



**Awiti v Elimu Sacco Society Limited (Cause 1539 of 2016)  
[2023] KEELRC 810 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 810 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1539 OF 2016  
M MBARÚ, J  
MARCH 27, 2023**

**BETWEEN**

**EDWARD AWITI ..... CLAIMANT**

**AND**

**ELIMU SACCO SOCIETY LIMITED ..... RESPONDENT**

**RULING**

1. The respondent, Elimu Sacco Society Limited filed application dated December 20, 2022 seeking stay of the judgment delivered on December 8, 2022 pending hearing and determination of the intended appeal. the application is made and based on the grounds that, following judgment herein, the respondent is aggrieved and has filed a Notice of Appeal and intends to proceed to the Court of Appeal and unless stay of execution is allowed, there is fear that the claimant will execute the judgment to the detriment of the respondent.
2. The application is supported by the Supporting Affidavit of Angela Nyanjong the general manager and who avers that the court in its judgment on December 8, 2022 directed that the claimant should clear within 30 days so that he can be paid his dues but the respondent is aggrieved by the judgment of the court and intends to appeal and if stay of execution is not allowed the claimant will proceed and execute. He is not gainfully employed anywhere and may never be able to refund the decretal sum. The respondent is ready and willing to secure the decretal sum herein pending the hearing of the intended appeal and ready to abide by any other conditions that court may find just to issue so as to allow the respondent the right to address intended appeal.
3. In reply, the claimant filed his Replying Affidavit and avers that judgement herein issued in his favour for the sum of ksh 624,000 with costs and which was to be paid within 30 days after December 8, 2022 but the respondent has opted to file the instant application. The application does not satisfy the requirements of Order 42 Rule 6 of the Civil Procedure Rules, there is no sufficient cause or any



pending appeal that has been filed and there exists no proof that the claimant is unable to refund the decretal sum once paid and he should be allowed to enjoy the fruits of his judgment.

4. The claimant avers that the respondent is in abuse of court process and there exists no matter to justify the application seeking stay of execution and no proper security has been offered for the due performance of the judgment herein to warrant issuance of the orders of stay of execution and the same should be dismissed with costs.
5. The respondent filed a Further Affidavit sworn by Angela Nyanjong who avers that the instant application was made without delay and in line with the court practice. The respondent is willing to secure the decretal sum pending the hearing and determination of the intended appeal. the respondent will suffer loss and damage if execution is allowed to proceed as such will negate the intended appeal.  
Both parties addressed the application by way of written submissions.
6. The respondent as the applicant submitted that the respondent has satisfied the provisions of Order 42 rule 6 in that the application herein was filed without undue delay and also there exists Notice of Appeal against the judgment herein and a draft Memorandum of Appeal has been attached to the supporting affidavit to demonstrate that indeed there are arguable grounds upon which the intended appeal shall be based upon. The respondent is willing to deposit security to secure the due performance of the judgment and the respondent has relied on the following cases, *Halal & another v Thornton & Turpin (1963) Ltd* [1990] eKLR; *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR; *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR.
7. The claimant submitted that the respondent has not demonstrated that it would suffer any loss if the application seeking stay of execution is not granted which is a fundamental requirement for the issuance of an order of stay of execution and without which the other limbs are not justified to address. Save that, upon the judgment herein on December 8, 2022 the respondent was allowed 30 days to pay
8. and only filed the instant application on January 20, 2022 in delay so as to avoid and frustrate the claimant from enjoying the fruits of his judgment.
9. The claimant also submitted that the respondent has offered a deposit of security but failed to state the terms and nature of the same leaving it open and without any good or arguable appeal, the application seeking stay of execution should be dismissed with costs. The claimant has relied on the following cases, *Equity Bank Limited v Taiga Adams Company* Civil Appeal No 722 of 2005; *Kenya Posts and Telecommunication Corporation v Paul Wachanga Ndarwa* Civil Appeal No 367 of 2001, *Gianfranco Manenthi & another v Africa Merchant Assurance Company Limited* [2019] eKLR.

## Determination

10. An applicant seeking stay of execution pending hearing and determination of an appeal must satisfy the provisions of Order 42 rule 6 of the *Civil Procedure Rules* save in this case, the respondents only intends to file an appeal which intention has not been actualised save to file a Notice of Appeal. the right of appeal is secured in law pursuant to Section 17 of the *Employment and Labour Relations Court Act*, 2011 that a party aggrieved and or dissatisfied with orders of the court has a right to file an appeal to the Court of Appeal. such right secured, the intention to appeal should not be frustrated and or negated through execution of the orders against which the appeal should be premised upon.
11. On the other hand, before the intention to appeal is actualised, the party who has a valid judgment should not be frustrated with regard to enjoying the fruits of his judgment.



13. Therefore, in balancing each party's right to appeal and in securing a valid judgment, security should be to ensure the subject of the suit is preserved in a manner that each party will access justice. One way is to deposit the entire decretal sum in a joint interest earning account pending the actualisation of the intended appeal and given a timeframe within which such should be done, failure to which the order of stay should lapse. In this case, such a balance is found necessary given each party's right to access justice.
14. Accordingly, application dated December 20, 2022 is allowed upon the following conditions;
  - a. Judgement herein is stayed subject to the respondent making a deposit of the decretal sum Ksh 624,000 in a joint interest earning account held in the names of both parties within 30 days;
  - b. Where the intended appeal is not filed and served upon the claimant within the next 45 days, orders (a) above shall lapse; and
  - c. Costs shall follow the cause.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 27<sup>TH</sup> DAY OF MARCH, 2023.**

**M. MBARÚ JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

