



**REPUBLIC OF KENYA**

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

**AT NAKURU**

**ELRC APPEAL NO. E011 OF 2021**

**CAPITAL D ELEGANCE LTD.....APPELLANT/APPLICANT**

**-VERSUS-**

**FRANCIS OWUOR MASINDE.....RESPONDENT**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**RULING**

**1. INTRODUCTION**

1. In a Notice of motion dated 23<sup>rd</sup> November, 2021 expressed to be brought under Rules 3, 8, and 17 of the Rules of this court, 2016 the Appellant is seeking stay of execution of the judgment and decree in Nakuru CMC Employment Cause No. 254 of 2019 pending the hearing and determination of Appeal No. 11 of 2021.
2. The said judgment was delivered on 12<sup>th</sup> November, 2021 (Y.I. Khatambi PM) and the Memorandum of appeal was filed on 24<sup>th</sup> November, 2021.
3. The said application is supported by the affidavit of **TOM NDALE** sworn on 23<sup>rd</sup> November, 2021 and a copy of the judgment of the trial lower court is annexed.
4. The Respondent, **FRANCIS OWUOR MASINDE**, filed a replying affidavit sworn on 30<sup>th</sup> November, 2021 in opposition to the application.
5. Counsel for the Appellant filed written submissions on 11<sup>th</sup> February, 2022 dated 19<sup>th</sup> January, 2022 but Counsel for the Respondent expressed that he did not wish to file written submissions and relied on the averments in the replying affidavit in opposition to the application.
6. The application was filed under certificate of urgency and an interim order for stay of execution was granted on 14<sup>th</sup> February, 2022 pending the hearing and determination of the application.

**II. ISSUES FOR DETERMINATION**

7. The issues for determination in this application are:-

(i) Should a stay of execution be granted as prayed by the Appellant pending the hearing and determination of the appeal and on what terms?

(ii) Costs.

8. This court has carefully gone through the said motion together with the supporting affidavit and the written submissions by Counsel for the Appellant. The Appellant argues that it has filed the appeal and this application without delay, and that it is apprehensive that if stay is not granted the appeal shall be rendered nugatory.

9. The Appellant alleges that the appeal raises triable issues and that if execution is effected the Respondent who is alleged to have no known sources of income may not be able to refund the decretal sum plus costs in case the appeal succeeds.

10. The Appellant did not undertake to provide security in the supporting affidavit but in the written submissions by its Counsel the Appellant states that it is willing to provide whatever security that it may be required to provide.

11. Beyond the letter dated 18<sup>th</sup> November, 2021 by Counsel for the Respondent annexed to the supporting affidavit of the Appellant, there is no evidence as to whether costs have been assessed or whether a decree and certificate of costs has been issued.

12. As stated above, the application is opposed by the Respondent. The Respondent argues that the application is premature as no decree has been issued. He also deposes that the Appellant has not undertaken to provide for security or offered such security in its affidavit.

13. However, the Respondent in paragraph 9 of the replying affidavit prays that if the application is allowed the Appellant be ordered to provide security by way of payment of part of the decretal sum to the Respondent or by having the entire decretal sum deposited in a joint interest earning account in the names of lawyers for both parties.

### **III. LAW AND PRINCIPLES APPLICABLE**

14. **Order 42 Rule 6 of the Civil Procedure Rules** provides as follows;

*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 an application and to make such order thereon as may to it seem just and any person aggrieved by an order to stay made by the court 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.*

15. The above quoted provision points to the direction that this court has fettered discretionary judicial powers in granting or refusing an application for stay of execution. Fettered because in exercising that discretion this court is guided by the provisions of the law, including **order 42 rule (6)** above, **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (Cap 21), Section 3(1) and (2) of the Employment and Labour Relations Court Act No 20 of 2011**, and most importantly the overriding duty to do and dispense justice.

16. The conditions set under **Order 42 Rule 6** on which this court may grant a stay of execution are self-explanatory. Without splitting hairs, the said conditions are that:

(i) the court has to be satisfied that substantial loss may be occasioned to the Applicant if the stay order is not granted.

(ii) the Applicant has approached the court without unreasonable delay.

(iii) the court is satisfied that such security as the court orders, for the due performance of the decree, has been supplied by the Applicant.

17. The filing or pendency of an appeal is clearly not tantamount to an order for stay of execution and an application has to be made to the court appealed from or the court appealed to and an order obtained to stay the execution (see **Order 42 Rule 6(1) of the Civil Procedure Rules**). Further, this discretion in granting or refusing stay of execution is distinguishable from that of the Court of Appeal under Rule 5(b) of that court's rules which is unfettered.

18. The path of stay of execution is a highly travelled path- way. Along the way many precedents have been set especially on the interpretation of the law applicable and the principles.

19. Let me now turn to the law as set out above and the circumstances of this cause. In situations where a court has judicial discretion in granting or refusing to grant an order prayed for, each cause has its unique characteristics and circumstances. Each condition shall be examined and applied to this cause and the application before the court with a view of answering the issues identified earlier on, that is, whether the application for stay of execution herein should be granted or denied.

20. This court has gone through the Memorandum of appeal which raises about 16 issues for determination in the appeal. Without going into the merits of the appeal, this court takes the view that *prima facie* the appeal raises triable and arguable issues.

21. There is therefore a danger that if the stay is not granted on whatever conditions, the appeal may be rendered nugatory.

22. As noted elsewhere in this judgment, the judgment of the lower court was delivered on 12<sup>th</sup> November, 2021 and this appeal was filed on 24<sup>th</sup> November, 2021 and the application for stay filed on the same date.

23. The Appellant moved without delay in filing the appeal and the application for stay of execution.

24. Through the written submissions by his counsel the Appellant has undertaken to offer security or comply with whatever conditions if the stay is granted.

25. Considering the entire circumstances of this application this court grants stay of execution of the decree on the following conditions.

(a) The Appellant shall pay a sum of Kshs.250,000/= to the Respondent within 30 days of this ruling.

(b) The balance of the decretal sum shall be deposited in court within 30 days of this ruling.

(c) The Respondent shall cause the decree and a certificate of costs to be drawn and issued in the lower court to establish the decretal sum due and payable and hence establish the balance amount to be deposited in court as per (b) above.

(d) The stay granted herein shall automatically lapse if the Appellant fails to comply with (a) and (b) above.

(e) The costs of this application shall abide by the outcome of the appeal.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 26<sup>TH</sup> DAY OF APRIL, 2022.**

.....

**DAVID NDERITU**

**JUDGE**