



**Radar Security Limited v Obiele (Appeal E189 of 2022)
[2025] KEELRC 1738 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1738 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E189 OF 2022**

**SC RUTTO, J
JUNE 13, 2025**

BETWEEN

RADAR SECURITY LIMITED APPELLANT

AND

KENNEDY KHATETE OBIELE RESPONDENT

RULING

1. What comes up for determination is the Appellant/Applicant's Notice of Motion dated 28th February 2025, seeking the following orders:
 1. Spent.
 2. Spent.
 3. That, this Honourable Court be pleased to review and vary its findings in the Ruling dated 18th October, 2024 and grant the Appellant Applicant interim orders of stay of execution of the orders of execution of decree in Nairobi CMEL CASE NO.130 of 2018 pending hearing and determination of the Appeal before Court of Appeal, Nairobi.
 4. That, pending hearing and determination of this Application interpartes this Honourable Court be pleased to temporarily restrain the Respondents, her agents, auctioneers or anybody acting on her instructions from attaching, selling, advertising for sale or interfering in any manner whatsoever with the Applicants goods or properties
 5. That, pending hearing and determination of the intended Appeal herein this Honourable Court be pleased to restrain the Respondent, his agents, auctioneers or anyone acting on his behalf from attaching, selling, advertising for sale or interfering in any manner whatsoever with the Applicants goods or properties.
 6. Cost of this suit be provided for.



2. The Application is premised on the grounds appearing on its face and the Affidavit of Beryl Odhiambo, the Applicant's Human Resources Manager. Grounds in support of the Motion are that this Court delivered its judgment on 18th October, 2024 dismissing the Applicant's Appeal on a technicality amongst which that the Appeal was filed out of time without considering the Notice of Appeal dated 9th day of September, 2022 appealing from the Judgment of Hon. Selina N. Muchungi delivered on 9th September, 2022.
3. It is further averred that the Applicant has preferred a substantial Appeal against the entire judgment delivered on 18th October 2024, with high chances of success and is highly apprehensive that unless stopped, the Respondent will execute the orders of this Court. That the Applicant stands to suffer irreparable loss as the Respondent has not filed any statement of means to date.
4. According to the Applicant, the intended Appeal if successful, will be rendered nugatory and justice subverted if execution is not stayed pending hearing and determination of the Appeal.
5. That the application is made without undue delay and that the Respondent will not suffer any prejudice if the orders sought are granted.
6. The Respondent herein, Kennedy Khatete Obiele opposed the Application by filing a Replying Affidavit sworn on 17th March 2025. The Respondent avers that the Appellant herein has no arguable Appeal in place as the case was dismissed for reasons that there was no competent Appeal.
7. The Respondent contends that this Court having dismissed the Appeal, it therefore follows that the appropriate forum which the instant application should have been filed is the Court of Appeal.
8. That a similar application dated 27th February 2025 had been filed in the Chief Magistrates Court and no orders of stay were granted. In the Respondent's view, double filing of the same application is an abuse of the judicial process of the Court and should result in dismissal of the Application.
9. According to the Respondent, the Applicant is misusing the Court to stay the execution of a judgment that was delivered in accordance with the Civil Procedure Rule Act. That execution is a lawful process and it is not a ground for granting stay of execution.
10. The Respondent has further averred that he will suffer grave prejudice and injustice if the Application herein is allowed, the net effect being to deny him the timely enjoyment of the fruits of his Judgment and the Applicant succeeding in buying time and delaying the matter further.

Submissions

11. Pursuant to the directions issued by the Court on 20th March 2025, the Application was canvassed by way of written submissions. In support of the Application, the Applicant has submitted that it faces unfair execution proceedings based on the decretal sum unjustly and irregularly awarded to the Respondent without its participation. Referencing the case of Samvir Trustee Limited v Guardian Bank Limited (2007) eKLR and Allan Otieno Osula v Gurdev Engineering & Construction Ltd (2015) eKLR, the Applicant has further submitted that the right of appeal must be balanced against an equally weighty rigid right of the Respondent to enjoy the fruits of the judgment delivered in his favour.
12. Placing reliance on the case of Abdurrahman Abdi v Safi Petroleum Products Ltd & 6 others (2011) eKLR, the Applicant has argued that the hardship and prejudice likely to be occasioned to them in the matter is greater than the hardship to be occasioned to the Respondent as they will lose the opportunity to prosecute their appeal and have the same determined on merits.



13. On the other hand, the Respondent has submitted that the Application is defective and an abuse of the court process as it has been brought under Section 79A of the Civil Procedure Act instead of Section 79G of the Act.
14. The Respondent has further posited that the Applicant has not satisfied the threshold for filing an appeal out of time. In support of this position, the Respondent has sought to rely on the case of *Thuita Mwangi v Kenya Airways Ltd (2003) eKLR*.
15. It is the Respondent's further submission that the Memorandum of Appeal and intended Appeal do not raise pertinent issues in law, considering that the judgment of the trial court was delivered legitimately.
16. It is the Respondent's position that the Applicant has not advanced a substantive and or fundamental reason for seeking stay of execution. In support of this argument, the Respondent placed reliance on the case of *Shell Ltd v Kibiru & another KLR 401*.

Analysis and Determination

17. Having considered the Notice of Motion, the Respondent's Replying Affidavit and the rival submissions, the Court has singled out the singular issue for determination as being whether the Applicant has satisfied the requirements for the grant of an order for Review under Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024.
18. The primary reason advanced by the Applicant in support of its application for the review is that the Court did not consider the Notice of Appeal dated 9th September 2022, appealing from the judgment of Hon. Selina N. Muchungi delivered on 9th September 2022. To this end, the Applicant referenced the Court to a Notice of Appeal dated 9th September 2022 appearing at page 107 of the Record of Appeal.
19. Indeed, in rendering its judgment dated 18th October 2024, the Court took cognizance of the said Notice of Appeal, which was filed pursuant to Rule 75 of the Court of Appeal Rules, 2010. Noting that the filing of the said Notice of Appeal was contrary to Order 42 Rule 1(1) of the Civil Procedure Rules, 2010 and Rule 8(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 (in force then), the Court deemed the said Notice of Appeal superfluous as it did not constitute an Appeal to this Court.
20. Pursuant to Order 42 Rule 1(1) of the Civil Procedure Rules, an Appeal to the High Court is by filing a memorandum of appeal. The said statutory provision is couched as follows:

“Form of appeal [order 42, rule 1.]

Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.” Underlined for emphasis
21. Similarly, Rule 8 (1) of the Employment and Labour Relations Court (Procedure) Rules 2016 (now revoked) provides as follows:

“[8]. (1) Where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.” Underlined for emphasis



22. Under the Employment and Labour Relations Court (Procedure) Rules, the form of the memorandum of appeal is as per Form 1 set out in the First Schedule.
23. In light of the foregoing, it is evident that since the Applicant was appealing the Judgment of the Senior Resident Magistrate, the proper manner of invoking this Court's jurisdiction was by way of a memorandum of appeal and by all means, not a Notice of Appeal pursuant to the Court of Appeal Rules which do not apply in this Court.
24. Needless to say, the Notice of Appeal dated 9th September 2022 by the Applicant is superfluous and does not in any way support the Applicant's case that it filed an appeal within the stipulated time but was overlooked by the Court.
25. I reiterate that the Notice of Appeal dated 9th September 2022, is not an Appeal to this Court as contemplated under the Civil Procedure Rules, 2010 and the ELRC (Procedure) Rules (2016) (in force at the time).
26. In light of the foregoing, the Court finds the Notice of Motion dated 28th February 2025 to be without merit and consequently, it is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2025.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Wachakana for the Appellant/Applicant

Mr. Mwangi for the Respondent

Millicent Court Assistant

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

