

KARISA OMAR HAZIZI RESPONDENT

*(Being an appeal arising out of the judgment of Hon. J. Ongondo -
SPM issued on 16th May 2023 in Malindi CM-ERL No. 34 of 2021)*

RULING

1. Before me is the Appellant's Notice of Motion dated 12th June, 2023, expressed to be brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 42 Rule 6 and Order 2 Rule 14 of the Civil Procedure Rules. The following orders are sought:-
 - a. that there be a stay of execution of the Judgment delivered on 16th May 2023 by Honourable J. Ong'ondo, in Malindi Chief Magistrate's Court ELR Case No. 34 of 2021 pending the hearing of the application.
 - b. that there be a stay of execution of the Judgment delivered on 16th May 2023 by Honourable J. Ong'ondo, in Malindi Chief Magistrate's Court ELR Case No. 34 of 2021 pending hearing and determination of the appeal filed herein.
 - c. that costs of the application be provided for.
2. The application sets out on its face the grounds upon which it is founded, and is premised on the Appellant/Applicant's supporting affidavit sworn on 12th June 2023 and a further affidavit sworn on 14th June 2023. It is deponed in the said affidavit that Judgment was entered in favour of the Respondent on 16th May 2023, that the Respondent is in the verge of executing the decree, that the appeal herein is arguable and has overwhelming chances of success, and will be rendered nugatory if



orders sought in the application are not granted. That the Appellant/Applicant is ready and willing to deposit a half of the decretal sum herein in Court as security.

3. One of the documents annexed to the said affidavits sworn in support of the application is the trial Court's Judgment delivered on 16th May 2023. I have noted from the said Judgment that the Respondent was awarded a total sum of Kshs. 241,300/=.
4. The application is opposed by the Respondent vide her replying affidavit sworn on 26th June, 2023. It is deponed in the said replying affidavit that decree and certificate of costs are yet to be issued by the trial Court, that the Appellant/Applicant has not met the conditions of grant of stay pending appeal in that she:-
 - a. has not shown what substantial loss she will suffer, and
 - b. has not deposited any security for due performance of the decree.
5. It is further deponed by the Respondent that the decree appealed against is a money decree, and cannot be rendered nugatory as the Respondent is in gainful employment and will refund the decretal sum in the event of the appeal succeeding.
6. The Employment and Labour Relation Court (Procedure) Rules, 2016 are basically silent on stay of execution of this Court's decrees and of the Lower Courts when the Court exercises its appellate jurisdiction. Rule 32 of this Court's said Rules however saves the provisions of the Civil Procedure Rules on execution of decrees and orders in this Court's Rules.
7. The Appellant/Applicant herein is seeking a stay of execution of the trial Court's decree pending hearing and determination of the appeal herein. Order 42 Rule 6(1) is the provision of the [Civil Procedure Rules](#) which provides for stay of execution pending appeal, and it provides as follows:
 - "(1) no appeal or second appeal shall operate as a stay of execution of 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 if preferred may apply to the appellate Court to have such order set aside."
8. The Court of Appeal (Madan, JA) stated as follows in [Butt vs. Rent Restriction Tribunal \[1979\]](#) eKLR:-
 - "... It is the discretion of the Court to grant or refuse stay, but what has to be judged is whether there are or not particular circumstances in the case to make an order staying execution. It has been said the Court as a general rule ought to exercise its best discretion in a way so as to prevent the appeal, if successful, from being nugatory, per Brett LJ in *Wilson vs. Church* (No. 2) 12 ChD (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. The trial Court's decree herein is a money decree, and if execution of the decree is not stayed pending hearing and determination of the appeal herein, execution will proceed and the appeal will be rendered



nugatory. The Respondent has not demonstrated ability to refund the decretal sum to the Appellant if the appeal succeeds.

10. In *Bii Vs. National Union of Nurses* [2022] KEERC 3864 [KLR] 27 July 2022 (Ruling) the Court stated as follows:

“ 31. The above principle was further stated in *ABN Amro Bank vs. Lemond Foods Limited – Civil Application No. 15 of 2000* where the Court of Appeal held that:-

“...the legal burden still remains on the Applicant but the evidential burden would then have shifted to Respondent to show that he would be in a position to refund the decretal sum if it is paid to him and the appeal was to succeed. The evidential burden would be very easy for the Respondent to discharge. He can simply show what assets he has such as land, cash in bank and so on.”

11. I find and hold that the Appellant’s Notice of Motion dated 12th June 2023 is merited, and the same is hereby allowed in the following terms:-

- a. there will be a stay of execution of the trial Court’s decree in Malindi Chief Magistrate’s Court ELR Case No. 34 of 2021 pending hearing and determination of the Appeal herein, on condition that the Appellant deposits Kshs. 150,000= being part of the Judgment sum, in this Court within twenty one (21) days of this Ruling.
- b. the appeal shall be fast tracked and shall be fixed for hearing.
- c. costs of the application shall be in the appeal.

12. It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9th NOVEMBER, 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 Appellant

..... Respondent

