



**Njimia Mombasa Pharmaceuticals Limited v Mwasi (Appeal  
E129 of 2023) [2024] KEELRC 1881 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1881 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E129 OF 2023**

**AK NZEI, J  
JULY 18, 2024**

**BETWEEN  
NJIMIA MOMBASA PHARMACEUTICALS LIMITED ..... APPELLANT  
AND  
JANET WAKESHO MWASI ..... RESPONDENT**

*(Being an appeal from the entire judgment of Hon. J.B. Kalo – CM  
in Msa MC ELR Case E778of 2021 delivered on 2nd November 2023)*

**RULING**

1. The Court’s record shows that the Appeal herein was instituted by the Appellant on 16/11/2023 vide a memorandum of appeal dated 10/11/2023. The appeal is expressed to be against the judgment of Hon. J. B. Kalo – CM delivered on 2/11/2023 in Mombasa Chief Magistrate’s Court Employment Case No. E778 of 2021. The memorandum of appeal is not shown to have been accompanied by the documents required under Rule 8(4) of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) to accompany a memorandum of appeal at the point of filing. The said subrule provides as follows:-

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- “(4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.

Provided that where copies of proceedings are not filed with the memorandum of appeal, the Appellant shall file such copies as soon as possible and within a reasonable time.”

2. On 23/11/2023, the Appellant filed an urgent Notice of Motion dated 22/11/2023 seeking the following orders:-



- a. That the application be certified as urgent and service be dispensed with, and be heard ex-parte in the first instance.
  - b. That pending hearing and determination of the application inter-partes, the Court be pleased to grant a temporary stay of execution of the judgment delivered on 2<sup>nd</sup> November 2023 and the consequential order arising thereon.
  - c. That upon hearing the application inter-partes, the Court be pleased to order stay of execution of the judgment in suit (sic) delivered on 2<sup>nd</sup> November 2023 pending the hearing and determination of the Applicant's appeal against the same.
  - d. that costs of the application be in the cause.
3. The application, shown to be brought under Order 42 Rule 6 of the [Civil Procedure Rules](#) and Sections 1A, 1B, and 3A of the [Civil procedure Act](#), is predicated on the supporting affidavit of Maina Njuguna Advocate sworn on 22/11/2023. The application was first placed before me on 23/11/2023, but I declined to either certify the same as urgent or to issue an interim order of stay of execution of the trial Court's decree, and directed that the application be served. The Respondent has since opposed the application vide grounds of opposition dated 14/2/2024.
  4. The single issue for determination is whether the Appellant's aforesaid application is merited. As already stated in this Ruling, crucial documents that ought to have accompanied the memorandum of appeal filed herein were not filed. An application for stay of execution pending appeal cannot stand, and indeed cannot be entertained by the Court appealed to, unless the decree and/or judgment of the Court appealed from is placed before the Court appealed to. On 22/2/2024, just before the Court fixed the application for Ruling, Counsel for the Appellant/Applicant told the Court that she had uploaded the trial Court's judgment.
  5. I have perused the said judgment, delivered by the trial Court on 2/11/2023, and I have noted that the Respondent herein was awarded a total sum of kshs. 216,583, costs of the suit and interest.
  6. Section 13 of the [Employment and Labour Relations Court Act](#) provides that decrees and orders of this Court are enforceable in accordance with the rules made under the [Civil Procedure Act](#). Order 42 6(1) & (2) provide as follows:-
    - “(1) No appeal or second appeal shall operate as a stay of execution of proceedings under a decree or order appealed from except in so far as the Court appealed from 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 shall have been granted or refused by the Court appealed from, 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 to it seem just and any person aggrieved by an order of stay made by the Court from whose decision the appeal if preferred may apply to the appellate Court to have such order set aside.
    - (2) No order for stay of execution shall be made under subrule (1) unless:-
      - a. The Court is satisfied that substantial loss may result to the Applicant unless the order is made and 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.”
7. I have noted from the supporting affidavit that the Appellant has undertaken to abide by any condition that the Court may order. Further, the application was filed without any delay.
8. It was stated as follows in *BUTT-VS- RENT RESTICTION TRIBUNAL* [1979] eKLR:-
- “If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay that would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be better remedy, will become available to the Applicant at the conclusion of the proceedings. It is in the discretion of the Court to grant or refuse stay, but what has to be judged in every case is whether there are or not particular 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 best discretion in a way so as to prevent the appeal, if successful, from being nugatory, per Brett LJ in *Wilson -vs- Church* (No. 2) 12 Ch D(1870) 454 at P459. In the same case, Cotton LJ, said at P.458:-
- “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court has to see that the appeal if successful, is not nugatory.”
9. I will exercise this Court’s discretion in favour of the Appellant/Applicant, but on the conditions set out herein. The Appellant/Applicant’s Notice of Motion dated 22/11/2023 is hereby allowed in the following terms:-
- a. there will be a stay of execution of the trial Court’s decree in Mombasa Chief Magistrate’s Court Employment Case No. E778 of 2021 on condition that the Appellant/Applicant deposits the entire decretal sum in this Court within twenty one (21) days of this ruling.
- b. the Appellant/Applicant shall file and serve a complete record of appeal herein within sixty (60) days from the date of this ruling; failing which the stay herein granted shall automatically lapse.
- c. costs of the application shall be in the appeal.
10. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> July 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.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Appellant



Respondent

