



REPUBLIC OF KENYA



**Maisha Steel (EA) Ltd v Wafula (Appeal E155 of 2023)  
[2024] KEELRC 335 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 335 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E155 OF 2023  
DKN MARETE, J  
FEBRUARY 21, 2024**

**BETWEEN**

**MAISHA STEEL (EA) LTD ..... APPLICANT**

**AND**

**MARTIN MUKWANA WAFULA ..... RESPONDENT**

**RULING**

1. This application dated 18th September, 2023 and seeks the following order of the court;
  1. That this Honourable Court be pleased to certify this Application as urgent and hear it ex parte in the first instance.
  2. That pending the hearing and determination of the application inter-partes or further orders of the Court, this Honourable Court be pleased to grant to the Applicant an interim stay of execution of the judgment delivered in the Chief Magistrate's Court at Ruiru in Employment Cause No. E062 of 2021 (*Martin Mukwana Wafula v. Maisha Steel (EA) Limited*) on 28<sup>th</sup> April, 2023;
  3. That this court be pleased to deem the attendant appeal as properly filed and do forthwith issue directions towards its adjudication and determination;
  4. That pending the hearing and determination of the appeal this Honourable Court be pleased to grant to the Applicant a stay of execution of the judgment delivered in the Chief Magistrate's Court at Ruiru in Employment Cause No. E062 of 2021 (*Martin Mukwana Wafula v. Maisha Steel (EA) Limited*) on 28<sup>th</sup> April, 2023 as per the terms and conditions issued by Hon. Justice Ocharo Kebira on 26<sup>th</sup> July, 2023;



5. That this Honourable Court be pleased to compel the Respondent's Counsel to sign and execute such account opening documents as are necessary for compliance with the orders of Hon. Justice Ocharo Kebira dated 26<sup>th</sup> July, 2023;
  6. That such further conditions pursuant to the grant of the above prayers be imposed upon the Applicant, as this Honourable Court deems fit and expedient in the circumstances; and
  7. That the costs of, and incidental to, this application be in the appeal.
2. The application is grounded inter alia on the facts that he had hearing before filed a Misc Application No. ELRC E147 of 2023 in which he served he received favourable orders as follows;
1. The decretal sum is deposited in a joint interest-earning account in the names of counsel for the parties within 45 days;
  2. The Applicant to file and serve the Record of Appeal within 21 days thereof; and
  3. In default execution to issue.
3. The applicant was thereafter expeditiously endeavoured to procure the relevant materials culminating in the filing of a Memorandum of Appeal on 25<sup>th</sup> August, 2023 and a record of Appeal on 6<sup>th</sup> September, 2023.
4. The Applicant further avers laxity on the part of counsel for the Respondent in the facilitation of compliance with the orders of court by refusing to execute the documentation for opening of a joint account but instead instruct Bealine Auctioneers to partake proclamation with a view to execution of judgement. This as follows;
- f. the intended appeal is well-founded, has a high probability of success and this Honourable Court ought to exercise its discretion and deem the filed Record of Appeal as properly filed and do forthwith issue directions towards its disposal.
  - g. the failure to file and serve a Record of Appeal within the set timeline was not occasioned by the applicant by any default on its part or that of the Applicant's Advocates, but the same is attributable wholly to the period taken by the Ruiru Chief Magistrate's Court registry, with regard to preparation and delivery of a certified copy of proceedings, over which neither the Applicant nor the Applicant's Advocates had control.
5. The applicant has been willing and continues to support a deposit of the decretal amount in a joint interest earning account as ordered by court. She therefore seeks order as prayed.

The Respondent opposes the application on the following grounds;

1. The application is res judicata as the issues of stay of execution pending appeal and leave to file the appeal out of time were determined by consent of the parties and endorsed by Hon. Justice Ocharo Kebira as per the orders made on 26<sup>th</sup> July, 2023.
2. The court is functus officio having already pronounced itself on the subject of stay of execution pending appeal and leave to file the appeal out of time. The court cannot therefore be called upon to yet again deliberate on the same issues.
3. The Respondent's Advocates cannot be compelled to execute account opening documents in compliance with the orders made by Hon. Justice Ocharo Kibera on 26<sup>th</sup> July, 2023, the said orders having lapsed as a result of non-compliance by the Applicant.



4. There is no competent appeal before the court, the Memorandum of Appeal herein having been filed outside the twenty one (21) days' leave period granted by the court.
5. The application is frivolous, vexatious, an abuse of the court process and an afterthought meant to forestall execution of the decree.
6. The Respondent in further response and opposition to the application files a Replying Affidavit sworn on 26th September, 2023 which comes out thus;
  - a. The Applicant presented before this court an application dated 13<sup>th</sup> July, 2023 (ELRC Misc. Application No. E147 of 2023 – *Maisha Steel (EA) Limited v Martin Mukhwana Wafula*), seeking *inter alia* leave to file the appeal out of time and stay of execution pending the hearing and determination of the appeal.
  - b. My Advocates responded to the said application by filing my Grounds of Opposition dated 21<sup>st</sup> July, 2023.
  - c. The said application came up for inter partes hearing on 26<sup>th</sup> July, 2023 before Hon. Justice Ocharo Kebira.
  - d. By consent of the parties, the application was allowed and endorsed by Hon. Justice Ocharo Kebira as an order of the court in the following terms;
    - a. That the applicant is granted leave to file and serve the appeal against the Respondent in Ruiru Chief Magistrate Court, Employment Cause No. E062 of 2021 within 21 days.
    - b. That pending the hearing and determination of the intended appeal, there be a stay of execution of the decree in the same stated matter, subject to the sum of Kshs.474,004.88 be deposited in a joint interest earning account in the names of counsel for the parties, within 45 days from today.
    - c. That in defaulting of any of the conditions above, execution to proceed.
7.
  - a. Despite being granted leave to file its appeal within 21 days of the orders, on or before the 16<sup>th</sup> August, 2023, the Applicant filed its Memorandum of Appeal on the 25<sup>th</sup> August, 2023 clearly outside the time granted by the court.
  - b. As a result of filing its appeal out of time, the orders of 26<sup>th</sup> July, 2023 lapsed.
  - c. My Advocates cannot therefore be compelled to execute account opening documents in compliance with orders which lapsed as a result of non-compliance by the Applicant.
8.
  - a. The application is *res judicata* as the issues of stay of execution pending appeal and leave to file the appeal out of time were determined by consent of the parties and endorsed by Hon. Justice Ocharo Kebira as per the orders made on 26<sup>th</sup> July, 2023.



- b. The court is functus officio having already pronounced itself on the subject of stay of execution pending appeal and leave to file the appeal out of time. The court cannot therefore be called upon to yet again deliberate on the same issues.
  - c. There is no competent appeal before the court, the Memorandum of Appeal herein having been fled outside the twenty one (2) days' leave period granted by the court.
9. The Respondents penultimate case is that the application is frivolous, vexatious and an abuse of the process of court and an afterthought meant to frustrate and forestay execution and should be dismissed with costs.

**Further Affidavit**

10. This application comes tilts in favour of the Applicant. Whereas it is clear that it could be a repeat of the earlier application in which consent orders guiding stay of execution were issued by Kebira, J., it would appear that these were not implemented due to no fault of their Applicant. The Respondent was not amenable and co-operative in the opening of a joint interest earning account for depositing the decretal amount as consented onto in the earlier order of court.
11. In the ensuing confusion, time lapsed and therefore the need for this further application to right the situation. It is the applicant's case that she is willing and ready to abide with the orders of court for deposit for the decretal amount pending hearing and determination of the appeal. It is only in the interest of justice that this application be allowed so as to facilitate her right to a fair hearing in the appeal.
12. I am therefore inclined to allow the appeal with orders each party bears their cost of the same.

**DELIVERED, DATED AND SIGNED THIS 21<sup>ST</sup> DAY OF FEBRUARY 2024.**

**D. K. NJAGI MARETE**

**JUDGE**

Appearances:

Mr. Michuki instructed by E Kinyanjui & Co. Advocates for the Claimant/Applicant.

Mr. Otinga instructed by SN Otinga Advocates for the Respondent.

