



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

**AT NAIROBI**

**MISC. APPLICATION NO.E.220 OF 2021**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**C. DORMAN LIMITED.....CLAIMANT**

**VERSUS**

**AGGREY AMULAKHO MUKHWANA.....RESPONDENT**

**RULING**

The applicant has filed an application dated 24<sup>th</sup> November, 2021 by way of a certificate of urgency. He is praying for the following inter alia:-

1. Interim stay of execution be granted pending hearing and determination of this application.
2. An order do issue to the Deputy Registrar to facilitate production of the lower court file before this Honourable Court file for speedy disposal of both this application and the appeal.
3. Stay of execution be granted pending hearing and determination of Employment and Labour Relations Court Appeal number E.139/2021.
4. Costs of the application be in the cause.

**Evidence**

5. The evidence garnered from the notice of motion are that judgment was delivered on 29<sup>th</sup> October, 2021 by the trial magistrate who awarded the Claimant Kshs.1,541,716/50 being the total amount claimed plus costs.

6. The applicant states that he lodged the appeal within time against the entire Judgment.

He filed an application for stay of execution in the lower court but failed to get the lower court pleadings. He says he made attempts to get a hearing date for the said application but did not succeed as he was informed the Registry could not trace the file.

7. He says that he is apprehensive that meanwhile the Respondent could proceed with the execution and hence he filed this application in the High Court.

8. He says if stay is not granted the Claimant will not be able to refund the decretal sum.

9. He further states that the appeal has high chance of success.

10. He finally says they are ready to abide by any conditions and terms as to security as the court may deem fit to impose.

11. The Respondent in his Replying Affidavit says that the applicant is bent on delaying the matter so justice is not done. The Respondent is acting in person.

12. He says that the applicant did not miss the lower court file where he had initially filed the application because he even took a screen shot of the decree and a letter dated 29<sup>th</sup> October, 2021. He says the issue of missing file is an excuse to delay the matter.

He prays the application be dismissed with costs and in the alternative if the application is granted the applicant to deposit the decretal sum being Kshs.1,541,718.80/= plus interest and costs of this suit in court to make security of costs.

13. Grant of stay of execution pending appeal is provided under order 42 rule 6 of the Civil Procedure Rules which relevant section herein provides:-

No appeal or second appeal shall operate as stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as court appealed may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay have been granted or refused by the court appealed for the court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may just aid any person aggrieved by the order for stay made by the court whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

14. Such stay is granted only where the court is satisfied substantial loss may occur to the applicant unless the same is granted and that application has been made without undue delay.

Further such security can be provided for due performance given by the applicant.

15. In the case of **BUTT VS THE RENT RESTRICTION TRIBUNAL (1979)** the court of appeal states what should be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power to grant or refuse stay is discretionary and decisions should be exercised in such a way as not to prevent an appeal. If there is no overwhelming hindrance a stay must be granted so that appeal may not be rendered nugatory should appeal court reverse the Judge's discretion.

16. Also in **RWW VS EKW case (2019) eKLR** the court observed "the purpose of an application for stay of execution pending 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.

17. In the present case the Judgment having been delivered on 29<sup>th</sup> October 2021 the application in the lower court was filed on 9<sup>th</sup> November, 2021. Subsequently when the applicant could not secure the lower court file he came to the High Court on 24<sup>th</sup> November, 2021 by way of miscellaneous application and there was no delay.

18. Considering that the applicant is ready to comply with orders as to security and the Respondent is agreeable to that, I do hereby exercise my discretion as guided by the provisions of order 42 Rule 6 of the Civil Procedure Rules and grant the applicant:-

1. His orders for stay of execution pending hearing and determination of Employment and Labour Relations Court Appeal number 139 of 2021.
2. An order also is issued to the court Registrar to facilitate production of the lower court file before this Honorable Court for speedy disposal of the appeal.
3. The applicant is ordered to deposit the decretal amount of kshs.1,541,716.50 with the court within 30 days of this Ruling.

Costs of the application be in the cause.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 7<sup>TH</sup> DAY OF DECEMBER, 2021**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**