



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

APPEAL NO.E053 OF 2021

EDMOR STEEL MILLERS LIMITED APPELLANT

VERSUS

ABEL SHIKANDA MUTSOLI RESPONDENT

RULING

The appellant filed application dated 30th July, 2021 seeking for orders that the application dated 14th June, 2021 be heard together with the instant application and on the grounds that following judgement in Mavoko CMEL No.1 of 2019 and judgement delivered on 15th April, 2021 for the sum of Ksh.427,050 in favour of the respondent the appellant made application on 14th June, 2021 for stay of execution and the court did not consider the application since the impugned copy of judgement or decree was not filed.

The appellant has since filed the judgement obtained on 28th July, 2021.

In the subject application dated 14th June, 2021 the appellant is seeking stay of execution of the judgement delivered on 15th June, 2021 in Mavoko CMEL No.1 of 2019 as the appellant is aggrieved and wish to appeal and unless there is stay of execution there will be loss and damage.

The application is supported by the Supporting and Supplementary Affidavits of Laban Waigwa the human resource manager of the appellant company and who avers that the respondent filed CMEL No.1 of 2019 at Mavoko and awarded ksh.427,45. There is proclamation and warrants of attachment issued and unless stay is issued the respondent will proceed with execution.

The appellant has an arguable appeal and in the interests of justice this should be heard first. The appellant is willing and ready to deposit security for the due performance of the appeal once it is heard.

In reply, the respondent filed a Replying Affidavit sworn by Lemmy Regau Nyawade advocate who avers that the application by the appellant is in abuse of court process as the appellant has not demonstrated what substantial loss will be suffered if stay of execution is not allowed as held in the case of **James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR** that under Order 42 Rule 6, an applicant seeking stay of execution must demonstrate what substantial shall be suffered if stay of execution is not issued.

The appellant has further failed to demonstrate what arguable grounds of appeal they have to justify stay of execution.

Nyawade Advocate also avers that it will be prejudicial to the respondent if the orders sought by the appellant are allowed on the face of failure to comply with Order 42 of the Civil Procedure Rules.

Both parties filed written submissions which have been put into account and the single issue for determination is whether stay of execution should be allowed pending the hearing of the hearing of the Appeal.

On 14th May, 2021 the appellant filed Memorandum of Appeal setting out various grounds upon which they seek to challenge the judgement of Hon. H Onkwani delivered on 15th April, 2021 in Mavoko CMEL No.1 of 2019.

To allow the appeal be heard, the appellant filed the instant applications seeking stay of execution under the provisions of Order 42 rule 6 and Order 51 Rule 1 of the Civil procedure Rules.

As correctly submitted by the respondent, under the provisions of Order 42 Rule 6 an applicant seeking stay of execution must satisfy the

court that;

- a) Substantial loss may result to the applicant unless the order is made,
- b) The application has been made without unreasonable delay, and
- c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

And in the case of **James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR** the court held that;

... the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because

execution is a lawful process. Under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

Save to satisfy the grounds of filing the application without delay and offer of security deposit and there is a Memorandum of Appeal, the appellants have not demonstrated the matter of what substantial loss will be incurred.

It is however in the interests of justice that the appeal which has clear grounds be heard first of the merits and to secure the subject judgement, conditional stay of execution shall issue.

Accordingly, application dated 14th June, 2021 is hereby allowed on condition that the decretal sum of Ksh.427,045 is paid into a joint interest earning

account held by the advocates of both parties and within the next 30 calendar days and after which the order of stay shall lapse if there is no compliance. In the event the respondent does not cooperate the appellant shall deposit the same in court on the 31st day from the date hereof.

Delivered in court at Nairobi this 20th day of December, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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