



**Steel v TNT Express Worldwide (Kenya) Limited (Cause 562  
"B" of 2017) [2022] KEELRC 4116 (KLR) (19 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4116 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 562 "B" OF 2017  
M MBARŪ, J  
SEPTEMBER 19, 2022**

**BETWEEN**

**TIMOTHY GRAEME STEEL ..... CLAIMANT**

**AND**

**TNT EXPRESS WORLDWIDE (KENYA) LIMITED ..... RESPONDENT**

**RULING**

1. The claimant filed application dated March 22, 2022 seeking for orders that he be allowed stay of execution of the judgement herein delivered on February 17, 2022 pending the hearing of his intended appeal.
2. The application is supported by the affidavit of the claimant and on the grounds that on February 17, 2022 the court delivered judgement and found the claimant liable to pay Ksh 2,087,292 a sum awarded to the respondent in the judgement. Aggrieved, the claimant wishes to file an appeal against the judgement and has since filed notice of appeal and hence seeks an order of stay of execution since if the judgement is executed it will render his intended appeal nugatory and he shall suffer irreparable loss and damage. To await costs will significantly enhance the award and the claimant is apprehensive that this will place him at risk and occasion him injustice.
3. In his supporting affidavit and supplementary affidavit, the claimant avers that he has his draft memorandum of appeal to demonstrate that his intended appeal has high chances of success and should be allowed stay so as to prosecute it.
4. That the respondent has admitted to owing the claimant Ksh 744, 388 a return air ticket but the court held in judgement that the claimant should pay the respondent without putting this into account. The court has discretion to grant stay of execution and should apply so as to place both parties on equal footing.



5. The funds deposited by the respondent pending hearing and judgement have since been released and there is no assurance that if the appeal is successful the respondent shall pay the claimant his dues.
6. In reply, the respondent filed the replying affidavit of Jessicah Kaingu the Country Manager and a director of the respondent and who avers that in order for the court to exercise its direction to grant a stay of execution of the decree, the claimant as the applicant must demonstrate that he has an arguable appeal and it shall be rendered nugatory if stay is not allowed.
7. Ms Kaingu avers that the draft memorandum of appeal attached by the claimant to his application does not show an arguable appeal since the court in judgement found that the claimant had not shown a case of constructive dismissal but rather resigned from employment and hence not entitled to damages for alleged unfair termination of employment. the court held that the merger of the respondent with a third party did not in itself mean the claimant's employment had been terminated to justify a claim for severance pay in redundancy and therefore the court correctly held that respondent was entitled to the prorated benefits paid to the claimant following his resignation.
8. The intended appeal shall not be rendered nugatory should an order of stay not be allowed. The appeal is against a money judgement and the respondent is able to refund.
9. On May 18, 2018 the court ordered that the respondent to deposit \$100,000 pending hearing and determination of the claim which order the respondent complied with and which demonstrates the respondent is keen to abide court orders and for these reasons, the application should be dismissed with costs.
10. Both parties filed written submissions which the court has put into account and the single issue for determination is whether stay of execution should issue.
11. The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement.
12. The court in *Samvir Trustee Limited vs Guardian Bank Limited Nairobi* (Milimani) HCCC 795 of 1997 in addressing an application seeking stay of execution pending hearing of an intended appeal held that;

It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention.

13. For the applicant to obtain a stay of execution, he must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss. See *Nicholas Mutuku Mwasuna v Patricia Mueni Kilonzo* [2022] eKLR.



14. The only matter the claimant has asserted is that the respondent has since taken back the \$100,000 security deposit ordered by the court herein on May 18, 2018. Such deposit was to allow thhe court to hear and determine the matter which has since issued through judgement on February 17, 2022. The respondent cannot be faulted in this regard. That the respondent had admitted to owing the claimant a sum of ksh 744,388 for a return ticket and which amount was not put into account in thhe judgement
15. The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, upon reasonable grounds, that the respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the respondent to see if there is any money there.
16. The claimant has attached his draft memorandum of appeal, such right of appeal is secured under section 17 of the Employment and Labour Relations Court Act, 2011 and he should be allowed a fair chance to urge his case. To secure the judgement herein, he shall deposit half the judgement sum as stated to be a decretal sum of Ksh 2, 087,292.
17. As for the prayer for stay pending the intended appeal, it is my view that this is a case where a stay ought to be granted with conditions.
18. Accordingly, the order which commends itself and which I hereby grant is that there will be stay of execution pending the hearing and determination of the intended appeal on condition that the claimant deposits half of the decretal sum into a joint interest earning account to be held by both parties within 30 days from the date of this ruling and in default the prayer for stay shall be deemed to have been dismissed with costs.

Orders accordingly.

**DELIVERED IN COURT AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

..... and .....

