



**Rikai v East African Portland Cement PLC (Cause E563 of 2020)  
[2022] KEELRC 14651 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14651 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E563 OF 2020  
M MBARÚ, J  
OCTOBER 27, 2022**

**BETWEEN**

**SIKOI OLE MOPIA RIKAI ..... CLAIMANT**

**AND**

**EAST AFRICAN PORTLAND CEMENT PLC ..... RESPONDENT**

**RULING**

1. The respondent, East African Portland Cement PLC filed application dated November 9, 2021 seeking for stay of the judgement delivered on October 28, 2021 pending the hearing of the intended appeal.
2. The application is supported by the Affidavit of Joel Kemei and on the grounds that in the judgement of the court the claimant was awarded Ksh788, 409.60 being service pay and in arriving at the calculation it based the same on the gross monthly salary and not the basic pay which the respondent has ordinarily used in calculating service gratuity.
3. The respondent is dissatisfied with the judgement and has filed a notice of appeal and requested certified copies of proceedings and the judgement and the intended appeal shall be rendered nugatory if the judgement herein is not stayed. The subject of the intended appeal has great financial implications on the respondent's operations as this drastically alters the manner in which service gratuity payable is tabulated. The assigned gross monthly salary in the judgment with regard to clause 21 of the CBA poses serious financial implications on the respondent and stay of execution should be allowed.
4. In reply, the claimant filed his replying affidavit and avers that the application by the respondent is in abuse of the court process as there is no demonstration that the intended appeal will be a success. The court in awarding service gratuity applied the applicable CBA between the respondent and the trade union representing the claimant and provisions of clause 21 which are clear and allow service pay 72 days per year service pay. The harm to be suffered by the respondent if the service gratuity is paid to the claimant is not demonstrated.



5. The claimant avers that the court in judgement applied the correct terms of the CBA which allow calculation of service gratuity on a gross monthly salary and the instant application is only meant to delay the claimant from enjoying the fruits of his judgement without any good cause since the respondent has failed to demonstrate good cause, sufficient reasons or offered any security for the due performance of the decree herein in the event the intended appeal is unsuccessful.
6. The respondent is seeking stay of execution of the judgement herein delivered on October 28, 2021 for the reasons that the court should have tabulated the service gratuity due to the claimant based on a basic pay instead of a gross monthly salary and that if such a rate is applied this will lead to economic hardships taking into account the COVID-19 pandemic and the current economic hardship occasioned thereof.
7. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. If the subject is not maintained before the determination of the appeal, then it would render the appeal nugatory or an academic exercise. In the case of *RWW v EKW* [2019] eKLR the court held that;

.. the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

8. In this regard, the respondent intends to file an appeal. Such intention is demonstrate through the notice of appeal. The intent is not actualised through any other manner or draft memoranda or the principles required pursuant to Order 42 rule 6 of the *Civil Procedure Rules* which requires an applicant to demonstrate that;

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 1<sup>st</sup> 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.
- 9.. An applicant must clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd v Kibiru and Another* [1986] KLR set out two different circumstances when substantial loss could arise as follows:-

It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI rule 4 (now Order 42 rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the respondents would be unable to repay the decretal sum plus costs in two courts...

10. Similarly in this case, though he application is filed timeously, the court finds no legitimate reason(s) given by the applicant to justify a stay of execution of the judgement herein and there is no effort



whatsoever to address the principles with regard to what loss shall be suffered if the application is declined or an offer of security for the due performance of the judgement herein where the intended appeal is addressed.

11. Accordingly, application dated November 9, 2021 is hereby found without merit and the same is dismissed with costs to the claimant.

**DELIVERED IN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022.**

**M. MBARŪ JUDGE**

**In the presence of:**

**Court Assistant: Okodoi**

..... **and** .....

