



Republic v Joshua Nyamweya Oigara, CBS, Chief Executive Officer, KCB Bank Kenya Ltd & 4 others; Inyangu (Exparte Applicant) (Miscellaneous Application E002 of 2023) [2025] KEELRC 149 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 149 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E002 OF 2023
BOM MANANI, J
JANUARY 30, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

JOSHUA NYAMWEYA OIGARA, CBS, CHIEF EXECUTIVE OFFICER, KCB BANK KENYA LTD 1ST RESPONDENT

PAUL RUSHDIE RUSSO, CHIEF EXECUTIVE OFFICER, KCB BANK KENYA LTD 2ND RESPONDENT

JAPHETH OCHIENG ACHOLA, GROUP HUMAN RESOURCE DIRECTOR, KCB BANK KENYA LTD 3RD RESPONDENT

KCB BANK KENYA LTD 4TH RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE 5TH RESPONDENT

AND

DAVID MUGASIA INYANGU EXPARTE APPLICANT

RULING

Background

1. Through the application dated 14th October 2024, the 4th Respondent seeks the following orders:-
 - a. Spent.
 - b. Spent.



- c. Pending the hearing and determination of the intended appeal to the Court of Appeal, there be stay of execution of the order delivered on 15th June 2023 requiring the 4th Respondent to supply the Ex-Parte Applicant the documents set out in the Interested Party's order of 5th May 2022 within 7 days of the order.
 - d. Costs of this application be provided for.
2. The basis for the application is that by a ruling delivered on 15th June 2023, the court directed the 4th Respondent to provide the Ex-Parte Applicant with the documents listed in the Interested Party's order of 5th May 2022 within seven (7) days of the order. The Respondent states that it applied for review of the aforesaid order through the application dated 29th February 2024 on the ground that the documents sought by the Ex-Parte Applicant do not exist. As such, it was not possible for it (the 4th Respondent) to comply with the order.
 3. The Respondent avers that by the court's ruling of 19th September 2024, the application for review was dismissed. As a consequence, it (the 4th Respondent) remains saddled with the order of 15th June 2023 commanding it to supply the Ex-Parte Applicant with documents which it does not have.
 4. The 4th Respondent contends that as a result of the foregoing, it has been forced to appeal the decision. However, it fears that the Ex-Parte Applicant will enforce the order despite the pendency of the appeal as indeed he has attempted to do through a pending application for contempt of court.
 5. The 4th Respondent contends that in view of the foregoing, it has become necessary to apply for stay of execution of the order in question pending resolution of the appeal. It avers that if the stay orders do not issue, the Ex-Parte Applicant will prosecute the contempt of court application to its detriment as its officers risk being deprived of their personal liberty should the application be allowed.
 6. The Ex-Parte Applicant has filed a replying affidavit dated 22nd October 2024 in response to the application. He contends that the 4th Respondent's Notice of Appeal challenges the order which was issued on 19th September 2024 and not the order of 15th June 2023.
 7. He further argues that the order which issued on 15th June 2023 is not one of the orders from which an appeal lies as of right under section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules. He avers that the 4th Respondent has not obtained leave of the court to appeal.
 8. He contends that the 4th Respondent challenged the decision of 15th June 2023 through an application for review and lost. As such, it is not open to it to appeal from the same order.

Analysis

9. I do not understand the 4th Respondent's application of 14th October 2024 as suggesting that its (the 4th Respondent's) intended appeal is against the court order of 15th June 2023. All it (the 4th Respondent) has done is to give a chronology of events which prompted the decision to move to the Court of Appeal against the orders of 19th September 2024.
10. According to it, after this court issued the orders of 15th June 2023 compelling it to provide the Ex-Parte Applicant with certain documents, it applied for review of that order. However, in the ruling of 19th September 2024, the court declined the request for review prompting the decision to approach the Court of Appeal.



11. Indeed, the Notice of Appeal annexed to the application shows that the proposed appeal is against the order of 19th September 2024 refusing to review the earlier order of 15th June 2023. As such, the Ex-Parte Applicant's suggestion that the appeal is against the decision dated 15th June 2023 is incorrect.
12. The Ex-Parte Applicant contends that an appeal does not lie as of right from the order of 15th June 2023. That is arguable. However, this is not the order which the 4th Respondent is challenging on appeal. Rather, it is challenging the order of 19th September 2024 by which the court refused to review the decision of 15th June 2023. Nevertheless, let us examine the correctness of the Ex-Parte Applicant's thesis in this respect.
13. It is to be noted that the current proceedings arise from an employer-employee dispute. Therefore, they are regulated by the *Employment and Labour Relations Court Act* and the rules made thereunder.
14. Section 17 of the *Employment and Labour Relations Court Act* provides for appeals from decisions of this court. It reads as follows:-

“ Appeals from the Court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the Court in accordance with Article 164(3) of *the Constitution*.”
15. My understanding of this provision is that it grants parties to disputes before the Employment and Labour Relations Court (the ELRC) a right of appeal against all decisions made by the court including those for adoption of awards to employees against employers by quasi-judicial tribunals. Second, the Act directs that all such appeals lie to the Court of Appeal. As such, the 4th Respondent was entitled to appeal against both decisions of 15th June 2023 and 19th September 2024 to the Court of Appeal.
16. It is imperative to point out that the ELRC has its own procedure rules. As such, it only applies provisions of the *Civil Procedure Act* and Civil Procedure Rules where the Employment and Labour Relations (Procedure) Rules (ELRC Rules) permit.
17. One such instance where the ELRC Rules permit the application of the *Civil Procedure Act* and Civil Procedure Rules is in enforcement of decrees and orders of the ELRC (see rule 32 of the ELRC Rules). As such, the 4th Respondent's application dated 14th October 2024 being one of stay of execution and therefore falling under the realm of execution proceedings is properly premised on Order 42 of the Civil Procedure Rules which addresses stay of execution pending appeal.
18. But that is as far as application of the *Civil Procedure Act* and Civil Procedure Rules to proceedings relating to employment disputes goes. One cannot invoke provisions of the *Civil Procedure Act* and Civil Procedure Rules in these proceedings unless the ELRC Rules have sanctioned it. As such, it was not open to the Ex-Parte Applicant to invoke section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules to fight off the instant application as the ELRC Rules have not sanctioned the application of these provisions to proceedings before the ELRC.
19. But even assuming that the position I express above is incorrect, would the Ex-Parte Applicant's thesis have passed muster? I think not.
20. As indicated earlier, the 4th Respondent's appeal is against the order of the court refusing the request for review. Under Order 43 (1) (x) of the Civil Procedure Rules, an appeal lies as of right from a decision on an application for review. As such and in any event, the 4th Respondent would still have been entitled to appeal against the orders of 19th September 2024 as of right. Consequently, the Ex-Parte Applicant's thesis fails.



21. The 4th Respondent contends that the reason why it seeks an order for stay of execution pending appeal is because it fears that the Ex-Parte Applicant is poised to execute the order of 15th June 2023 by way of contempt of court proceedings notwithstanding pendency of the appeal. It contends that if this happens, it stands to suffer irreparable harm since this will deprive its officers who will be affected by the order of their liberty.
22. I have looked through the court file and indeed noted that the Ex-Parte Applicant has filed an application dated 13th October 2023 seeking leave of the court to commence contempt of court proceedings against the 4th Respondent's officers for their failure to implement the order of 15th June 2023. As such, the 4th Respondent's assertions in this regard are not illusionary.
23. I have looked at the Ex-Parte Applicant's response to the instant application. He does not controvert the 4th Respondent's assertion that he is indeed poised to execute the order of 15th June 2023. Further, he does not controvert the 4th Respondent's assertion that the effect of a contempt of court order against its officers may result in deprivation of their civil liberties thereby causing them substantial loss.
24. The Ex-Parte Applicant having not controverted these averments, I find that the 4th Respondent has demonstrated that there are sufficient reasons to warrant the granting of the orders sought. I am satisfied that if execution of the court's order of 15th June 2023 is allowed to proceed in the face of the intended appeal, the 4th Respondent will suffer substantial loss.
25. As regards security for the performance of the impugned order in the event that the intended appeal fails, I note that the order only seeks to compel the 4th Respondent to produce certain documents. As such, it is unlikely that the documents will not be supplied to the Ex-Parte Applicant should the 4th Respondent lose the appeal. Consequently, I do not think that the Ex-Parte Applicant requires any special form of security to guarantee enforcement of the order.
26. As regards whether the application was filed expeditiously, I note that the orders which are sought to be challenged on appeal were issued on 19th September 2024. And the application for stay of execution was filed on 14th October 2024, hardly one month down the line. As such, I find that the motion was filed without undue delay.

Determination

27. Having regard to the foregoing, I find that the application dated 14th October 2024 is merited.
28. Accordingly, I grant the 4th Respondent's plea for stay of execution of this court's orders of 15th June 2023 requiring it (the 4th Respondent) to supply the Ex-Parte Applicant the documents set out in the Interested Party's order of 5th May 2022 within 7 days of the order pending the hearing and determination of the intended appeal against the orders of 19th September 2024 to the Court of Appeal.
29. Costs of the application shall abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JANUARY, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Ex-Parte Applicant

.....for the 4th Respondent



ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

