



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**CAUSE NO. EOO8 OF 2021**

**INEET MILLERS COMPANY LTD.....CLAIMANT**

**VERSUS**

**JACKLINE NYACHIO.....RESPONDENT**

**RULING**

1. By a motion dated 18<sup>th</sup> August, 2021, the Appellant seeks orders among others that:

- a) There be a stay of execution of the judgment delivered on 23<sup>rd</sup> July, 2021 and the Decree thereto with respect to ELDORET MC ERLC NO. 44 OF 2018 – JACKLINE NYACHIO OMAMBIA -V- INEET millers co. ltd pending hearing and determination.
- b) Costs of the Application be granted to the Appellant/Applicant herein.

2. The application was brought on the grounds among others that:

- a) The Honourable trial court in Eldoret MC. ELRC NO. 44 of 2018 delivered its judgment in the matter on 23<sup>rd</sup> July, 2021 directing the Appellant/Applicant herein to pay the Respondent herein a cumulative decretal sum of Ksh. 1,940,410.
- b) The Appellant/Applicant is aggrieved entirely by the above mentioned decision of the trial court and has since commenced its Appeal before this Honourable Court vide the Memorandum of Appeal dated 17<sup>th</sup> August, 2021.
- c) The Appellant/Applicant has a cogent and arguable Appeal as evidenced in the Grounds of Appeal set out in the Memorandum of Appeal.
- d) The Honourable Trial Court granted an order for stay of execution for a period of 30 days commencing on 23<sup>rd</sup> July, 2021.
- e) The stay of execution currently in force will automatically lapse on 23<sup>rd</sup> August, 2021 exposing the Appellant and sale of its assets which form the backbone of its business operations.
- f) The Appellant/Applicant is undergoing serious economic constraints hence execution for recovery of the colossal decretal sum will completely cripple its operations to the detriment of its shareholders and employees.
- g) The Appellant like any other business has suffered immensely due to the effects of the COVID 19 pandemic and at the moment is trying to recover hence any disruption cause by the execution will frustrate the recovery process and possibly brings its operation to a halt.
- h) That the Appellant/Applicant stand to suffer substantial and irreparable loss and damage as the Respondents' financial status is unknown and there is a likelihood that the Appellant/Applicant will be unable to recover the decretal sum from the Respondent on a successful appeal in the event that the execution process is completed.
- i) The best interest of justice will be served by a grant of the orders which will facilitate the realization of the Appellant's/Applicant's right to be heard and right of Appeal.

3. The application was further supported by the affidavit of Kenneth Kipng'etich Mutai who deponed among others that:

- a) That I am an adult Kenyan of sound mind and a Director for the Appellant /Applicant herein duly authorized by its Board to

swear this Affidavit on its behalf hence competent to do so.

b) That the Respondent herein commenced a claim against the Appellant/Applicant in ELDORET MC. ELRC NO. 44 OF 2018 vide her statement of claim dated 11<sup>th</sup> September, 2018. (**Annexed and marked as 'KKM 1' is a true copy of the statement of claim**)

c) That the appellant/Applicant herein rendered its Defence in the above-mentioned cause vide its Reply to Memorandum of Claim dated 21<sup>st</sup> September, 2018. (**annexed and marked as 'KKM 2' is a true copy of the Reply to Memorandum of claim**)

d) That the Honourable L. Kassan (CM) sitting at Eldoret heard the above-mentioned matter and delivered its judgment in the matter on 23<sup>rd</sup> July, 2021 directing the Appellant/Applicant herein to pay the Respondent herein a cumulative decretal sum of Ksh.1,940,410. (**annexed and marked as 'KKM 3' IS A TRUE COPY OF the judgment**)

e) That the Appellant/Applicant is aggrieved entirely by the above-mentioned decision of the trial Court and has since commenced its appeal before this Honorable Court vide the Memorandum of Appeal dated 17<sup>th</sup> August, 2021. (**Annexed and marked as 'KKM 4' is a true of the Memorandum of Appeal**)

f) That the Appellant/Applicant has a cogent and arguable Appeal with a high likelihood of success as evidenced in the Grounds of Appeal set out in the Memorandum of Appeal.

g) That the Honourable Trial Court granted an order for stay for execution for a period of 30 days at the time of delivery of the impugned Judgment commencing on 23<sup>rd</sup> July, 2021.

h) That the stay of execution currently in force will automatically lapse on 23<sup>rd</sup> August, 2021 which is barely one week away exposing the Appellant/Applicant to the risk of execution which will lead to proclamation, attachment and sale of its asses which form the backbone of this business operations.

i) That the Appellant/Applicant is undergoing serous economic constraints hence execution for recovery of the colossal decretal sum will completely cripple its operations to the detriment of its shareholders and employee.

j) That the appellant/applicant like any other business has suffered immensely due to the effect of COVID 19 pandemic and at the moment is trying to recover hence any disruption caused by the imminent execution will frustrate the recovery process and possibly bring its operations to a halt.

k) That the Appellant/applicant through its business offers employment to approximately 30 Kenyans and remits taxes to the Government hence it is in public interest to protect its business from a potential collapse.

l) That the imminent execution will taint the image of the Appellant/Applicant and negatively affect its business reputation depriving it of the necessary good will for the continuity of its business operations and this is a substantial loss which cannot be adequately remedied.

m) That the Appellant/Applicant stand to suffer substantial and irreparable loss and damage as the Respondent's financial status is unknown and there is likelihood that the Appellant/Applicant will be unable to recover the decretal sum from the Respondent on a successful appeal in the event that the execution process is completed.

4. The respondent filed a Replying Affidavit in opposition to the application and in which she deponed *inter alia*.

a) **That** I am the respondent herein, hence competent to swear this Affidavit.

b) That the Contents of the Appellant's application, and the accompanying affidavit sworn by Kenneth Kipnetich Mutai have been read and explained to me by my advocate on record and having understood the contents thereon, I wish to state as follows in response.

c) That my advocate advises me, which advise I hold to be true that the applicants current advocate is improperly on record for not seeking leave to come on record after judgment had already been delivered in the lower court matter as provided for in Order 9 Rule 9 of the Civil Procedure Rules.

d) That my advocate advises me which advise I hold to be true that the Applicant's Counsel failure to comply with Order 9 rule of the Civil Procedure Rules, renders the Application defective and fit for dismissal.

e) That the aforementioned notwithstanding, the Application does not disclose any reasonable and/or sufficient grounds to warrant granting of the orders sought.

f) That the Applicant has not demonstrated any chances of success of the Appeal.

g) That notably, the Certified copy of proceedings have not been exhibited to demonstrate the genuines of the grounds listed in the memorandum of appeal.

h) That the Applicants supporting Affidavit, and more specifically paragraph 9 of the said Affidavit is a confirmation that the Applicant is at the risk of closure and in the event the applicant runs out of business, any judgment that may be granted in my favour is likely to be rendered unimplementable.

i) That the applicant has not offered to deposit security for costs and/or a guarantee of payment of the decretal sum in the event the judgment is upheld and I am likely to suffer immensely if the orders sought in the Application are granted.

5. This Court has power under Order 42 of the Civil Procedure Rules to grant a stay of execution pending appeal. The power is discretionary but is however guided by the parameters set out under Order 42.

6. As was observed in the case of **Lake Victoria North Water Services Board & Another -V- Alfred Odongo Amombo [2017] eKLR**, the court is persuaded that the applicant merits an order of stay of execution pending the hearing and determination of the appeal.

7. The Court therefore grants an order of stay of execution pending the hearing and determination of the appeal herein.

**8. It is so ordered.**

**DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF MARCH, 2022**

**ABUODHA NELSON JORUM**

**JUDGE ELRC**