



REPUBLIC OF KENYA



Moi Teaching and Referral Hospital Board v Jelagat & another (Appeal E013 of 2021) [2022] KEELRC 1750 (KLR) (20 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 1750 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL E013 OF 2021
NJ ABUODHA, J
MAY 20, 2022**

BETWEEN

MOI TEACHING AND REFERRAL HOSPITAL BOARD CLAIMANT

AND

FIBIAN JELAGAT 1ST RESPONDENT

DORIS CHEPKORIR 2ND RESPONDENT

RULING

1. By a motion dated October 8, 2021 the applicant sought orders among others that:-
 - a. That there be a stay of execution of the Judgment against the applicant pending the hearing and determination of this application.
 - b. That this honourable court be pleased to issue a stay of execution of judgment of the Chief Magistrate's Court in E&LRC No 53 of 2020 pending the hearing and determination of the appeal.
2. The application was supported by the affidavit of Dr Wilson Aruasa who deponed in the main that:
 - a. That I am the Chief Executive Officer of the applicant hence duly competent and authorized to swear this affidavit.
 - b. That the applicant is a National Referral Hospital domiciled in Eldoret town within Uasin Gishu County and serves residents of 23 Counties in Kenya, parts of Eastern Uganda, South Sudan, Tanzania and the Democratic Republic of Congo.
 - c. That the applicant is funded by the Government of Kenya and through its internally generated revenue thus capable of providing security as may be ordered by court.



- d. That the applicant is dissatisfied with the judgment delivered by the Chief Magistrate Court in E&LRC No 53 of 2020 in which the court ordered the applicant to compensate the 1st and 2nd respondents as follows:
- 1st respondent Six months' compensation for unfair termination being Ksh 77,644 x 6 = 465,864.00 Withheld salary from October 2019 to March 2020 being: Ksh 77,644 x 6 = 465,864.00
- Total = Ksh 931,728.00
- 2nd respondent Six month's compensation for unfair termination being:
- Ksh 75,074 x 6 = 450,444. Withheld salary from October 2019 to March 2020 being: Ksh 75,044 x 6 = 450,444.
- Total =Ksh 900,888.00
- e. That the said judgment was delivered in the absence of both parties on September 8, 2021 and the applicant was therefore unable to apply for orders of stay of execution of the judgment before the trial court magistrate.
- f. That a copy of the said judgment was sent to the applicant's advocate via email on September 9, 2021.
- g. That the applicant is desirous of appealing the judgment of the trial court and has subsequently filed a notice of appeal and applied for typed proceedings of the trial court.
- h. That being a service provider in the health sector, the applicant is apprehensive that the 1st and 2nd respondents will proceed to execute the judgment against it and attach its assets therefore crippling its operations.
- i. That in addition to the above, the applicant shall be consigned to pay a substantial amount of Ksh 931,728.00 and Ksh 900,888.00 to the 1st and 2nd respondents respectively to forestall attachment of its assets.
- j. That the 1st and 2nd respondents were terminated from the applicant hospital employment and have no means of repaying the judgment sum should the applicant's appeal succeed.
- k. That on the other hand the applicant hospital is a going concern capable of depositing any security as may be required by court. That the applicant hospital shall suffer substantial loss of assets and disruption of services in the event the order of stay of execution of judgment of trial court is not granted.
- l. That this application has been made in good faith and without unreasonable delay.
3. The respondents filed in replying affidavit through one Fibian Jelagat Yego who deponed *inter alia* that:
- a. That I am a female adult of sound mind and the 1st respondent herein thus competent to swear this affidavit.
- b. That I have authority and consent from the 2nd respondent to swear this affidavit on my behalf and on her behalf.
- c. That this application before this honourable court lacks merit, frivolous, a gross abuse of the court process and aimed at delaying the enjoyment of the fruits of our judgment.



- d. That it is true that the judgment in this matter was delivered in absence of the parties on September 8, 2021 but the court ordered for stay of proceedings for 30 days. The said stay has since lapsed on the October 8, 2021.
 - e. That the memorandum of appeal alleged has not been attached to this application to help the court ascertain whether the appeal raises triable issues and/or has a high chance of success as claimed hence there is no appeal upon which this court can order a stay.
 - f. That the applicant has not demonstrated to this honourable court how it shall suffer substantial loss of assets and disruption of services in the event the order of stay of execution is not granted. The applicant has not indicated the substantial loss it will incur if the respondents proceed to execute.
 - g. That the applicant has not demonstrated that it has a financial muscle to pay the decretal sum but it is hell bent on frustrating us further it has chosen to bring this appeal despite clear indication that it has no chances on appeal.
 - h. That without prejudice to the forgoing, in the event that the court allows the application, the appellant be ordered to deposit security amounting to the whole decretal sum to the joint interest earning account of the applicant's and respondent's advocates.
4. In his submissions in support of the application, Mr Owino for the applicant submitted that the issuance of an order for stay of execution is discretionary. However, the discretion should be exercised judiciously. In support, counsel relied on the case of *Butt v Rent Restriction Tribunal*. Counsel further stated that what was at stake was a substantial amount and that there was no evidence that if the applicant's assets were attached on the amount paid and if the intended appeal was successful, the respondents would be in a position to refund the amount.
 5. Mr Owino further submitted that the applicable law in the matter was Order 42 rule 6 of the *Civil procedure Rules*. According to counsel, the application was made within the shortest time possible and that the applicant would suffer substantial loss if the respondent proceeded to attach and subsequently sell the applicants assets. In this regard, counsel relied on the case of *Kenya Shell v Kibiru & Another* [1986]KLR 410.
 6. Counsel further submitted that the respondents had not placed any evidence before the court indicating they would be in a position to reimburse the applicant should it emerge victorious on appeal. The respondent's employment were terminated by the applicant and they had no means whatsoever of satisfying the judgment of the applicant was to emerge victorious on appeal. On this score counsel relied on the case of *NIC Bank v Aquines Francis Wasike & Another* [2006] eKLR.
 7. The respondent had not controverted the applicant's assertions concerning their financial means but merely reiterated their entitlement to the decretal sum.
 8. On the issue of security, counsel submitted that the applicant had indicated its willingness to deposit security for the performance of the decree and thereby safeguard the respondents' interest pending appeal.
 9. Mr Kirui for the respondents on his part submitted that the applicant had not demonstrated to the court how it shall suffer substantial loss of assets and disruption of services in the event that the order of stay of execution was not granted. He further urged the court that in the event that the application is allowed, the appellant be ordered to deposit the security amounting to the whole decretal sum in a joint interest earning account. Counsel relied on the case of *Equity Bank v Taifa Adams Company Ltd* [2006]eKLR and *Halal & Another v Thomson & Turpin LTD* [1993] KLR 365.



10. Mr Kirui further submitted that the case at hand was a money claim thus refundable in case of the success of the appeal. The respondents were ladies of means and successful business persons with farming supplements doing fairly well and therefore the applicants contention that they will be unable to refund was baseless.
11. The governing statutory provision concerning stay of execution pending appeal is contained under Order 42 rule (6)(2) which provides.

“No order for stay of execution shall be made unless the court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made within unreasonable delay and 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.”
12. This is a money decree involving approximately Ksh 1.8 million. It was issued against the applicant in favour of the respondents who were its former employees who were terminated from employment but successfully contested the termination in the lower court. The applicant was dissatisfied with the judgment of the lower court and intends to appeal against the judgment of the lower court to this court.
13. The applicant has contended that it risks suffering substantial loss if the decretal sum was paid to the respondents since they were its former employees and do not have reliable source of income to repay the decretal sum if the appeal is successful.
14. In the case of *National Credit Bank v Aquinas Francis Wasike & Another* the Court of Appeal held that while it was the legal duty on the applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such applicant to know in detail that resources owned by the respondent or lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.
15. The applicant has expressed fear that the decretal sum was substantial and that the respondents being former employees who had been terminated, do not have reliable income to repay the decretal sum in the event the appeal succeeds. This in view of the court is a reasonable fear and it became the responsibility of the respondents to demonstrate what resources they have to be able to refund the decretal sum in the event the appellant was successful.
16. Counsel for the respondents submitted that the respondents were ladies of means and successful business persons with farming supplements doing fairly well. However, this was not demonstrated by affidavit evidence or otherwise, the successful business the respondents were running.
17. The applicant indicated its willingness to deposit security for the performance of the decree however the court takes judicial notice that the applicant is a public Hospital being run mostly on public funds. Besides it is a going concern and not about to run into any financial headwinds. In the circumstances there is no need to order for the deposit for security for the performance of the decree. The applicant is capable of settling the decretal sum in the event the appeal is unsuccessful.
18. In conclusion the court grants unconditional stay of execution of the judgment of Chief Magistrate’s Court E&LRC No 53 of 2020 pending the hearing and determination of the appeal.
19. Costs to abide the outcome of the appeal herein.
20. It is so ordered.



DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF MAY, 2022
ABUODHA NELSON JORUM
JUDGE ELRC

