



Fursys Kenya Limited v Andrew (Employment and Labour Relations Appeal E047 of 2021) [2023] KEELRC 3410 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3410 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E047 OF 2021**

**K OCHARO, J
DECEMBER 20, 2023**

BETWEEN

FURSYS KENYA LIMITED APPELLANT

AND

JUSTUS ANDREW RESPONDENT

(Being an appeal against the Judgement of the Milimani Chief Magistrate's Court [Hon Mr David Obonyo (SRM) dated 1st April 2021 in CMEL Cause No. 1412 of 2019])

RULING

Introduction

1. Through a Notice of Motion Application dated 3rd November 2023, expressed to be brought under section 12 of the *Employment and Labour Relations Court Act*, the Respondent/Applicant sought that the sum of Kshs. 555,435.00 that was deposited in Court pending the hearing and determination of the appeal herein, be released into his Advocate's account for onward transmission to him.
2. The application is anchored on the grounds put forth on the face of the application and the affidavit in support thereof sworn by Seth Ojienda, Counsel for the Applicant.
3. The Respondent resists the application upon the basis of the replying affidavit that was sworn on the 16th of November 2023,

The Application

4. The Applicants contend that the afore-stated sum was deposited in the Judiciary Account by the Appellant as security pending the appeal hearing. Further, the appeal was dismissed on the 27th of October 2023, hence the deposited sum should be released into his Counsel's Account No. xxxx hosted



at the Co-operative Bank, University Way Branch, for onward transmission to him in part settlement of the Decree.

The Response

5. The Appellant contends that the order sought by the Respondent/Applicant is unmerited. The application herein amounts to an execution process which has been commenced illegally as it has not been preceded by taxation of party and party costs.
6. It is stated further that the Appellant being dissatisfied with the Judgement of this Court of 27th October 2023, has lodged a Notice of Appeal herein signalling his intention to assail the Judgement by way of an appeal to the Court of Appeal. Further, the intended appeal is meritorious and raises several arguable grounds of appeal.
7. The intended appeal will be rendered nugatory if the orders sought are not granted as the Applicant may proceed to execute against the Appellant both in the Lower Court and this Court.
8. The Appellant contends further that it is willing to comply with any condition of stay that this Court may deem fit to attach to an order of stay pending the intended appeal. Further, the Applicant is a man of straw. There are all chances that if the deposited amount is released to him and the appeal eventually succeeds with the consequence of him being called upon to refund the money, he won't.

Analysis and Determination

9. I have carefully considered the material placed before me by the parties for against the instant application and distil only one issue for determination, whether the Applicant's Application herein should be granted.
10. The Appellant contends that the Applicant has commenced execution proceedings without first having party and party cost taxed in this matter, an illegal move. I get the Appellant acquitted the Application by the Applicant to an execution process. Though the Appellant does not mention specifically state the basis for the argument that taxation of cost was imperative before the move by the Applicant, this Court takes it that it (the Appellant) has the provisions of Section 94 of the [Civil Procedure Act](#) in mind. The provision is the only one that impedes the commencement of execution of a decree before taxation not unless there is leave of Court.
11. I have found considerable difficulty in understanding what informed the Appellant's position that the application herein amounts to an execution process. I am not persuaded that it is. The application seeks that the purpose for which the deposit was made, be given effect. Where a Court directs that a decretal amount or part thereof be deposited in an account pending appeal as security, the undoubtable intention of the Court is always that the amount shall be released after the appeal either to the Appellant, where the Court has wholly allowed the appeal or to the Respondent where the appeal has failed. An order of stay of execution that is conditional upon provisions of security normally seeks to ensure that the success of either of the parties in the appeal is not rendered nugatory by a failure of the losing party to avail the decretal sum when called upon to.
12. I have no doubt in my mind that the sum of Kshs. 555,435.00 was ordered to be deposited pending the appeal herein, for the intention and purpose above stated.
13. In my understanding, and in light of the foregoing premises, Section 94 of the [Civil Procedure Act](#) does not contemplate proceedings as are in the instant application.



14. The Court notes that the Applicant has not filed any application for a stay of execution of the Judgement herein pending appeal. The averments in paragraphs 5 and 6 of the replying affidavit can only be good material for consideration in such an application if it had been filed.
15. In the upshot, I conclude that the Applicant's application herein is meritorious, and order that the amount of Kshs. 555,435.00 which was deposited as security pending the appeal herein, be released to the Counsel for the Applicant through account No. xxxx, hosted at Co-operative Bank, University Way Branch for onward transmission to the Applicant.
16. Orders accordingly.

READ, DELIVERED AND SIGNED THIS 20TH DAY OF DECEMBER, 2023.

OCHARO KEBIRA

JUDGE

In the Presence of;

Mr Waigwa for the Appellant

Mr. Ojienda 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 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

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JUDGE

