



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**APPEAL NO.E101 OF 2021**

**SAFETRACT LIMITED.....APPELLANT**

**VERSUS**

**GODFREY OCHIENG OMONDI ...RESPONDENT**

**RULING**

The appellant filed application dated 16<sup>th</sup> September, 2021 seeking for orders that there be stay of execution of the judgement and decree delivered on 24<sup>th</sup> August, 2021 in Nairobi Milimani Commercial Court, CMEL No.538 of 2018 pending the hearing of the appeal and on the grounds that the trial court in its judgement awarded the respondent Ksh.454,667 together with interests and costs based on the Amended Counterclaim and the appellant is aggrieved and seek stay of execution to allow for the hearing of the appeal.

The application is supported by the annexed Supporting and Further Affidavits of Esther Wainaina the chief executive officer of the appellant and who avers that the trial court in the judgement delivered on 24<sup>th</sup> August, 2021 held that the respondent had not proved constructive dismissal yet went ahead to dismiss the appellant' claim and enter judgement in favour of the respondent as prayed in the counterclaim.

The appellant has a good appeal on grounds of law and facts as the trial court judgement failed to give account of the facts placed before it. If the respondent is paid the award there is no chance he will be able to refund the same upon a successful appeal since he has no employment or known income. The application is filed without delay and in the interests of justice application be allowed.

In reply, the respondent filed the Replying Affidavit of Faith Mutio Mutuku Advocate who avers that she is in conduct of the matter for the respondent and that upon judgement in CMEL No.538 of 2018 the court entered judgment dismissing the appellant's claim in favour of the respondent who was awarded Ksh.454, 667 as damages for unlawful and constructive dismissal. The respondent discovered a contradiction between page 6 paragraph 27 and page 7 paragraph 3 of the judgement and vide letter dated 21<sup>st</sup> September, 2021 requested the matter be mentioned for directions and the trial court directed that the finding that *in my view did not prove constructive termination* was a trying error and that the entire analysis of the court clearly shows the respondent was constructively dismissed.

Ms Mutuku also avers that the draft Memorandum of Appeal is frivolous and does not raise any triable issues. The respondent filed amended defence and counterclaim dated 2<sup>nd</sup> July, 2019 and there was no response by the appellant.

Under Order 42 rule 6 of the civil Procedure Rules an applicant seeking stay of execution should demonstrate the loss to be suffered and in any event produce security. The applicant has not complied and it is not sufficient to state there is a good appeal. The respondent is a person of means and has land in Ugenya town valued at Ksh.700, 000 and is currently placed with ACE Prestige Motors and is paid a 25% commissions and therefore is able to make good any monetary judgement upon the hearing of the appeal.

Any stay of execution shall delay justice as there is no case of any irreparable loss to be suffered by the applicant. Where the court is inclined to allow the application the respondent seeks to be paid half the decretal sum and the balance be deposited in an interest earning account held in the joint names of the advocates.

Both parties filed written submissions which have been put into account and the issue for determination is whether the appellant should be allowed stay of execution of the judgement delivered on 24<sup>th</sup> August, 2021 in Nairobi Milimani CMEL No.538 of 2018 and if the conditions for stay of execution have been met.

The application is premised on the provisions of Order 42 and Rule 6 of the Civil Procedure Rules and which requires that;

**2. 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 Applicant unless the order is made;**

**b. 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.**

The applicant’s case is that aggrieved by the decision of the trial court in Nairobi CMEL No.538 of 2018 seek to appeal and which appeal has high chances of success as the judgement was entered on the assumption that the respondent’s counterclaim was not defended and the appellant had filed a defence; that the court found there was no proof of constructive dismissal yet went ahead to dismiss the appellant’s claim and enter judgement in favour of the respondent as prayed in the counterclaim and for these reasons seek stay of execution to allow the appeal be heard and determined.

The applicant’s case is also that unless stay is allowed the appeal will be negated and they are ready to deposit security as directed by the court.

The respondent case is that there was an error in the judgement with regard to finding of constructive termination and a letter was written in this regard. The court directed that the error be amended.

Indeed for an applicant to be allowed to enjoy and order of stay of the judgement and decree of the court, there must be proof of the substantive loss to be suffered and further where the application is filed without delay demonstrate a security deposit for the due performance of the judgement once the appeal is addressed.

Both parties acknowledge that the judgement delivered on 24<sup>th</sup> August, 2021 had an error with regard to the findings on constructive dismissal and which led to the respondent filing letter dated 21<sup>st</sup> September, 2021 for directions on the error and there was a mention on 23<sup>rd</sup> September, 2021.

The proceedings after judgement was delivered and how the trial court addressed the error noted I the judgement is not part of the record. The proceedings filed end on 24<sup>th</sup> August, 2021.

The record leading to the judgement attached by the respondent to the Replying Affidavit of Faith Mutio Mutuku as annexure “FMM-III” is not attached.

Any amendment to the judgement should abide the provisions of section 16 of the Employment and Labour Relations Court Act, 2011 read together with Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Where there is an error noted on the record and relating to a typing error, such should be addressed pursuant to Rule 34, which is not the case here. The record in this regard is missing and not clear how the trial court made changes to the judgement of 24<sup>th</sup> August, 2021. Rule 34 directs that;

**34. The Court shall, either at the request of the parties or on its own motion, cause any clerical mistake, incidental error or omission to be rectified and shall notify the parties of such rectification.**

The court finds the draft memorandum of appeal sets grounds which the court should address on the merits.

With an arguable appeal, the applicants asserts that the respondent if paid the judgement amount will not be able to refund the same as he has no known income but he challenges this on the grounds that he has new employment and had land in Ugenya worth Ksh.700, 000 and to which he has attached a valuation report save this is only a cover page and the stated new employment is without evidence.

The court finds the conditions for grant of stay of execution of the judgement and decree of the trial court in Nairobi CMEL No.538 of 2018 delivered on 24<sup>th</sup> August, 2021 have been met and application dated 16<sup>th</sup> October, 2021 is with merit.

Accordingly, stay of execution is hereby allowed on condition that the entire decretal sum of Ksh.454, 770 is deposited in an interest earning account held in the joint names of the advocates for the parties herein and secured within the next 30 days. Each party shall bear own costs.

**DELIVERED IN COURT AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

**M. MBARU**

**JUDGE**

In the presence of:

Court Assistant: Okodoi

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