



**Ali v Mistry V Naran Mulji & Company (Appeal E002 of 2022)
[2024] KEELRC 13646 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13646 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E002 OF 2022**

**AK NZEI, J
MAY 16, 2024**

BETWEEN

MWAMLEU TSUMA ALI APPELLANT

AND

MISTRY V NARAN MULJI & COMPANY RESPONDENT

*(Appeal from the judgment of the Hon. G. Kiage, SRM delivered on
17th December 2021 in Mombasa CM- ELR Cause No. 231 of 2020)*

RULING

1. The application before me is the Respondent/Applicant’s Notice of Motion dated 31st January 2024 and expressed to be brought under Order 42 Rule 6(1), (2) & (3) of the Civil Procedure Rules, among other provisions of the law. The Respondent/Applicant seeks the following orders:-
 - a. that there be a stay of execution of this Court’s judgment delivered on 9/2/2023, the warrants of execution and attachment and notice of proclamation dated 26/1/2024 and any subsequent orders pending hearing and determination of the application.
 - b. that there be a stay of execution pending appeal of this Court’s judgment delivered on 9/2/2023, the warrants of attachment and notice of proclamation dated 26/1/2024 and any other subsequent orders pending the hearing and determination of Mombasa Court of Appeal Civil Appeal No. E055 of 2023.
 - c. that costs of the application be provided for.
2. The application sets out on its face the grounds on which it is founded, and is based on the supporting affidavit of Ketan Patel, the Respondent/Applicant’s director, sworn on 31/1/2024. It is deponeed in the said supporting affidavit:-



- a. that the Respondent/Applicant has appealed to the Court of Appeal against this Court's judgment and that a Record of Appeal was served on time on 26/4/2023, and that the appeal is ready for prosecution.
 - b. that directions on the appeal were taken on 31/1/2024 that the appeal be heard during the month of May 2024.
 - c. that the Appellant/Respondent instructed Sure Auctioneers who visited the Applicant's premises and served a proclamation notice dated 26/1/2024. That the said notice expires on 1/2/2024, whereupon the said Auctioneers will proceed and attach the Applicant's assets to satisfy this Court's judgment, thus crippling the Applicant's day to day operations as the attached goods are the Applicant's tools of trade, and rendering the appeal nugatory.
 - d. that the appeal raises meritorious grounds of appeal.
3. Documents annexed to the said supporting affidavit include a proclamation of attachment issued by M/s Sure Auctioneers on 26/01/2024 and warrants of attachment and warrants of sale issued by this Court on 23/1/2024.
4. The application is opposed by the Appellant/Respondent vide a replying affidavit sworn by himself on 2/2/2024. It is deponed in the said affidavit:-
- a. that judgment was delivered on 9/2/2023 whereupon the Respondent/Applicant sought, and was granted 30 days stay of execution, and which lapsed on 9/3/2023.
 - b. that the application herein is res-judicata pursuant to Section 7 of the *Civil Procedure Act* as this Court already heard and determined an application for stay of the execution sought by the Applicant. That this Court lacks jurisdiction to hear and to determine the same application for stay of execution.
 - c. that the Applicant's application and appeal are a delaying tactic meant to deny the Appellant/Respondent the right to enjoy his rightfully obtained judgment as the application has been made one (1) year after judgment was delivered.
 - d. that the decree is a monetary one and the Appellant/Respondent is in a position to repay the same in the event the Applicant's appeal succeeds.
 - e. that the application has not met the requirements for stay of execution stipulated under Order 42 Rule 6 of the Civil procedure Rules.
5. The application was presented before the Court under a certificate of urgency on 1/2/2024. The Court certified the application as urgent and directed that the same be served on the Appellant/Applicant. On 5/2/2024, in the presence of Counsel for both parties, the Court gave directions on disposal of the application by way of written submissions and granted an interim order of stay of execution in the following terms:-
- “(a) In the meantime, there will be interim stay of execution of the Court's decree herein on condition that the Respondent/Applicant deposits the entire decretal sum in this Court within ten (10) days of today.
 - (b) the Respondent/Applicant will also pay the Auctioneers' lawful charges within the aforesaid period of ten (10) days of today.



(c) Mention on 20/2/2024 to fix a Ruling date.”

6. The matter was mentioned on 20/2/2024 and on 28/2/2024 respectively. On 28/2/2024, Counsel for both parties confirmed to the Court that the decretal sum had been deposited as ordered by the Court, though belatedly. This satisfies the requirement for provision of security as set out in Order 42 Rule (6) (2) (b) of the Civil Procedure Rules which states as follows:-

“(2) No order for stay of execution shall be made under subrule (1) unless:-

a.

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.”

7. On the Appellant/Respondent’s assertion that the Respondent/Applicant’s application herein is res-judicata and that this Court has no jurisdiction to determine it as the Respondent/Applicant was granted 30 days’ stay of execution upon delivery of the Court’s judgment and which stay has since lapsed, this Court is of a different view. Order 42 Rule 6 (5) of the Civil Procedure Rules provides that:-

“(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.”

8. In my view, the foregoing provision does not bar an Applicant who first makes an informal application for stay of execution immediately following the delivery of a judgment or ruling from subsequently filing a formal application. That is why Order 42 Rule (6) (3) provides as follows:-

“Notwithstanding anything contained in subrule(2), the Court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.”

9. The application herein is, therefore, not res-judicata, and this Court has jurisdiction to hear and to determine the same. Having stated that, and taking into account the fact that security for due performance of this Court’s decree as may ultimately be binding on the Respondent/Applicant has been given, the single issue for determination by this Court is whether a stay of execution pending hearing and determination of Court of Appeal Civil Appeal No. E055 of 2023 (Mombasa) should be ordered.

10. Without belaboring the point, this Court’s decree that the Respondent/Appellant has appealed against is a money decree, and refusal by this Court to maintain the status quo by granting a stay of execution pending hearing and determination of the appeal filed in the Court of Appeal will render the said appeal nugatory. In the words of Colton LJ In *Wilson -vs- Church* [NO. 2] [1879] 12 CH D 454 at page 458:-

“...When a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory.”



11. In Butt -vs- Rent Restriction Tribunal [1979] eKLR, the Court of Appeal (Madan, JA) stated as follows:-

“....It is the discretion of the Court to grant or to refuse stay, but what has to be judged is whether there are or not peculiar circumstances in the case to make an order staying execution. It has been said that the Court, as a general rule, ought to exercise its discretion in away so as to prevent the appeal, if successful, from being nugatory...”

12. Justice of the case herein demands that I grant a stay of execution pending appeal as sought by the Respondent/Applicant. The Appellant/Respondent, who has deponed that he is able to refund the decretal sum if it is paid over to him and the pending appeal succeeds, does not stand to suffer any prejudice if the application herein is allowed as the entire decretal sum is shown to have been deposited in this Court as a condition for the stay. His position is fully secured and he will get the entire decretal sum paid to him in the event of the pending appeal not succeeding.

13. Consequently, the Notice of Motion dated 31/1/2024 is hereby allowed in the following terms:-

- a. a stay of execution of this Court’s decree herein is hereby ordered pending hearing and determination of Mombasa Court of Appeal Civil Appeal No. E055 of 2023.
- b. the decretal sum herein, already deposited in this Court pursuant to this Court’s Orders dated 5/2/2024, shall remain so deposited pending hearing and determination of Mombasa Court of Appeal Civil Appeal No. E055 of 2023.
- c. each party shall bear its own costs of the application.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH MAY 2024

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

.....Appellant

.....Respondent

