



**Leo Designs Limited v Maina (Civil Appeal (Application)  
E515 of 2023) [2025] KECA 78 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KECA 78 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E515 OF 2023  
F SICHALE, F TUIYOTT & , JJA  
JANUARY 24, 2025**

**BETWEEN**

**LEO DESIGNS LIMITED ..... APPLICANT**

**AND**

**HARRISON MACHARIA MAINA ..... RESPONDENT**

*(Being an application for stay of execution the Judgment of the  
Employment & Labour Relations Court at Nairobi (Nzioki Wa Makau,  
J.) dated 29th September 2021 in ELRC Cause No. E144 of 2021)*

**RULING**

1. The applicant herein, Leo Designs Limited has moved this Court through an application dated 23<sup>rd</sup> July 2024, brought under Rule 5(2)(b) of the [Court of Appeal Rules](#) and Sections 3, 3A & 3B of the [Appellate Jurisdiction Act](#) seeking orders, inter alia:

- “1. Spent.
2. Spent.
3. Pending the hearing and determination of the appeal, the honourable Court be pleased to order stay of execution of the judgment delivered on 29<sup>th</sup> September 2021 and the resultant decree and stay any further proceedings in Cause No. 144 of 2021.
4. In the alternative, pending the inter parties hearing of this application and the appeal, the honourable Court be pleased to issue an order of status quo ante 18<sup>th</sup> July 2024.



5. Costs of this application abide the intended appeal.”
2. The application is premised on the following grounds:
  - a. The applicant’s oral application for stay of execution before the trial court was dismissed on 30th June 2022.
  - b. The applicant is apprehensive that the respondent will commence execution at any time in satisfaction of the decree.
  - c. The applicant is ready and willing to provide any security as this Court may direct.
  - d. The applicant has an arguable appeal with high chances of success, and if stay of execution is not granted, the appeal may be rendered nugatory as the applicant may be forced to pay the decretal amount which becomes irrecoverable as the respondent’s financial means is unknown.
  - e. Unless the orders sought are granted, the applicant stands to suffer irreparable loss which cannot be compensated.
3. The application is supported by the affidavit of Enrico Dolciami, the managing director of the applicant, sworn on 23<sup>rd</sup> July 2024. He reiterated the grounds on the face of the application and further stated that:
  - a. The applicant’s intended appeal is against the ruling of the trial court dated 30<sup>th</sup> June 2022 in which the court dismissed the applicant’s application to set aside the judgment of the court dated 29<sup>th</sup> September 2021.
  - b. The respondent has since served the applicant with a party and party bill of costs dated 16<sup>th</sup> January 2024 and a taxation notice dated 29<sup>th</sup> February 2024.
  - c. The applicant’s notice of preliminary objection to the taxation was dismissed, and directions were issued.
4. Opposing the application, the respondent in his replying affidavit sworn on 26<sup>th</sup> July 2024 stated that:
  - a. The applicant seeks stay of execution of the judgment dated 29<sup>th</sup> September 2021 in which no appeal was preferred as the appeal herein refers to the ruling dated 30<sup>th</sup> June 2022 where the trial court declined to set aside the orders of 29<sup>th</sup> September 2021.
  - b. The applicant has no arguable appeal as the trial court exercised its discretion in declining to set aside the judgment on the grounds that the applicant failed to give a satisfactory reason for not complying with mandatory rules of procedure.
  - c. There is an inordinate delay in applying for stay of execution of the impugned judgment after an unjustifiable delay of 3 years, hence the application herein is an afterthought.
5. When the application came up for hearing on 18<sup>th</sup> September 2024, Mr. Opini learned counsel appeared for the applicant. Although Mr. Marienga learned counsel was unable to join in the court session, Mr. Opini informed us that he had instructions from the said counsel to rely on their respective written submissions.
6. In its written submissions, the applicant relied on the cases of *Stanley Kang’ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, *Regnoil Kenya Limited v Winfred Njeri Karanja* [2019] eKLR, and *Commissioner of Customs v Anil Doshi* [2007] eKLR, in submitting that it had demonstrated through the grounds set out in the memorandum of appeal that it has an arguable appeal.



7. The applicant further submitted that it had demonstrated that the respondent's financial means are unknown and therefore if the decretal sum is paid to him and the appeal succeeds, it may be difficult if not impossible to recover the money, thus the appeal will be rendered nugatory.
8. In response to the respondent's claim that there was no appeal preferred against the judgment dated 29<sup>th</sup> September 2021, the applicant submitted that the ruling dated 30<sup>th</sup> June 2022 is the substance of the appeal herein.
9. The applicant urged that the application be allowed.
10. In his written submissions, the respondent relied on the case of *Nairobi City Council v Tom Ojienda & Associates* [2022] KECA, in outlining the established principles for granting a stay of execution.
11. The respondent proceeded to submit that the applicant had failed to demonstrate an arguable appeal in this matter and relied on the cases of *Kenya Industrial Estate Limited & Another v Matilda Tenge Mwachia* [2021] eKLR and *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR in which the Court held that an arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by the Court.
12. He submitted that the setting aside of a regular judgment is discretionary and the trial court judiciously exercised its discretion in declining to set aside the judgment.
13. The respondent further submitted that the applicant had failed to comply with Rule 77 of the *Court of Appeal Rules*, having failed to issue a notice of appeal against the judgment dated 29<sup>th</sup> September 2021 and therefore any alleged appeal against the said judgment is incompetent and a nullity.
14. On whether the appeal would be rendered nugatory, the respondent submitted that this is a money decree, which is reversible. He submitted that the applicant had not demonstrated that he would be unable to compensate the applicant in the event the intended appeal is successful.
15. The respondent urged that the application be dismissed with costs as the application herein did not meet the legal threshold for an arguable appeal and the nugatory aspect.
16. We have carefully considered the application. The issue for determination is whether the application is merited.
17. The jurisdiction of this Court under Rule 5(2)(b) is original, independent, and discretionary. However, we must exercise this discretion judiciously and rationally, and not out of impulsiveness or sympathy.
18. It is common ground that the applicant seeks stay of execution of the judgment dated 29<sup>th</sup> September 2021 as set out in the notice of motion. However, the notice of appeal on record is for the ruling dated 30<sup>th</sup> June 2022. There is no dispute that no appeal was preferred against the said judgment and no notice of appeal was filed to the effect.
19. The application before us is for stay of execution of the judgment, the applicant cannot then turn around in the supporting affidavit and state that the stay sought is with regard to the ruling in which the court declined to set aside the impugned judgment.



20. The applicant did not file a notice of appeal against the judgment of 29<sup>th</sup> September 2021. Rule 5(2) (b) provides that:

“In any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

21. Rule 77 on the other hand provides that:

“(1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.

3. Each notice of appeal under sub-rule (1) shall state whether it is intended to appeal against the whole or part only of the decision and, where it is intended to appeal against a part only of the decision, shall —

- a. specify the part complained of;
- b. the address for service of the appellant; and
- c. the names and addresses of the persons intended to be served with copies of the notice.

4. When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

5. Where it is intended to appeal against a decree or order, it shall not be necessary that the decree or order be extracted before lodging the notice of appeal.

6. A notice of appeal shall be substantially in Form D as set out in the First Schedule and signed by or on behalf of the appellant.”

22. In this instance, as no appeal was preferred against the judgment of 29<sup>th</sup> September 2021, we find that this Court lacks jurisdiction to entertain the application for stay of execution of a judgment against which no appeal was preferred.

23. If the court ordered that the execution be stayed pending the hearing and determination of the appeal, such an order would be in perpetuity, and the applicant would have no reason to institute an appeal after the execution is stayed.

24. It is noteworthy, that the applicant in its supporting affidavit stated that;

“The applicant’s intended appeal is against the Ruling of the trial court dated 30<sup>th</sup> June 2022 in which the court dismissed the applicant’s application to set aside the judgment of the court dated 29<sup>th</sup> September 2021.”

This ruling did not direct either party to do anything. It left the parties in the same position they were in at the time the application was filed. It was a negative order and incapable of execution.



25. In the circumstances, we find that the application herein is unmerited. Consequently, the application is dismissed with costs to the respondent.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY, 2025.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

.....

**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

signed

**DEPUTY REGISTRAR.**

