



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MALINDI**

**ELRC CAUSE NO. 13 OF 2019**

**GALGALO JARSO JILLO.....CLAIMANT**

**VERSUS**

**AGRICULTURAL FINANCE CORPORATION.....RESPONDENT**

**RULING**

1. The application before me is by the Applicant/Respondent and is dated 3<sup>rd</sup> January 2022. It seeks to stay execution of the judgment by the court delivered on 24<sup>th</sup> November 2021 pending the hearing and determination of the proposed appeal against it.
2. The Claimant/Respondent has opposed the motion. He has filed a replying affidavit dated 23<sup>rd</sup> February 2022.
3. The Applicant/Respondent avers that it is dissatisfied with the court's decision in its entirety and wishes to have it set aside on appeal. In line with the Court of Appeal rules, the Applicant/Respondent has lodged a Notice of Appeal and applied for certified copies of the proceedings and judgment.
4. In the application, the Applicant/Respondent argues that the Claimant's financial means are suspect since in his testimony before court he alluded to the fact that he has no formal employment after he was terminated by the Applicant/Respondent. Consequently, there is considerable fear on the part of the Applicant/Respondent that should the proposed appeal succeed after the Claimant has accessed the decretal sum by way of execution or otherwise, the possibility of recovering it from him will be near zero thus rendering the entire appeal process futile. In the Applicant's/Respondent's view, it is imperative that the court grants stay of execution of the decree in the cause in order not to render the proposed appeal an academic exercise.
5. The Applicant/Respondent argues that being a public institution, it is in a position to pay the decretal sum as and when it may be called upon to do so. It is ready to provide security for the performance of the decree either by way of a bank guarantee or otherwise.
6. As indicated above, the Claimant is opposed to the request by the Applicant/Respondent. It is the Claimant's case that the Applicant/Respondent has not lodged a valid appeal to warrant the prayer for stay of execution pending the hearing and determination of the appeal.
7. Further, the Claimant argues that even if there is evidence of an intended appeal against the court's decision, there is no evidence that the proposed appeal is an arguable one. Consequently, it is pointless to stay enforcement of the court's judgment to wait for processing of an appeal whose merits are in doubt. Such action only deprives the Claimant the right to enjoy the fruits of his judgment.
8. It is the Claimant's view that the application for stay of execution pending appeal has been filed after inordinate delay. That it took the Applicant/Respondent two months since delivery of judgment to present a formal application for stay of execution pending appeal and even then without explaining the reasons for the delay.
9. I have considered the rival arguments by the parties. It is not in doubt that the Applicant/Respondent has signified an intention to appeal against the court's judgment. This intention is demonstrated by the fact that the Applicant/Respondent has filed a Notice of Appeal dated 3<sup>rd</sup> December 2021 a copy of which is annexed to the affidavit in support of the application under consideration and marked as JK1.
10. The filing of a Notice of Appeal is deemed as the commencement of an appeal to the Court of Appeal. Therefore, the presence of the Notice of Appeal in this cause is enough evidence that there is a pending appeal against the court's decision. I would therefore observe that contrary to the position taken by the Claimant in response to the current application, there is in fact and law a pending appeal against the court's judgment. Consequently, the matter now falls within the purview of rule 32(2) of the Employment and Labour Relations Court (Procedure) Rules as read with Order 42 of the Civil Procedure Rules in so far as they relate to execution proceedings pending appeals.

11. The conditions for grant of an order for stay of execution pending appeal under Order 42 of the Civil Procedure Rules are self evident. They include that: -

*a) The applicant seeks the orders without unnecessary delay;*

*b) The applicant furnishes the court with security for the performance of the decree; and*

*c) The applicant demonstrates that he/she is likely to suffer substantial loss should the orders not issue.*

12. One of the Claimant's grounds for opposing the application for stay of execution is that the Applicant/Respondent has not demonstrated that it has an arguable case before the Court of Appeal. However, this is not one of the grounds required to be established by an applicant under Order 42 of the Civil Procedure Rules. The requirement only applies to applications for stay of execution pending appeal under rule 5(2) (b) of the Court of Appeal rules.

13. Regarding the possibility of loss in the event of non issuance of the orders sought, I think that possibility, remote as it may seem, does in fact exist. The Claimant stated in evidence that he is currently not in any gainful employment. This assertion is repeated by the Applicant/Respondent in the affidavit in support of the application under consideration. It is noteworthy that the Claimant did not dispute this fact in his response to the application. There is no evidence that the Claimant has other means to refund the decretal sum should the appeal succeed after he has executed the decree. Such eventuality will undoubtedly not only occasion the Applicant/Respondent substantial loss but also render the appeal an academic exercise.

14. On whether the application was filed after unreasonable delay, I note that the judgment was delivered on 25<sup>th</sup> November 2021. The application was lodged on 3<sup>rd</sup> January 2022, hardly one and a half months down the line.

15. In any event, I note that on 25<sup>th</sup> November 2021, the court granted the Applicant/Respondent stay of execution orders for a period of twenty one (21) days pending filing of a formal application if at all. This period ran up to about the Christmas season in the year 2021. It was therefore reasonable for the Applicant/Respondent to move the court, as it indeed did, around 3<sup>rd</sup> January 2022. The application is therefore filed without delay.

16. I note that the Applicant/Respondent has offered to abide by any reasonable conditions that the court may impose as to security for the performance of the decree. In particular, the Applicant/Respondent has offered to facilitate the issuance of a bank guarantee as security for this purpose. Being a public entity, it will be undesirable to hold its funds in an escrow account pending the appeal. The offer to provide a bank guarantee for the payment of the decretal sum appears reasonable in the premises.

17. I therefore order as follows: -

*a) That the Applicant's/Respondent's prayer for stay of execution pending processing of its proposed appeal is granted subject to the Applicant/Respondent furnishing the Claimant's Advocates and the court a suitable guarantee from a reputable financial institution within Kenya for the payment of the decretal sum herein together with the costs and interest awarded.*

*b) That the guarantee aforesaid be made available within 21 days of this decision.*

*c) That in the event of failure to provide the guarantee aforesaid, the Claimant is granted the liberty to execute the decree.*

*d) That the costs of this application are granted to the Claimant.*

**DATED, SIGNED AND DELIVERED ON THE 17TH DAY OF MARCH, 2022**

**B. O. M. MANANI**

**JUDGE**

**IN THE PRESENCE OF:**

**MAINGA FOR THE CLAIMANT/RESPONDENT**

**MULWA FOR THE RESPONDENT/APPLICANT**

**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> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B. O. M. MANANI**

**JUDGE**