



**Bollore Transport & Logistics Ltd v Kidaha (Appeal E060 of 2022)
[2022] KEELRC 1613 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1613 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E060 OF 2022
NZIOKI WA MAKAU, J
JULY 28, 2022**

BETWEEN
BOLLORE TRANSPORT & LOGISTICS LTD APPELLANT
AND
WYCLIFF ISASIDA KIDAHA RESPONDENT

RULING

1. The Motion before me is an application for stay of execution pending appeal and seeks the following orders:-
 1. Spent.
 2. That there be an interim order of Stay of Execution of the Judgment and Decree of the Hon. A. N. Makau delivered on 28th April 2022 in the Chief Magistrates Court at Milimani, Chief Magistrates Employment and Labour Case No. 466 of 2019 - Wycliff Isasida Kidaha vs Bollore Transport & Logistics Limited pending the hearing and determination of this Application inter-partes.
 3. That there be an Order of Stay of Execution of the Judgment and Decree of the Hon. A. N. Makau delivered on 28th April 2022 in the Chief Magistrates Court at Milimani, Chief Magistrates Employment and Labour Case No. 466 of 2019 - Wycliff Isasida Kidaha vs Bollore Transport & Logistics Limited pending the hearing and determination of the Appeal.
 4. That the costs of this Application be costs in cause.
2. The Application is premised on grounds on the face of the Motion and on the annexed affidavit of Maurice Lugadiru. In the main the Appellant/Applicant states that the Learned Magistrate erred in her findings on fact and the law. The Appellant/Applicant thus urges a stay as it pursues the appeal before this Court, this being a money decree, it is the position of the Applicant that the Respondent shall not



be able to refund the amount should the appeal succeed, and taking into account the time it may take to have the appeal heard and determined, if execution proceeds, the appeal will be rendered nugatory as the same will have been overtaken by events and reduced to a mere academic exercise. He depones that he is aware that judgment was delivered on 28th April 2022 in the Chief Magistrates Court at Milimani in favour of the Respondent as against the Appellant for a sum of Kshs 177,517.04/- plus costs of the suit. And that being aggrieved by the whole of the decision of the Honourable Court as contained in the Judgment, the Applicant has lodged an Appeal against it through a Memorandum of Appeal dated 19th May 2022 and filed in court on the same date. He depones that he has been advised by the Advocates on record for the Appellant that there was no stay of execution granted to the parties upon delivery of the Judgment as the Judgment initially scheduled for delivery on 1st April 2022 but not delivered on the said date was delivered on 28th April 2022 without notice and in the absence of both parties hence there was no stay of execution granted. He states that the absence of Stay of Execution orders against the Judgment means that the Respondent is at liberty to proceed with execution during the pendency of the appeal, and in the premises, there is possibility of execution being levied at any time. He asserts that the appeal filed by the Applicant has strong and arguable grounds with a likelihood of succeeding, and the grounds raised include the following:

- i. The Learned Trial Magistrate arrived at a decision contrary to the evidence presented before her by both parties.
 - ii. The Learned trial Magistrate misinterpreted the provisions of law as regards issuance of notice where the employment is terminated following a disciplinary process.
3. He depones that this being a money decree, it is the position of the Applicant that the Respondent shall not be able to refund the amount should the appeal succeed, and taking into account the time it may take to have the appeal heard and determined, if execution proceeds, the appeal will be rendered nugatory as the same will have been overtaken by events and reduced to a mere academic exercise. He depones that the Applicant consequently stands to suffer substantially and that there is therefore need to preserve the subject matter of the appeal by issuing stay of execution orders, to be in force pending hearing and determination of the Appeal already filed. He depones that in fulfilment of security as envisaged under Order 42 Rule 7(1) of the *Civil Procedure Rules*, 2010, the Applicant is willing and abide by such conditions as to security as this court may issue whilst granting stay of execution and further that the Applicant has filed this Application without undue delay as the Applicant has already applied for certified copies of the proceedings and Judgment to compile record of appeal. He depones that it is in the interest of justice and fairness that this Application should be allowed, and the Orders sought herein be granted as prayed.
4. The Respondent in response filed his Replying Affidavit and asserts that the application is unmeritorious, frivolous, an abuse of the court's valuable time, a means to delay justice, an after-thought, a ploy to deny him the fruits of judgment, and should thus be dismissed with costs. He deponed that he has been advised by his advocates on record which advice he believes to be true that the instant application is bad in law, a non-starter, incompetent and devoid of merit for having been brought under the wrong provisions of the law. He is further advised by his Advocates that the Appellant has not met the mandatory conditions envisaged under Order 42 Rule 6(2) of the Civil Procedure Rules 2010 and more particularly failure to provide security for the due performance of the decree. He asserts that he has also been advised that the power to grant or refuse an application of stay pending appeal is discretionary and not given as a matter of right and therefore the Applicant is misguided in faulting the trial court for failure to issue stay orders at the instance. He depones that there is no eminent danger of any execution as can clearly be seen from the record, judgment having been delivered on 28th April 2022, a letter calling for settlement having been done on the 12th May



2022 no execution proceedings taken out to date. He states that he was also aware that the judgment in the lower court was scheduled for 1st April 2022 but the same was not ready and the trial magistrate rescheduled the same to 29th April 2022 but that date was declared as a National Holiday for the State Funeral for the Former President Mwai Kibaki hence the judgment was delivered on the 28th April 2022 in the absence of both parties. He deponed that the application herein is therefore not merited and should be dismissed with costs.

5. The matter was disposed of by way of written submissions and in her submissions filed before the Court, the Appellant/Applicant submits that the following issues fall for determination.

- a) Whether the Court should grant stay of execution.
- b) Security as condition for grant of Stay of Execution pending the Appeal.

The Appellant/Applicant submits that the fact that this Court has got jurisdiction to grant an order for stay of execution pending appeal is not in dispute. It submits that the Hon. Chief Magistrates Court (Hon. A. N. Makau) vide the Judgment delivered on the 28th April 2022 found that the termination of the Claimant was unlawful, and therefore awarded the Claimant compensation totalling the sum of Kshs. 225,495.02 plus costs and interests. The Applicant asserts being dissatisfied by the decision exercised its lawful right being to lodge an appeal and the Appeal has detailed a total of six (6) grounds which the Applicant is convinced are not only arguable but also have very high chances of success. The Appellant submits that being the position, the question therefore is whether it is necessary to protect the substratum of the matter pending the exercise of the right of appeal. The Appellant has averred that this is a money decree in which case execution may levy to recover the same, and the Applicant pleads that the Respondent shall not be able to refund the amounts due should the appeal succeed. It is submitted that for this reason the Applicant lodged this application for stay of execution. The Appellant cites the case of *Amal Hauliers Limited v Abdulnasir Abubakar Hassan* [2017] eKLR, where Weldon Korir J. quoted with approval the decision of the Court of Appeal in *Butt v Rent Restriction Tribunal* (1972) KLR 417 where the Court of Appeal states thus;

1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

[bolding/underlining for emphasis]

6. The Appellant submits further that this Court in exercising its discretion to consider the application for stay in such a manner as not to prevent an appeal. One way in which an appeal can be prevented,



particularly in a case involving a money decree is by declining to grant a stay of execution in this matter, in which case execution shall proceed and the appeal shall be rendered nugatory. The Appellant submits that having pleaded the fact that the Respondent shall be unable to refund the monies if the Appeal were to succeed, the duty to demonstrate the ability to refund the monies should the appeal succeed lay with the Respondent. The Appellant submits that the Respondent has however not discharged the said burden as the Respondent has neither refuted the said averments or demonstrated any means to satisfy the decree. In the case of *Benisa Limited v John Ngotho Maina* [2022] eKLR, the Court held as follows;

As the Court of Appeal observed in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another* (supra)

“... while the legal duty is 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 an applicant to know in detail the resources owned by a 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 then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

7. The Appellant submits that sentiments were expressed in *Directline Assurance Company Limited v Michael Njima Muchiri & Another* [2020] eKLR. The Appellant submits that in the instant application, the Respondent has not discharged this evidential burden. The Appellant submits that the grounds of opposition are deficient in details since whilst the Respondent pleads at paragraph 7 of the reply that there is no eminent danger or execution, the same Respondent confirms that he has already issued demand for payment and taking into account the time taken to determine an appeal, there is nothing that would stop the Respondent from initiating the execution process pending the hearing and determination of the Appeal. On this basis, it is the Applicant’s plea that this court does grant stay of execution. On the issue of security, the Appellant submits that it is the Court that determines what kind of security to be given as a condition for granting the stay and that having offered to provide security it has complied with the legal requirement for stay pending appeal. It submits that since this is an appeal against the monetary award to the Respondent, the Applicant is ready and willing to deposit the said amount either in court or to be held in an interest earning account the joint names of the Parties’ advocates pending the determination of the Appeal.
8. The Respondent on his part in the written submissions he filed before the Court asserts that the application before the Court is for stay of execution pending appeal. The Respondent submits that the application is however brought under Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016. It is submitted that Rule 17 of the ELRC Rules provides for Interlocutory applications and temporary injunctions. It does not provide for applications for stay of execution pending appeal. The Respondent submits that the power to grant or refuse to stay of execution pending appeal is discretionary in nature and the court has to balance the interests of both parties as was held by Makau J. in the case of *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & Another (Garnishee)* [2019] eKLR.

The discretionary relief of stay of execution pending appeal is designated for the benefit of both parties so that none of the parties would be worse off by virtue of an order of the Court, that none is disadvantaged but to ensure substantive justice is administered fairly and justly to all parties. This arises out of the Court’s realisation that both parties have rights which the Court is bound by law to safeguard; the respondent’s right to appeal which includes the



prospect that the appeal will not be rendered nugatory or on successful appeal if the decretal amount has been paid; the Respondent would be able to repay and on the other hand the decree which includes the Respondent's enjoyment of the fruits of the judgement which includes all full benefits under the decree.

9. Further, in the case of *Machira T/A Machira & Co. Advocates v East African Standard (No. 2)* [2002] 2 KLR 63, the Kuloba J. held as follows:

“To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court. ”

10. The Respondent submits that the Applicant herein has terribly failed to satisfy the second limb of the mandatory conditions envisaged under Order 42(6)(2), the very substantial loss they fear to incur in the event their intended appeal succeeds. The Respondent submits the Applicant has the burden to prove that by refusal to grant stay of execution it stands to suffer substantial loss and that the Applicant has not availed any such evidence, as the Applicant has not discharged their duty to prove the nature of loss that they are likely to suffer should an order of stay be denied.
11. The Appellant has moved the Court and has submitted eruditely on aspects relating to factors on the grant of stay pending appeal as well as the surmise that the Respondent would be unable to refund the decretal sum should the appeal succeed. The Respondent though having indicated he is not yet in the throes of execution negates this by demonstrating that he has initiated the process by seeking payment. In my considered view the best course would be to grant the stay to prevent the appeal being rendered nugatory. Such stay is granted on condition that the entire decretal sum be deposited in an interest earning account within the next 14 days. Such account shall be in the names of advocates for the parties.
12. As a side note, the Respondent labours under the misapprehension that the Appellant did not have the right to hinge her application on the Civil Procedure Rules as regards stay pending appeal. Whereas the nomenclature in the Employment and Labour Relations Court (Procedure) Rules 2016 is not explicit as regards stay pending appeal, the intent is there. It would be unconscionable for a Court to strike out an application for stay pending appeal since the words stay pending appeal do not appear in our Rules. That would not be just. It would be sacrificing justice at the altar of technicality. As indicated in the preceding paragraph the stay is granted on the conditions spelt out above. The costs of the motion will abide the outcome in the Appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022

NZIOKI WA MAKAU

JUDGE

