



**Njoroge v Flamingo Horticulture (K) Ltd (Cause 009 of 2019)
[2022] KEELRC 95 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 95 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 009 OF 2019
DN NDERITU, J
JUNE 16, 2022**

BETWEEN

MILLICENT NYAMBURA NJOROGE RESPONDENT

AND

FLAMINGO HORTICULTURE (K) LTD APPLICANT

RULING

INTRODUCTION

1. In a Notice of motion dated 3rd August, 2021, filed under certificate of urgency the Respondent/ Applicant prays as follows:-
 - (1) Spent
 - (2) Spent
 - (3) That pending the hearing and determination of the Respondent's/Applicant's intended appeal, the Honourable court be pleased to stay and/or suspend the execution of the judgment of the court dated and delivered on 18th March, 2021 and all consequential orders and proclamation, attachment, and execution processes.
 - (4) That the Honourable Court be pleased to grant such other orders or further orders as it shall deem fit and just to grant.
 - (5) That costs of this application be provided for.
2. The application is expressed to be brought under Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Section 2 and 13 of the *Employment and Labour Relations Court Act No 20 of 2011*, and Rule 32(2) of the *Employment and Labour Relations (Procedures) Rules, 2016*, and all other enabling provisions of law.



3. The application is based on the grounds on the face of it and the affidavit of Audrey Namwakura, legal officer of the Respondent/Applicant, with several annexures thereto.
4. The Petitioner responded to the application by way of a replying affidavit sworn by herself on 3rd March, 2022.
5. By consent, Counsel for both parties addressed the court by way of written submissions. Counsel filed their respective submissions on 29th March, 2022.
6. As distilled from the affidavit in support of the application, the replying affidavit, and the written submissions by Counsel for both parties, there is only one issue for determination in this application – should this court grant stay of execution of the judgment dated and delivered on 18th March, 2021 (Wasilwa J) pending the hearing and determination of Nakuru Civil Appeal No. E072 of 2021 and on what conditions?
7. On 18th March, 2021 the court (Wasilwa J) awarded the Petitioner/Respondent a sum of Kshs.1,132,000.00 with costs.
8. Dissatisfied with the said award the Respondent, the applicant herein, filed the above mentioned appeal.
9. On 4th August, 2021 interim orders for stay of execution were issued (Mbaru J) and the same were extended on 14th March, 2022 pending the hearing and determination of the application.
10. Order 42 Rule 6 of the Civil Procedure Rules reads as follows:-
 - “(1) 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 for 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 application and to make such order thereon as may to it seem just, any person aggrieved by an order for stay made by the court from whose decision the appeal is preferred may appeal to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under sub-rule
 - (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;
 - (b) such security as the court orders for the due performance of such decree or order as may be ultimately be binding on him has been given by the applicant.”
11. In paragraphs 9, 10, and 11 of the supporting affidavit the Applicant has expressed its apprehension that if the execution is allowed to proceed and the decretal sum plus costs paid to the Petitioner, it



shall suffer irreparably as it may not be able to recover the same from the Petitioner in case the appeal succeeds.

12. The Applicant has portrayed the Claimant as a person of no means. This particular averment has not been responded to by the Petitioner in her replying affidavit.
13. In paragraphs 12 and 13 of the supporting affidavit, the Applicant has undertaken to provide security and or deposit the decretal sum and or abide with such conditions as this court may set in granting stay of execution.
14. In paragraphs 5, 6, 7 and, 8 of the replying affidavit the Petitioner is in agreement that if the stay of execution is granted the Applicant should deposit the decretal sum in a joint escrow account as security in due performance of the decree.
15. This court is of the opinion that the parties and their respective Counsel are more or less in agreement that stay may be granted so long as the Respondent/Applicant provides security or deposits the decretal sum in a joint escrow account or such other condition as this court may impose.
16. The judgment was delivered on 18th March, 2021 and the application for stay of execution was filed on 3rd August, 2021. Although the delay of three (3) months has not been explained this court is of the opinion that the same is not inordinate as the decree was issued on 2nd August, 2021 and a certificate of costs on 23rd July, 2021.
17. Further, the Applicant's Counsel did apply for copies of typed proceedings and the judgment as early as 19th March, 2021 which were not availed until 18th August, 2021 as per the certificate of delay on record.
18. In his written submissions, Counsel for the Applicant has alleged that the Petitioner has filed a cross-appeal and this has not been specifically denied by the Petitioner or her Counsel in the written submissions or indeed in the replying affidavit.
19. This court has gone through the pleadings filed by the parties and the submissions by their respective Counsel along with the decided cases cited in support of the respective positions taken by either party.
20. While stay of execution orders are discretionary, this court is guided by the provisions of order 42 Rule 6 as set out above and the primary objective in dispensing justice in all causes in accordance with Sections 1A, 1B and 3A of the *Civil Procedure Act* and Sections 3 and 13 of the *Employment and Labour Relations Court Act*, amongst other laws.
21. In the interest of justice, considering the entire circumstances of this cause and the application, this court allows stay of execution on the condition that the Respondent/Applicant shall avail the entire decretal sum plus costs and have the same deposited in a joint interest earning account in a reputable bank within 30 days of this ruling. The said account shall be in the joint names of the law firms representing the parties.
22. Failure to comply with the condition set above within 30 days shall automatically lapse the stay orders.
23. There is no order as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF JUNE 2022.

.....

DAVID NDERITU



JUDGE

