



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**CIVIL APPEAL NO E001 OF 2020**

**KANAMAI TIMBER & HARDWARE LIMITED....APPLICANT**

**VS**

**BERNARD KATUTI.....RESPONDENT**

**RULING**

1. This ruling ensues from the Appellant's Notice of Motion dated 18<sup>th</sup> November 2020, seeking stay of execution of the judgment delivered on 29<sup>th</sup> May 2020, in *Malindi CMELRC No. 4 of 2019* and subsequent execution proceedings thereto, together with all consequential orders pending hearing and determination of the Applicant's intended appeal.

2. The application is supported by an affidavit sworn by the Applicant's Manager, Peter Munene Njoka and is based on the following grounds:

- a) The Chief Magistrate's Court delivered judgment in respect of *Malindi CMELRC No 4 of 2019* on 29<sup>th</sup> May 2020;
- b) At the delivery of the judgment, the learned Magistrate made a finding that the Respondent had established his case on a balance of probability and entered judgment in favour of the Respondent in the sum of Kshs. 780,899.40. The Applicant had been served with a notice of entry of judgment on 22<sup>nd</sup> September 2020 by the Respondent, threatening execution against the Applicant;
- c) The Applicant intends to exercise its undoubted right of appeal against the judgment delivered on 29<sup>th</sup> May 2020;
- d) The Applicant has already filed a Memorandum of Appeal and applied for certified copies of the proceedings in respect of the suit to enable it mount the appeal;
- e) There is imminent risk that the Respondent shall proceed to execute the judgment delivered in *Malindi CMELRC No 4 of 2019* against the Applicant, which shall render any subsequent proceedings moot and a mere academic exercise;
- f) Unless the orders sought herein are granted and execution of the judgment delivered on 29<sup>th</sup> May 2020 is stayed, the Applicant's appeal shall be rendered nugatory;
- g) The right of appeal is a constitutional right that actualises access to justice, protection and benefit of the law, whose essential substance encapsulates that the appeal should not be rendered nugatory, for anything that renders the appeal nugatory impinges on the very right of appeal;
- h) The Applicant is ready and willing to abide by the conditions of the Court;
- i) The application has been made without unreasonable delay and it is in the interest of justice that stay of execution and all consequential orders pending appeal, be granted;
- j) Unless the orders sought herein are granted, the Applicant is likely to suffer irreparable harm and/or loss.

3. In response to the Applicant's application, the Respondent filed Grounds of Opposition on 16<sup>th</sup> December 2020.

4. The Appellant's application is brought under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules, which sets the following conditions for grant of orders of stay of execution, pending appeal:

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 performance of such decree or order as may ultimately be binding on him has been given by the applicant.

5. In addressing the issue of substantial loss in a money decree the Court, in *Winfred Nyawira Maina v Peterson Onyiego Gichana [2015] eKLR* stated the following:

*“The substantial loss under Order 42 Rule 6 of the Civil Procedure Rules especially where a money decree is involved lies in the inability of the Respondent to pay back the decretal sum should the appeal succeed. The legal burden of proving this inability lies with the Applicant and it does not shift. There must be cogent evidence which shows the inability or financial limitation on the part of the Respondent to refund the decretal sum. And it is only when such prima facie evidence is laid before the court by the Applicant that the evidential burden shifts to the Respondent”.*

6. In the written submissions filed on behalf of the Respondent on 12<sup>th</sup> February 2021, reference was made to the decision in *Victory Construction V BM (a minor suing through next friend one PMM) [2019] eKLR* where **Odunga J** stated thus:

*“What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it was shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person’s right to enjoy the fruits of his success since lack of means per se is not necessarily a ground for granting stay.”*

7. Regarding the issue of delay, the Applicant pleads that it acted in good time after learning of the entry of judgment against it. The Applicant went ahead to point out some delay on the part of the trial court. The Court took judicial notice that at the material time, court processes had been adversely affected by the COVID-19 Pandemic. On this score, the Court is reasonably persuaded to move towards the Applicant and agree that the delay was not inordinate in the circumstances.

8. In any event, by the time the matter was placed before me, my sister **Mbaru J**, while sitting as the Duty Judge in Nairobi had, on 20<sup>th</sup> November 2020, allowed the Applicant to file and serve its Memorandum of Appeal out of time. I find no reason to interfere with the decision of my sister Judge in this regard. That settles the question of delay.

9. In considering an application for stay of execution pending appeal, the Court is minded to balance the Applicant’s right of appeal against the Respondent’s right to actualise judgment.

10. With this in view, I grant a conditional stay of execution in the following terms:

a) The Applicant shall release to the Respondent 50% of the decretal sum within the next thirty (30) days from the date of this ruling;

b) The remainder of the decretal sum, being 50% thereof, shall be deposited in a joint interest earning account in the names of the parties’ Advocates within the next forty-five (45) days from the date of this ruling;

c) Failure to meet any of the foregoing conditions will lead to an automatic lapse of the stay hereby granted.

11. The costs of this application will be costs in the appeal.

12. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY MARCH 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

**Appearance:**

**Miss Nyagah for the Appellant**

**Mr. Mrima for the Respondent**