



**Chemurgor v Laico Regency Hotel Limited; Underhill Limited (Objector)  
(Cause 2524 of 2016) [2025] KEELRC 2159 (KLR) (18 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2159 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2524 OF 2016**

**JW KELI, J  
JULY 18, 2025**

**BETWEEN**

**BETTY CHEMURGOR ..... CLAIMANT**

**AND**

**LAICO REGENCY HOTEL LIMITED ..... RESPONDENT**

**AND**

**UNDERHILL LIMITED ..... OBJECTOR**

**RULING**

1. The applicant/objector filed Notice of Motion application dated 7th March 2024 seeking for the following reliefs:-
  - a. Spent
  - b. This Honourable Court grant a Stay of Execution of the Auctioneers Proclamation Notice dated 1/03/2024 pending the Hearing and Determination of this Application.
  - c. This Honourable Court be pleased grant a Stay of Execution of the Auctioneers Proclamation Notice dated 1/03/2024 pending the Hearing and Determination of the Objector/Applicant intended Appeal.
  - d. The Costs of this Application be in the cause.

**Grounds of the application**

2. The court delivered a ruling on the 23/02/2024 dismissing the Objector's Application dated 21/11/2022.



3. The Objector/Applicant since has a served with been Notice of Attachment/Repossession/Distrain of Movable Property dated 1/03/2024 by BETABASE AUCTIONEERS.
4. The Objector/Applicant has decided to Appeal against the Ruling of the court and has thus filed this Application.
5. The Objector/Applicant Appeal has a high probability of success Objector/Applicant is apprehensive that the Decree Holder will proceed to execute the Decree before the Appeal herein is heard, rendering the Appeal nugatory and a mere academic exercise.
6. The Proclamation Notice, which only cites property belonging to Underhill Limited, has not been served on the Judgment Debtor, Laico Regency Hotel Limited, making the actions of the Auctioneer illegal.
7. The Application herein has not been made with unreasonable delay.
8. The Plaintiff/Applicant is willing to abide by the terms given by the court.
9. That it is within the interests of justice that these orders be granted to the applicant.
10. In support of the application the Objector filed supporting affidavit sworn by Ibrahim Adan on the 7<sup>th</sup> March 2024 where he annexed the ruling against the objector's application, proclamation notice and the Notice of Appeal.
11. The application was opposed by the Decree Holder who filed her replying affidavit sworn on the 7<sup>th</sup> June 2024 who asserted that the notice of appeal was filed without leave of the court hence defective, that the objector was not keen on the appeal for failure to request for typed proceedings, that the appeal had no chance of success as the lease agreement relied upon provided that the attached goods are property of the lessor and not the objector. That the lessor had not objected and the trial court in the impugned ruling held that the objector had not proved it had legal title to all proclaimed goods.
12. The applicant despite approaching the court under certificate of urgency, on numerous occasions asked the court for time to settle out of court leading to a delay over 1 year in disposal of the application. Finally, the parties informed the court they had not settled.
13. The court directed the application be canvassed by way of written submission. Only the Decree Holder complied.
14. The court addressed the merit of the application.

#### **The Decree Holder submissions**

15. These submissions are made in opposition to the Objector/Applicant's Notice of Motion application dated 7th March 2024, which seeks inter alia a stay of execution of the ruling delivered by this Honourable Court on 23rd February 2024. The ruling by Justice Ocharo Kibera dismissed Underhill Limited's objection to execution proceedings initiated by the Claimant/Decree Holder pursuant to a judgment issued in February 2020, in which the Claimant was awarded Kshs. 1,972,432.00 plus costs and interest.
16. The Application is opposed. The Claimant has filed a replying affidavit sworn on 7th June 2024. At the time of filing these submissions, the objector had not complied with the Court's order on filing of its submissions.



17. Section 75 of the *Civil Procedure Act* further provides that: 1)An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-
- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
  - (b) an order on an award stated in the form of a special case;
  - (c) an order modifying or correcting an award;
  - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
  - (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
  - (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
  - (h) any order made under rules from which an appeal is expressly allowed by rules
18. Order 43 Rule 1 of the Civil Procedure Rules provides that appeals shall lie as a right the orders specified therein and provides under Order 43 Rule 2 that an appeal shall lie with leave of the court from any other order made under the rule.
19. The Claimant submits from the outset that the Objector's Notice of Appeal is invalid and null for failure to comply with Section 75 of the *Civil Procedure Act* and Order 43 Rules 1 and 2 of the Civil Procedure Rules, 2010. An appeal against an order touching on objection proceedings is not provided under Order 43 Rule 1.
20. The Claimant submits that the Objector is challenging the ruling delivered by Hon. Justice Ocharo on 23rd February 2024. The Claimant submits that the order emanating from the ruling does not fall under the category of appealable orders as of right as specified under Order 43 Rule 1. The Objector was obligated under Order 43 Rule 2 to obtain leave to appeal, which Underhill Limited neither sought nor obtained. The law is unequivocal that where leave is required and not sought, any Notice of Appeal filed is a legal nullity.
21. In Peter Nyaga Muvake vs. Joseph Mutunga, the Court of Appeal emphatically stated: "Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked."
22. Order 43 Rule 3 requires that an application for leave under section 75 shall in the first instance be made to the Court making the order sought to be appealed from either orally at the time when the order is made or within fourteen 14 days from the date of such order.
23. The Objector did not seek leave to appeal against the order within fourteen (14) days and neither sought an extension of time to seek leave to appeal in the present application. The Claimant further relies on the decision of Said (Estate of Azubeidi) vs. Ikumbu<sup>2</sup>, where the Court of Appeal struck out a notice of appeal filed without leave and held that: "The omission to obtain leave is fatal. Any steps taken pursuant to such a notice, including stay applications, are void ab initio."



24. Given that the Notice of Appeal by the Objector/Applicant was filed without leave, it cannot anchor an application for stay of execution. The appellate jurisdiction of the Court of Appeal has not been invoked and therefore any proceedings emanating from it are unsustainable and defective.
25. The Claimant will submit on the principles for consideration when dealing with an application for stay of execution hereunder on a without prejudice basis to the foregoing.
26. Arguable appeal- At paragraph 6 of the supporting affidavit, the objector pleads that it has a bona fide and arguable appeal that deserves the hearing by the Appellate Court. The Objector has not annexed a draft Memorandum of Appeal for the Court to consider whether the same is arguable. The Court has no basis to determine whether the appeal is arguable and just on this limb, the Objector's application is for dismissal.. This Honourable Court in *James Mogaka vs. Kenya Commercial Bank Limited* held as follows:"The Respondent/Applicant asserts it has an arguable appeal which it has preferred to the Court of Appeal. However, no memorandum of such an appeal was availed as proof. In the absence of the proposed or actual memorandum of appeal this Court is handicapped in determining whether there is indeed an appeal being preferred. A mere notice of appeal is insufficient for purposes of grant of stay pending appeal as there should to be some arguable grounds upon which the intended appeal is premised. As none have been proffered the Application seeking stay fails and is dismissed with costs to the Claimant."
27. Nevertheless, the Claimant submits that the ruling of 23rd February 2024 was clear and well-reasoned. It found, after a detailed evaluation of the lease agreement and factual matrix, that the Objector did not have any legal or equitable interest in the goods under attachment. The court analysed clauses 3.2, 7.10, 10.5, and 11.5 of the lease agreement and held that the Objector assumed limited obligations as a lessee and did not acquire any proprietary rights over the attached chattels.
28. The burden of proof under Order 22 Rule 51(1) rested entirely upon the Objector to demonstrate ownership of the attached goods. It failed to discharge this burden. The learned Judge in his ruling correctly noted that the lease agreement did not aid the Objector as it provided that the items are property of the Lessor/Judgment Debtor and that there was no explanation on why the Lessor/Judgment Debtor did not initiate the objector proceedings.
29. On whether an arguable appeal has been demonstrated, the Court in *Mumilora Ltd vs. Lucy Wambui Yinda* the Court held as follows:"An arguable appeal must raise a bona fide point deserving judicial consideration. Where the trial court's findings are based on settled law and uncontroverted facts, no arguable issue arises." The Claimant submits that to demonstrate the Objector's lack of seriousness in pursuing an appeal, the applicant has to date not applied for typed proceedings or certified order to enable filing of an appeal.
30. Irreparable Harm- The Claimant submits that the Objector has failed to demonstrate that it will suffer any form of irreparable harm if stay is denied. The goods in question, kitchenware, hotel furniture, and fittings, are not unique or exceptional items incapable of monetary valuation.<sup>22</sup> In *Gatai vs. Mwangi?*, the court held as follows:

"Where the subject matter is capable of being valued and compensated by way of damages, the claim of irreparable harm collapses."

4.

23. The Claimant is executing a money decree which is capable of being assessed as damages. More importantly, as the Court noted in its ruling delivered on 23rd February 2024 at paragraph 31 that



the items attached allegedly on the basis of the lease agreement belong to the Lessor. The Objector therefore stands to suffer no harm, irreparable or otherwise, the items on the basis of its evidence do not belong to the objector. The Claimant submits that irreparable harm must be actual, imminent, and incapable of being addressed by compensation. None of these elements have been satisfied by the Objector.

31. Security-In its application, the Objector has neither made any proposal nor expressed a willingness to offer security for the due performance of the decree, as required by law. The supporting affidavit sworn by Mr. Ibrahim Adan is entirely silent on this crucial issue. This glaring omission is not merely a technical defect, it goes to the heart of the Court's discretionary power to grant a stay of execution pending appeal. Order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010, provides in mandatory terms that an applicant seeking a stay must furnish such security as the court may order. The Rule is couched in clear and imperative language. It is not open to the applicant to sidestep this obligation or to assume that a stay will be granted without demonstrating readiness to protect the interests of the decree-holder. In the case of *Galaxy Paints Co Ltd vs. Falcon Guards Ltd*, the Court of Appeal held: "Security is a core component of the discretion to grant a stay. Without security, the respondent remains exposed to prejudice in the event of a failed appeal." More recently, in *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another*, the High Court emphasized that while it is sufficient for an applicant to indicate readiness to provide security, there must be some concrete proposal or undertaking. The Court stated: "Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. ... it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security." Here, by contrast, the Objector is not willing to provide any security and thereby confirming that this is another attempt to deny the Claimant the fruits of its judgment as appreciated by the Judge at paragraph 34 of his ruling.

### **Decision**

32. The application before the court is of stay of execution. It thus falls under Order 42(6) of the Civil Procedure Rules. The applicant annexed the Notice of Appeal. There was no draft memorandum of appeal for the court to determine on existence of an arguable appeal and no security of costs was offered under Order 42(6) of the Civil Procedure Rules which is a mandatory condition of order stay to be issued. The court on perusal of the impugned ruling found that the applicant relied on a lease agreement which established that the attached items belonged to the lessor and not the objector. The court in the impugned ruling dated 23<sup>rd</sup> February 2024 paragraph 34 stated that the objection proceedings were nothing but tactic to delay the enjoyment of the fruits of judgment by the Decree Holder. The application took long in court as the objector had informed court it was trying to settle out of court. This is a money decree hence no issue of irreparable harm. No substantial loss was demonstrated that cannot be compensated by monetary award against the Decree Holder in the event the intended appeal is successful. The court finds no basis to further delay enjoyment of fruits of judgment by the Decree Holder. The application is dismissed with costs to the Decree Holder.
33. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF JULY, 2025.**

**J.W. KELI,**



**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Applicant/objector- absent

Claimant/Decree Holder- Mrs Maina

Judgment debtor- Absent

