



**Professional Clean Care v Fondo (Miscellaneous Application  
E030 of 2024) [2024] KEELRC 1359 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1359 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E030 OF 2024**

**M MBARŪ, J**

**JUNE 6, 2024**

**BETWEEN**

**PROFESSIONAL CLEAN CARE ..... APPLICANT**

**AND**

**PETRINILAR FONDO ..... RESPONDENT**

**RULING**

1 The applicant, Professional Clean Care filed an application dated 13 March 2024 under the provisions of Section 12(3) (i) and (iii) of the *Employment and Labour Relations Court Act*, rule 17 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and Order 21 rule 8 and 9, Order 42 rule 6(2) of the *Civil Procedure Rules* seeking orders that;

1. Spent.
2. This court be pleased to extend the time for filing the Memorandum of Appeal and Record of Appeal against the whole judgment/decree delivered by Hon. R, N, Akee on 6<sup>th</sup> December 2023 in CM ELRC No.514 of 2021.
3. The Memorandum of Appeal annexed hereto be hereby and dully deemed as properly filed.
4. Spent.
5. Spent.
6. The court be pleased to grant a stay of execution of the judgment of Hon. R.N. Akee delivered on 6 December 2023 in CMELRC No.514 of 2021 together with any resultant decree and any subsequent proceedings thereto pending the hearing and determination of the intended appeal.



7. The warrants of attachment dated 22<sup>nd</sup> February 2024 and the proclamation notice be lifted, set aside and or vacated.
  8. The respondent to bear the auctioneers costs.
  9. Any further orders the court may deem fit.
  10. Costs of this application be provided for.
- 2 The application is supported by the affidavit of Fred Oballa and on the grounds that On 12 March 2024 Sure Auctioneers acting on the instructions of the respondent served the applicant with a 7 day proclamation notice under a warrant of attachment given on 22<sup>nd</sup> February 2024 for the sum of Ksh.540,830. The said proclamation notice is scheduled to lapse on 19<sup>th</sup> March 2024.
  - 3 In his Affidavit, Oballa aver that the applicant is apprehensive that the respondent's agent will remove the proclaimed items from the applicant's possession at any time and proceed to dispose of the same by way of auction. The warrants of attachment were issued in relation to a judgment delivered on 6<sup>th</sup> December 2023 by the Chief Magistrate Court at Mombasa in CMELRC No.514 of 2021 Petronilar Konde v Professional Clean Care.
  - 4 The applicant was not aware that the subordinate court had delivered judgment because it was never notified despite the subordinate court having indicated on 2<sup>nd</sup> November 2023 that judgment would be delivered on notice. Furthermore, no draft decree and or certificate of costs was extracted and sent for approval or served upon the applicant as required under Order 21 Rule 8(2) of the Civil Procedure Rules.
  - 5 The applicant seeks to appeal the judgment delivered by the subordinate court which appeal had a high chance of success. If a stay of execution order is not granted and the applicant is successful in its appeal, the applicant will suffer substantial loss and irreparable damage and may not be able to recover the same from the respondent who has no known source of income.
  - 6 Oballa aver that should the execution of the judgment proceed, the intended appeal will be rendered nugatory. The applicant is willing to deposit security on conditions allowed by the court. There will be no prejudice visited against the respondent. The applicant has taken steps to lodge the Memorandum of Appeal and a draft is attached to the application.
  - 7 In reply, the respondent filed a Replying Affidavit and aver that on 6 December 2023, the trial court delivered judgment on notice to the parties. The stay orders pending appeal ought to be compliant with the condition of offering the security of the decretal sum pending the hearing of the appeal.
  - 8 The condition of stay has not been set and fulfilled by the applicant as they have not offered any security of the decretal sum. The respondent has an account in the online portal of the judiciary and the court has accessed the notices from the court and or noticed that judgment had been delivered. The delay in filing the appeal is inordinate and the same should be disallowed. In the event the court is to allow the motion, it is only fair that the conditions set in the law are fulfilled.
  - 9 The applicant filed a Further Affidavit of Fred Oballa who aver that the lower court did not serve a judgment notice and none is attached in the Replying Affidavit by the respondent. The applicant did not know such a matter until a proclamation notice was served.
  - 10 Oballa aver that the applicant is willing to deposit security in a joint interest-earning account to secure the appeal.
  - 11 Both parties attended and made oral submissions.



- 12 The applicant submitted that the reason for not filing the appeal in time arose out of failure by the trial court to issue notice of the judgment. This was to be served upon the parties which was not done and the applicant had no knowledge that judgment was delivered on 6 December 2023 until the execution process commenced. Immediately, the applicant filed this application and sought a stay of execution and time extension within which to file an appeal. The applicant is willing to deposit security to secure the appeal. Under Order 21 rule 8(2) of the Civil Procedure Rules, the respondent did not serve a draft decree to alert the applicant that judgment had been issued.
- 12 The applicant submitted that in the case of Ecobank Kenya Limited v Afrikon Limited [2017] eKLR, the court held that the Decree which is sought to be executed must be extracted in conformity with the provisions of Order 21 Rule 8 of The Civil Procedure Rules. These provisions were not adhered to by the respondent.
- 13 The applicant submitted that on 11 April 2024, the court allowed the applicant to file a Memorandum of Appeal and even though it did not meet the provisions of Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 this has since been corrected. The mistake of the advocate should not vest against the client.
- 14 The decretal sum has been deposited in court as if paid to the respondent, he has no known means of income to be able to refund the same upon a successful appeal.
- 15 The respondent submitted that the court is *functus officio* after refusing to grant a stay of execution as held in Asige Keverenge and Anyanzwa Advocates v Kenya Revenue Authority & another [2021] eKLR. Having determined the application for a stay of execution, the court has no jurisdiction to proceed. The ruling on 11 April 2024 is deemed as the ruling of the court. Seeking more time to file a Record of Appeal has since lapsed. There is no competent appeal on record and the application before the court should be dismissed.

### Determination

- 16 On 11 April 2024, both parties attended court to take hearing directions on the applicant's application dated 13 March 2024.
- 17 The respondent did not oppose this application on condition that the applicant should deposit the decretal sum in court and file the Record of Appeal to allow parties to take hearing directions.
- 18 The applicant accepted these conditions.
- 19 The court directed as follows;
- 20 Notice of Motion dated 13 March 2024 is hereby allowed as confirmed by the respondent on condition that the applicant shall deposit the decretal sum of Ksh.540, 830 in court within the next 21 days.
- 21 The applicant to file and serve a Memorandum of Appeal within the next 14 days.  
Mention to confirm the Record of Appeal on 30 April 2024.  
Interim orders extended.
- 22 As correctly submitted by the respondent, the application dated 13 March 2024 was allowed on the agreed terms and conditions. The stay of execution was addressed with finality. The time to file a Memorandum of Appeal was extended.
- 23 The function of the court under this application was spent on the orders of 11 April 2024. Having discharged its duty on the application before it, the court stands *functus officio*. The purpose of court



attendance on 30 April 2024 was to confirm that the Record of Appeal is filed and to take hearing directions thereof.

- 24 The jurisdiction to delve into the issue of whether the applicant has satisfied the conditions for the grant of an order for a stay of execution pending appeal is fully addressed. The time to file an appeal was granted. Court orders are not given in vain.
- 25 Has the applicant filed an appeal within the allocated time? Whether there is a security deposit or not, the purpose, in my humble view was to secure the appeal per the orders of 11 April 2024. These are moot questions given the court is functus officio.
- 26 The application dated 13 March 2024 is hereby dismissed. Costs to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JUNE 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

.....and.....

