



Bloomingdale Roses Kenya Ltd v Ndiritu (Employment and Labour Relations Appeal E012 of 2022) [2022] KEELRC 14670 (KLR) (15 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 14670 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E012 OF 2022
ON MAKAU, J
DECEMBER 15, 2022**

BETWEEN

BLOOMINGDALE ROSES KENYA LTD APPELLANT

AND

CATHERINE WANGARI NDIRITU RESPONDENT

(Being an appeal from the Judgment and Decree of Honourable Mararo (Principle Magistrate) delivered on 19th July, 2022 in Nanyuki Chief Magistrate's Court in ELRC Cause No. 12 of 2020)

RULING

Introduction

1. This ruling relates to the appellant's notice of motion dated August 5, 2022 brought under section 1A and 3A of the [Civil Procedure Act](#) and order 42 rule 6, order 51 rule 1 and all other enabling provisions of the law. The motion seeks;
 - a. Stay of execution of the judgment delivered on July 19, 2022 in Nanyuki CMCC ELRC No 12 of 2020 pending hearing and determination of this appeal.
 - b. Costs of the application be provided for.
2. The application is based on the grounds set out in the body of the motion and the supporting affidavit sworn on August 5, 2022 by Ms Hellen Nzioka. In brief the applicant's case is that it has an arguable appeal with high chances of success; that the appeal will be rendered nugatory if stay of execution sought is not granted; that it is ready and willing to furnish reasonable security as may be ordered by the court; and that the application has been made without unreasonable delay.
3. The respondent has filed replying affidavit dated August 23, 2022 to oppose the application. In brief the respondent contends that the applicant has not demonstrated substantial loss which will



be suffered if the stay is not granted; that the application lacks merits and it is only meant to delay settlement of the decretal sum; that the appeal will not be rendered nugatory if stay is declined because she is a lady of means; that the nature of security to be furnished has not been demonstrated; and that the appeal has no chances of success. Consequently, she prayed for the application to be dismissed with costs.

Submissions

4. The applicant submitted that substantial loss will be occasioned to it if stay is denied because the respondent's means and assets are unknown. It maintained that if execution is done, there is probability that the respondent will not be able to refund the decretal sum should the appeal succeed. As such it will be exposed to substantial loss and the appeal will become nugatory. Consequently, it was urged that granting stay will preserve the substratum of the appeal since the respondent has not shown how she can repay the decretal sum if the appeal succeeds.
5. For emphasis, reliance was placed on *Patrick Mweu Musimba v Richard N Kalembe Ndile & 3 others* [2013] eKLR and *National Industrial Credit Bank v Aquinas Francis Wasike & another* [2006] eKLR.
6. The applicant further submitted that the application was made timeously and without undue delay because the judgment was rendered on July 19, 2022 and the application was made on August 3, 2022.
7. Finally the applicant submitted that it is ready and willing to furnish security for the due performance of the decree if ordered by the court to do so.
8. The respondent has submitted that the applicant has not demonstrated which ground of appeal is arguable. Furthermore, the applicant has not discharged the burden of proving substantial loss or that the appeal will be rendered nugatory if stay is withheld. It was submitted that the sum involved is only Kshs 320,000 which cannot be termed colossal and not recoverable from her if the appeal succeeds.
9. Finally, it was reiterated that the applicant has not met the legal threshold set by order 42 rule 6(2) because it has failed to prove substantial loss and also failed to tell the court what kind of security it is ready to furnish as a condition for granting stay. She maintained that the decree is monetary and she has the capacity to repay if the appeal succeeds.

Analysis and Determination

10. The issue for determination is whether the applicant has met the threshold for granting stay pending appeal.
11. Order 42 rule 6(2) of the *Civil Procedure Rules* provides that;
 - “(2) No order for stay of execution shall be made under subrule (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.”
12. As regards substantial loss the applicant's case is that the respondent's means and assets are unknown and therefore there is probability that the decretal sum will not be recovered if the appeal succeeds after the execution is done. Such state of affairs will render the appeal nugatory.



13. The respondent has denied that the appeal on record is arguable and contended that she is a woman of means who can refund the decretal sum of Kshs 320,000 if the appeal succeeds.
14. I have considered the rival submissions and the cited precedents. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR 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 the 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.”
15. In this case the appellant has expressed reasonable fear that the decretal sum may not be recovered if the appeal succeeds after the execution because there are no known means or assets for the respondent. In response the respondent only stated that she is a woman of means and therefore capable of refunding the decretal sum of Kshs 320,000 if the appeal succeeds. However she did not mention any assets which she owns or indicated any means which she can use to refund the decretal sum if the appeal succeeds.
16. Guided by the said binding precedent, I find that the respondent has failed to discharge her evidential burden of proving that she has the capacity to repay the decretal sum should the appeal succeed. Consequently, I find that the applicant has satisfied the court that substantial loss may befall it if the stay order sought is withheld.
17. The next factor to consider is whether there was unreasonable delay in making the application for stay. The answer is in the negative because the judgment was rendered on July 19, 2022 and the application was filed on August 10, 2022. The time taken to file the application was less than one month which in the circumstances of the case was not unreasonable.
18. The last factor to consider is whether the applicant is ready and willing to furnish security for the due performance of the decree and the answer is in the affirmative. The applicant has expressly stated so in her application, supporting affidavit and submissions. The respondent’s only worry is that the applicant has not said what kind of security it is willing to furnish.
19. In my view all what matters is that the applicant is ready and willing to furnish security if the court grants conditional stay. Once that readiness is shown, the rest is left to the court to give directions on the nature of the security having regard to the circumstances of each case.

Conclusion

20. Having considered all the aforementioned factors, I am satisfied that the applicant has met the legal threshold for granting stay pending appeal. I therefore allow the application in the following terms;
 - a. Stay of execution is granted as prayed under order 3 in the notice of motion dated August 5, 2022.
 - b. The stay order is granted subject to the applicant depositing Kshs 200,000 in this court within 21 days of this ruling.
 - c. In default of (b) above the stay order shall lapse automatically after the lapse of the said period.
 - d. Costs of the application shall abide the outcome of the appeal.



DATED, SIGNED AND DELIVERED AT NYERI THIS 15TH DAY OF DECEMBER, 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 15th April 2020, this judgment 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

