



REPUBLIC OF KENYA



**Ali v Grain Industries Limited (Cause 3 of 2020)
[2025] KEELRC 1331 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1331 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 3 OF 2020**

K OCHARO, J

MAY 8, 2025

BETWEEN

ISMAEL AHMED ALI APPELLANT

AND

GRAIN INDUSTRIES LIMITED RESPONDENT

RULING

1. Due to the contentious issues flowing from the Notice of Motion application dated 29th November 2024, submitted by the Respondent/Judgment Debtor, it is vital to present a brief factual history of this case before delving into interrogating the merits or otherwise of the application.
2. By his Judgment dated 13th May 2022, Justice Byram Ongaya allowed the Claimant's claim herein and awarded him a sum of Kshs. 2, 808, 871.00, which amount he ordered to be paid on or before 1st July 2022, failing which interest would be payable thereon at Court rates from the date of the Judgment till full payment. Further directing the Respondent/Applicant to issue the Claimant with a certificate of service as per Section 51 of the [Employment Act](#).
3. Following the Judgment, and expressing their grievance and intention to challenge the decision, the Respondent filed a Notice of Appeal dated 26th May 2022.
4. By an application dated 27th January 2023, the Respondent /Applicant sought;
 - a. That the Court be pleased to order a temporary stay of execution and proclamation served by Fantasy Auctioneers pending the hearing of the Application.
 - b. That there be a stay of execution and proclamation by Fantasy Auctioneers pending hearing and determination of the appeal.
 - c. The costs of the application be provided for.



5. The Application was opposed.
6. The application was canvassed by way of written submissions. By her ruling dated 13th July 2023, Justice Nzei dismissed the application stating;
 - “ 13. The import of the foregoing subrule [6][4], in my view, is therefore this court can not order a stay of execution of its decree pending appeal; it must be satisfied that a valid notice has been given /filed, within 14 days of the decree or order intended to be appealed against.
 14.
 15. It is clear from the foregoing that the Notice of Appeal filed by the Respondent / Applicant on 27/ 5/ 2022 and endorsed by this court’s Deputy Registrar on 27 /5/2022 does not relate to this Court’s judgment delivered by the Honourable Justice Byram Ongaya on 13th May 2022. The intended appeal is shown to be against “a ruling delivered on 13th May 2022.
 16. I do agree with the Claimant that the Respondent did not, and has not, filed a Notice of Appeal against the Court’s judgment delivered on 13/5/ 2022. There is nothing upon which an application for stay of execution of this Court’s decree can be founded. The Notice of Motion dated 27/ 1/ 2023 is without basis, and I order that the same be, and is hereby dismissed. The interim stay orders given by this Court on 27 /1/ 2023 are hereby vacated”.
7. Meanwhile, the Respondent/Applicant submitted an appeal at the Court of Appeal, specifically appeal No E 43 of 2023 - Grain Industries Limited v Ismael Ahmed Ali, pursuant to the Notice of Appeal. The Court dismissed the appeal by its ruling dated 26th April 2024, following a motion filed by the Claimant/Decree Holder.
8. It isn’t disputed that, subsequently, through Miscellaneous Civil Application No. E 050 of 2024- Grain Industries Vs- Ismael Ahmed Ali, the Respondent, re-approached the Court of Appeal for extension of time to file the Notice of Appeal and the Appeal out of time. The application was granted on 22nd November 2024, culminating in the filing of an Appeal No. E 240 Of 2024.
9. Following the extension of time, the Respondent lodged and served a fresh Notice of Appeal dated 22nd November 2024. Based on this filing, the Respondent lodged the current Notice of Motion application, which the Claimant vehemently opposes.
10. Pursuant to the directions of this Court, the parties filed their respective written submissions for and against the application.

The Application.

11. In their Notice of Motion application, the Respondents/Applicants have sought the following orders;
 - I. That the Application be certified urgent and be heard on a priority basis.
 - II. Pending the hearing and determination of this application inter partes, the Court be pleased to stay execution of the judgment and decree issued herein on 13th May 2022.
 - III. Pending the hearing and determination of the intended appeal to the Court of Appeal, the Court be pleased to stay execution of the judgment and decree issued herein on 13th May 2022.



12. The application is based on the grounds presented within the application itself, alongside the supporting affidavit sworn by the Respondent's Legal Officer, Mohammed Nabil, on 29th November 2024, and an additional affidavit sworn on 15th January 2025. The following grounds emerge as the primary bases for the application:
- I. An appeal is pending against the Judgment and decree herein. The appeal raises arguable grounds and has a high chance of success.
 - II. Unless a stay of execution is granted, the Respondent will suffer prejudice, and the intended appeal rendered nugatory as;
 - a. The Claimant will execute the decree issued by obtaining the release of the colossal sum of KShs. 3, 438, 492.
 - b. The Claimant is a man with no known means and, as such, will not be able to refund the colossal sum if the appeal succeeds.
 - c. The application has been filed without any inordinate delay.
 - d. The Respondent has already deposited the KShs 3,483,492 as security for the due performance of the decree herein if the appeal fails.
 - e. The balance of convenience tilts in favour of the Respondent, for they will suffer prejudice if the sum deposited in court as security is released. The Respondent will not be able to seek restitution from an impecunious Claimant successfully.

The Response by the Claimant.

13. The Claimant counters the application with his replying affidavit, sworn on December 13, 2024. The affidavit outlines the following grounds that serve as the basis for the opposition:
- a. The application is incompetent, incurably defective, and is filed by a stranger.
 - b. This Court, having already decided on an application for stay pending appeal, and an application for review, doesn't have jurisdiction to decide on the same issues. The application is res judicata. The court is functus officio.
 - c. The application is an abuse of the court process as the Applicant has already made an application on record for a stay of execution dated 1st October 2024, with a ruling date.
 - d. The Respondent didn't comply with the Court of Appeal Orders. In the absence of compliance, it cannot be said that there is an appeal pending.
 - e. He is a man of means, and the Respondent, having been his employer for many years, knows this much.
 - f. The Applicant has applied to the Court of Appeal for a stay of execution pending appeal. The Respondent cannot be allowed to oscillate between courts.

The Rejoinder.

14. Through the further affidavit alluded to hereinabove, the Respondent/Applicant asserted that;
- a. It had filed an initial appeal, No E 043 of 2023—Grain Industries Limited v Ismail Ahmed Ali, which was dismissed because it was filed out of time.



- b. Subsequently, the Court of Appeal granted an extension to file a fresh Notice of Appeal on 22nd November 2024.
- c. Contrary to the Claimant's contention, it complied with the order by lodging and serving a fresh Notice of Appeal and main appeal -No E 240 of 2024.
- d. In the circumstances, the allegations that the applicant had filed previous applications based on the dismissed appeal are inconsequential in light of the Court of Appeal's orders of extension of time.

Analysis and Determination.

- 15. I have carefully considered the Applicant's application, the grounds on which it is anchored, the supporting and further affidavits thereof, the Claimant's replying affidavit, and the Parties' Counsels' respective submissions, and two principal issues emerge for determination on the instant application, thus;
 - a. Whether the instant application is res judicata, and this Court functus officio
 - b. If the answer to [a] is not affirmative, are the orders sought in the application merited?
- 16. The Claimant asserted, and his Counsel extensively submitted that the Respondent's Notice of Motion Application is res judicata as this Court had earlier through the ruling referred to hereinabove, dismissed a similar application for stay of execution of the decree herein pending appeal, and that in the circumstances, the Court is functus officio, and lacks the jurisdiction to entertain the current application.
- 17. It is crucial to point out that Counsel, ably submitted on the doctrines of res judicata, its purpose in litigation, and the consequences on suits or applications whenever found to be applicable in those suits and applications, and functus officio. The decisions cited by Counsel to support his submissions on the principles, were relevant in as long as they explained the doctrines, including Kenya Commercial Bank v Muiruri Coffee Estates & another [2016] eKLR, and Telkom Kenya Limited Vs John Ochanda [Suing on his behalf and on behalf of 996 former employees of Telkom Kenya Limited] [2024]eKLR.
- 18. The Claimant's Counsel submitted and urged this Court to find the filing of the instant application an abuse of the Court process, considering the many applications the Respondent has filed herein surrounding the decree and or stay of execution. He relied on the decision in Ahmed & Khadhi Mombasa [2021] KEHC 133[KLR].
- 19. I deliberately brought forth the procedural history of this matter hereinabove. I have carefully analysed the earlier application, and the ruling that Justice Nzei delivered on the same, and note these;
 - a. The Respondent's application was dismissed because;
 - I. The application sought orders that were not grantable under Order 42 of the Civil Procedure Rules. It did not seek a stay of execution of the decree but warrants of attachment and an auctioneer's proclamation.
 - II. The Respondent did not have a valid Notice of Appeal, so an application for a stay pending appeal could not be validly filed and considered by the court.
 - b. The Honourable Judge didn't venture into considering whether the Respondent's application had met the conditions under Order 42 Rule 6. In other words, the Court didn't consider, and determine the application on its merits. The application was dismissed on a technicality.



- c. The earlier application was anchored on an incompetently initiated appeal procedure.
20. Res judicata and functus officio doctrines have one thing in common: they both speak to the finality of court decisions. Considering the observations I have made hereinabove [para. 19], I have no hesitation in concluding that the two doctrines do not militate against the Respondent's application. The Claimant cannot successfully use them as a sword to slay it.
21. Order 42 Rule 6 of the Civil Procedure Rules, which are this Court's Procedure Rules, explicitly allow, as applicable in proceedings of this court, to spell out the conditions that an applicant seeking a stay of execution pending appeal must satisfy before the Court exercises its discretion to grant the application. It is clear, therefore, that the discretion is feathered. It must be demonstrated that the application was filed without undue delay, that the Applicant will suffer substantial loss if the order of stay of execution is not granted, and that the Applicant has offered security for the due performance of the decree should the appeal fail.
22. Undoubtedly, the instant application was filed within seven days of submitting the fresh Notice of Appeal. The Claimant hasn't argued that there was an inordinate delay in lodging the application, and I see no reason that could justify such a claim.
23. The Respondent/ Applicant contended that it will suffer substantial loss if the order sought isn't granted, allowing the Claimant to access the sum of KShs. 3, 438,492. The Claimant is a man of no known means, recovering the money from him if the appeal herein succeeds, and it will be impossible for him to refund it. Therefore, the success of the appeal shall be rendered nugatory.
24. Where the Applicant asserts that the Decree Holder doesn't possess the means of refunding the decretal sum, should the appeal succeed. The burden shifts to the Decree Holder to discount the assertion. It is essential to point out that discounting can only be successful if the Decree Holder demonstrates by plausible material that indeed he possesses the means. Mere assertions like, "I am not a man of straw. The employer/ Applicant knows I possess the means", cannot suffice.
25. In the present case, the Claimant, confronted with the claim that he lacks the capacity to reimburse the considerable amount at stake, merely presented an unsubstantiated claim of possessing the means to refund if requested to do so. In my opinion, this assertion does not adequately counter the Respondent's claim. Consequently, I conclude that the Respondent/Applicant has convincingly demonstrated that, should the order for a stay of execution not be granted, it will incur substantial loss.
26. The Respondent / Applicant undertook to provide security for the due performance of the decree, should its appeal fail. It reminded the court that the decretal sum was deposited in court courtesy of an interim order given on the earlier application mentioned above, and that the sum remains so deposited. The Court should order that it remain deposited as such, pending the appeal in the Court of Appeal.
27. Doing the best I can to balance the Claimant's right to enjoy the fruit of his judgment secured on merit, and not to act as an impediment to the Respondent's undeniable right of appeal, and considering that the Respondent has established all the conditions necessary for the grant of stay of execution, I grant the Respondent's application on the following terms;
- I. I. There shall be a stay of execution of the decree herein, pending the hearing and determination of the appeal in the Court of Appeal on the condition that the Respondent deposits the sum of KShs.3,438 492 in court.
- II. II. The sum of Kshs. 3,438,492 already deposited shall serve as that security and remain deposited pending the hearing and determination of the appeal.



28. Orders accordingly.

READ, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 8TH DAY OF MAY, 2025.

OCHARO KEBIRA

JUDGE

