



**Muky's Importers Limited v Gwede (Appeal E019 of 2022)  
[2024] KEELRC 117 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 117 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E019 OF 2022  
AK NZEI, J  
FEBRUARY 1, 2024**

**BETWEEN**

**MUKY'S IMPORTERS LIMITED ..... APPELLANT**

**AND**

**NYANJE SULEIMAN GWEDE ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Lesootia Sitabau – PM  
delivered on 11/2/2022 in Mombasa CM ELR Case No. 990 of 2019))*

**RULING**

1. The appeal herein is shown to have been filed on 9/3/2022 vide a memorandum of appeal dated 1/3/2022. The appeal is expressed to be against the judgment of Hon. Lesootia Saitabau, PM, delivered on 11/2/2022 in Mombasa CM ELR Case No. 990 of 2019. When the appeal came up for mention before me on 22/9/2022 pursuant to a notice issued by this Court's Deputy Registrar, the Appellant's Counsel sought to be granted thirty (30) days to file a record of appeal. This Court granted the request, and the Appellant was ordered to file and to serve a record of appeal within thirty (30) days of that order. No record of appeal was filed, either within the aforesaid period or at all.
2. On 26/10/2022, Counsel for the Appellant sought to be granted sixty (60) more days to file and to serve a record of appeal, stating that unavailability of the trial Court's record had led to non-compliance with this Court's orders of 22/9/2022. The Respondent objected to extension of time, but this Court made the following orders:-
  - “(a) the Appellant is granted 60 days to file and serve the record of appeal, failing which the appeal shall stand dismissed.
  - b. mention on 16/1/2023.”



3. The Appellant did not comply with the foregoing time bound and self-executing order, and this Court made the following orders on 16/1/2023:-
  - “(1) by dint of this Court’s orders dated 26/10/2022, the appeal herein stands dismissed.
  - (2) the Court file is hereby closed.”
4. On 10/5/2023, over three months from the date of the foregoing orders, the Appellant filed a Notice of Motion dated 9/5/2023, seeking the following orders:-
  - a. that the application be certified urgent and service be dispensed with in the first instance.
  - b. that pending hearing and determination of the application, there be a stay of execution of this Court’s order of 16/1/2023 together with all consequential orders thereof.
  - c. that pending hearing and determination of the application inter-partes, the Court be pleased to stay execution of the judgment and decree in Mombasa CMC Employment Case No. 990 of 2019, together with all consequential orders thereto.
  - d. that the appeal herein be reinstated for hearing and determination on merit.
  - e. that upon reinstating of the appeal herein, this Court be pleased to stay execution of the judgment and decree in Mombasa CMC Employment Case No. 990 of 2019 together with all consequential orders pending hearing and determination of the same.
  - f. that this Court be pleased to reinstate the orders of 26/10/2022 and to extend time to allow the Appellant to file its record of appeal.
5. The application was placed before me under a certificate of urgency on 10/5/2023, and finding no urgency in the application, I declined to issue interim orders, and subsequently directed the Respondent to respond to the application. Prayers a, b, and c in the application are thus spend.
6. The Applicant deponed as follows in the supporting affidavit of Khadija Abdulhakim Abdalla, sworn on 9/5/2023 in support of the application:-
  - a. that judgment in Mombasa CMC Employment case No. 990 of 2019 was delivered on 11/2/2022 against the Appellant for a sum of kshs. 728,662, and that a copy of the judgment was transmitted to the Appellant’s Advocates by email. That (the trial) Magistrate, Hon. Lesootia, had been transferred to Nairobi at the time of delivery of the judgment.
  - b. that the Appellant instructed its Advocates to file the appeal herein.
  - c. that an application for a stay of execution filed and paid for by the Appellant on 11/3/2022 in the trial Court was not received as the trial/lower Court’s file was said to be pending delivery from the trial Magistrate who had been transferred to Nairobi, and that this marked a long search by the Appellant/Applicant of the trial Court’s file, as it was said to be missing every time a clerk was send by the Appellant’s Advocates to check on it.
  - d. that at a given point in time, the (lower) Court’s Registry gave to the Appellant’s Advocates a list of files pending delivery from Hon. Lesootia, and that the Appellant’s (lower Court’s) case was listed as No. 48 thereon, but with no indication as to whether or not judgment had been delivered.



- e. that the lower Court's Registry declined to receive any correspondence from the Appellants' Advocates on grounds that none could be received in the absence of the Court file.
  - f. that the trial Court's file remained missing until the appeal herein was dismissed.
  - g. that the Appellant's Advocate on record herein was not representing the Appellant before the trial Court, and that the Appellant did not have the pleadings filed in that Court and that a record of appeal could not have been filed without the Court file.
  - h. that the Appellant's Motor Vehicle Registration No. KCQ 018Z was on 8/5/2023 attached by Sure Auctioneers, and that thereupon the Appellant became aware that the lower Court's file had been traced. That with availability of the trial Court's file, the Appellant/Applicant is able to file a record of appeal within the time given.
  - i. that the Appellant stands to suffer irreparable loss if the Respondent is allowed to sell the attached motor vehicle. That the Respondent is not a man of means, and will not be able to refund the decretal sum, should the appeal succeed.
  - j. that the application was brought without inordinate delay, and was filed as soon as the Appellant/Applicant became aware of the availability of the trial Court's record.
  - k. that the Appellant is ready and willing to meet the terms and conditions that this Court may set in staying execution.
7. Documents annexed to the said supporting affidavit included the trial Court's judgment shown to have been delivered by Hon. Lesootia Saitabau (PM) on 11/2/2022, copies of a Notice of Motion dated 9/3/2022 and shown to have been electronically filed in the trial Court on 11/3/2022, a list of pending files before the trial Magistrate (Hon. Lesootia – PM), warrants of attachment and warrants of sale issued to Sure Auctioneers by the trial Court on 27/4/2023; and a schedule of proclaimed property and Notification of Sale of Property issued by the said Auctioneers on 8/5/2023.
8. The Respondent filed a replying affidavit on 29/5/2023, sworn by himself on even date. It was deponed in the said replying affidavit:-
- a. that the application is brought in bad faith to deny the Respondent the fruits of the judgment delivered on 11/2/2022.
  - b. that the Respondent was unaware of the appeal herein until this Court served a mention notice dated 15/9/2022.
  - c. that the Appellant/Applicant did not comply with the Court's orders given on 22/9/2022 and 26/10/2022; and that the appeal was on 16/1/2023 marked as dismissed.
  - d. that unavailability of the lower Court's file did not bar the Appellant from filing a record of appeal, as Counsel had all the pleadings filed in the lower Court file. That the law allows for filing of a supplementary record of appeal to include documents not placed on record, and that the Appellant has not demonstrated the efforts made to trace the trial Court's record since dismissal of the appeal on 16/1/2023, that the Applicant only moved this Court upon proclamation of their motor vehicle; and that there has been inordinate delay in bringing the instant application. That the application is an abuse of this Court's process; and should be dismissed.
9. A copy of the trial Court's judgment delivered on 11/2/2022 by Hon. Lesootia Saitabau (PM) was annexed to the Respondent's said replying affidavit.



10. Both parties filed written submissions on the Notice of Motion application dated 9/5/2023, which is the application before me, and which I have considered.
11. It is to be noted that on 30/5/2023, Miss Njogu, learned Counsel for the Appellant/Applicant, orally submitted in Court that there are two (2) judgments in the lower Court's suit (file), one delivered on 11/2/2022 awarding the Respondent kshs 728,662.46, being the judgment appealed against, and which was transmitted to parties herein electronically; and that the replying affidavit served on the Appellant/Applicant's Counsel by the Respondent's Counsel had a different judgment attached to it, shown to have been signed on 15/2/2023. That both judgements are by the same Judicial Officer. That execution was issued based on the first judgment, for a total of ksh. 1,068,484.46. That the Appellant only recognizes the judgment delivered on 11/2/2022 and transmitted to the parties electronically. That the execution now in process is based on that first judgment/decree, and includes costs, interest and Court collection charges. That the Appellant/Applicant is not aware of any other proceedings that took place after delivery of the trial Court's judgment (on 11/2/2022), and was not notified of any other judgment, and that the dismissed appeal herein was against the judgment delivered on 11/2/2022.
12. The Appellant/Applicant's Counsel further told the Court that after this Court declined to grant interim stay orders (on 10/5/2023), the Appellant/Applicant filed another application in the trial Court, and that a status quo was ordered. Counsel submitted further that the lower Court application was filed because the appeal herein had been dismissed.
13. Having heard the foregoing oral submissions, I directed that the trial Court's record/file, complete with typed and certified copies of the said Court's proceedings and judgment, be forwarded to this Court once any pending application before that Court was determined by the Court. I further ordered that in view of the serious allegations of existence of two different judgments in the trial Court's suit, there would be no execution of either of the two judgments/decrees, pending hearing and determination of the application herein.
14. None of the parties herein has questioned the authenticity or validity of the judgment shown to have been delivered electronically and electronically signed by Hon. Lesootia Saitabau (PM) on 11/2/2022, awarding the Respondent, who was the Claimant in Mombasa CMC Employment suit No. 990 of 2019, a net award of ksh. 728,662.46. Indeed, copies of the said judgment are annexed to the affidavits filed by both parties herein. The appeal herein is shown to be against the said judgement; and the execution of the trial Court's decree taken out by the Respondent herein is shown to be based on the said judgment.
15. I have perused the trial Court's record/file, which has been forwarded to this Court pursuant to this Court's orders referred to in paragraph 13 of this Ruling. I have seen only one judgment in the said file, shown to have been signed by Hon. Lesootia Saitabau (PM) on 15/2/2023, awarding the Respondent a total award of ksh. 353,689.20. I have also noted from the trial Court's record that the matter was on 8/3/2023 placed before the Hon. D.O. Mbeja (PM) and that the Court ordered:

“judgment as per the typed copy.”

16. As already stated in this ruling, there is only one judgment in the trial Court's file/record, the one shown to have been signed by the trial Magistrate, Hon. Lesootia Saitabau (PM), on 15/2/2023, over a year after the first judgment now being executed.



17. I do agree with the Appellant/Applicant's Counsel that there are, indeed, two (2) judgments on the trial Court's suit, Mombasa CMC Employment Case No. 990 of 2019. I find this to be as amazing as it is worrying. I will say no more on the issue at this interlocutory stage. Be that as it may.
18. Having taken note of the foregoing scenario, and in the interest of justice, I will exercise this Court's discretion in favour of the Appellant/Applicant with a view to giving it an opportunity to move this Court on appeal. This Court, being a first appellate Court, must consider the facts and peculiar circumstances of the case herein, and make a just decision thereon. This can only be done if the Appellant/Applicant is granted an opportunity to move the Court on appeal.
19. Having said that, I allow the Appellant/ Applicant's Notice of Motion dated 9/5/2023 in the following terms:-
  - a. the appeal herein is hereby reinstated, and shall be heard and determined on merit.
  - b. the Appellant/Applicant shall file and serve a complete record of appeal within thirty (30) days of this Ruling.
  - c. there will be a stay of execution of the Court's decree in Mombasa CMC Employment Case No. 990 of 2019 pending hearing and determination of the appeal herein, on condition that the Appellant/Applicant deposits a sum of ksh. 500,000 in this Court within thirty (30) days of this Ruling.
  - d. each party will bear its own costs of the application.
  - e. mention on 5/3/2024 for taking of directions on hearing of the appeal
20. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST FEBRUARY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Appellant

.....Respondent

