



**Creamries Limited v Aminga (Employment and Labour Relations Court Appeal E001 & E002 of 2022 (Consolidated)) [2022] KEELRC 1154 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1154 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
EMPLOYMENT AND LABOUR RELATIONS COURT  
APPEAL E001 & E002 OF 2022 (CONSOLIDATED)**

**ON MAKAU, J**

**JULY 14, 2022**

**BETWEEN**

**CREAMRIES LIMITED ..... APPELLANT**

**AND**

**RICHARD ONYANGA AMINGA ..... RESPONDENT**

**RULING**

1. This ruling consolidates two Notice of Motions dated 12<sup>th</sup> April 2022 brought by the appellant under Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 42 Rule 6,7 and 8 of and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law. The applications seeks orders that: -
  - a. Pending the hearing and determination of the Application, there be a stay of execution of the decree issued in Sotik CMCC ELRC No. 2 of 20218 and No.1 of 2018.
  - b. Pending the hearing and determination of the Appeal herein, there be a stay of execution of the decree issued in Sotik CMCC ELRC No. 2 of 20218 and No.1 of 2018.
  - c. Costs of the application be provided for.
2. This Applications are premised on the grounds on the body of the motions and supported by the averments in the affidavit of appellant's Legal Officer Ms. Nyathira Muthuma sworn on 12<sup>th</sup> April 2022. In brief the affiant deposes that the appellant was dissatisfied with the judgment of the trial court delivered on 8<sup>th</sup> March 2022 and filed an appeal before this Court.
3. She further deposes that after lodging the appeal, the appellant filed before the trial court, application dated 4<sup>th</sup> April 2022 seeking stay pending appeal but the trial court gave a stay on condition that half of the decretal sum be paid to the respondents and the other half be deposited in court pending the appeal.



4. The appellant was dissatisfied with the terms of the said stay order and brought the instant motions on ground that it stands to suffer substantial loss should the decretal sum be paid to the respondents as directed by the trial court in the said order dated 6<sup>th</sup> April 2022. Instead, the appellant has offered to deposit the whole decretal sum in court pending the outcome of the appeal. She also contends that the application was made promptly in the good faith and in the interest of justice.
5. When the application came up for hearing under certificate of urgency, I ordered the appellant to deposit the entire decretal sum in Court within ten days and the appellant complied. Nevertheless, the respondents have insisted that the application should be heard on merits and they filed replying affidavits sworn on 26<sup>th</sup> April 2022 to oppose the applications.
6. In summary, the respondents aver that the application is brought in bad faith and is otherwise an abuse of the process of the court since the appeal herein has no chances of success but only a ploy to prevent the respondents from accessing the fruit of their successful litigation.
7. They further aver that the application does not meet the essential requirement for granting stay pending appeal as set out under Order 42 Rule 6 of the *Civil Procedure Rules* especially prove that substantial loss will be suffered if stay is denied. They content that they are able to refund the decretal sum if the appeal succeeds after execution and argued that the applicant has not discharged its burden of proving that they have no capacity to repay the money should the appeal succeed.
8. They averred that the matter herein being a monetary decree, the applicant must show that the decretal sum will not be recovered if paid out, or that the sum involved is so huge vis-à-vis the status of the applicant or business that paying out will ruin the applicant's business or the very existence. In their view, the applicant has not discharged the said burden of proof.
9. The respondents have urged the court, that should stay be ordered, the whole decretal sum be deposited as security in court or be deposited in an interest earning bank account to be held jointly between the counsel of both parties herein.
10. The applications were canvassed by written submissions which basically reiterates the facts summarized above and as such I need not repeat the same.

#### **Issues for determination and analysis**

11. The main issue for determination is whether the applicant has met the legal threshold for granting stay pending appeal. Order 42 Rule 6(1) of the *Civil Procedure Rules* states that an appeal shall not operate as stay of execution but that the Court can grant stay for sufficient cause being shown by the aggrieved party. It further provides that whether stay has been granted or not the appellate court still has the power to consider a similar application for stay and pronounce itself on the same.
12. Subsection (2) then sets out the legal threshold for granting stay of execution as follows: -
  - “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; 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.”



13. The foregoing provision is couched in mandatory terms and it basically means that granting of an order of stay pending appeal is a discretionary power that must be exercised judiciously upon the said threshold. The court has to consider whether it will be in the interests of justice to grant the same. The underlying interest ought to be that an appeal should not be rendered nugatory. In my view, an appeal becomes nugatory if the successful appellant is unable to recover all the decretal sum paid or does so with much difficulties. This is what the above provision refers to as substantial loss to the applicant.
14. The appellant has expressed fear that if the decretal sum is paid, then he will not recover the same should its appeal succeed. Its averment that the respondents lack financial ability to repay the decretal sum should the appeal succeeds is unknown, has not been rebutted. No evidence of their ability to refund the decretal sum has been tendered by them
15. Courts have discussed the obligations of both parties to an application for stay pending appeal. In the case of *National Industrial Credit Bank Limited –V- Aquinas Francis Wasike and Another* [2006] e KLR, the Court of Appeal held that:

“This court has said before and it would bear repeating that while the legal duty is on an 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 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.”
16. Again in *ABN Amro Bank N v Lemond Foods Limited* Civil Application No.15 of 2002 the Court Appeal held that :

“... the legal burden still remains on the applicant, but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has – such as land, cash in bank and so on.”
17. As observed above, the respondents have not tendered any evidence to prove their ability to repay the decretal sum should the appeal succeed after being paid the said sum. For that reason, I agree with the applicant that it stands to suffer substantial loss as the respondents are unlikely to refund the decretal sum should the appeal succeed after the same is paid to them.
18. The application was made on April 12, 2022 while the judgment was delivered on March 8, 2022. Before the instant application, the applicant had made similar application before the trial court on April 4, 2022 and conditional stay granted on April 6, 2022. Considering all the circumstances and facts of the case, I am of the opinion that the application herein was made without undue delay.
19. The claimant has asked that if stay of execution is granted, the decretal sum be deposited in court or in an interest earning account to be opened in the joint names of the advocates for the parties herein. Provision of security as a condition for granting stay plays the role of balancing between the right of an appellant to be heard on his appeal without fear of losing the substratum of the appeal on the one hand, and the right of the decree-holder to access his fruit of judgment immediately, should the appeal fail to succeed. The applicant has shown willingness to offer security and has already deposited the whole decretal sum in court in compliance with the interim stay order granted ex-parte on April 13, 2022.



20. In view of finding herein above that the applicant has satisfied the court that substantial loss will be occasioned if the order of stay pending appeal is withheld; that the application has been made without unreasonable delay; and that it is willing to abide by this court's order regarding depositing security, I allow the application dated 12<sup>th</sup> April, 2022 in the following terms: -
- a. Pending the hearing and determination of the Appeal herein, there be a stay of execution of the decree issued in Sotik Cmcc ELRC No. 2 of 2018 and No.1 of 2018.
  - b. As a condition for (a) above, the decretal sum deposited by the appellant in compliance with the interim stay order given on 13<sup>th</sup> April 2022 shall remain in the court as security in favour of the respondents, pending the hearing of the appeal herein or until further orders of the court should the appellant fail to prosecute its appeal with due diligence.
  - c. Costs of the application abide the outcome of the appeal or otherwise agreed between the parties.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 14<sup>TH</sup> DAY OF JULY, 2022.**

**ONESMUS N MAKAU**

**JUDGE**

**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.**

**ONESMUS N. MAKAU**

**JUDGE**

