



**Akshar Logistics Limited v Ekasiba (Appeal E004 of 2024)
[2024] KEELRC 943 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 943 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E004 OF 2024**

**M MBARŪ, J
APRIL 18, 2024**

BETWEEN

AKSHAR LOGISTICS LIMITED APPELLANT

AND

MOSES EKASIBA RESPONDENT

RULING

1. The ruling herein relates to the application dated 9 February 2024 based on the provisions of Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#) and seeking orders that;
 1. Spent.
 2. Spent.
 3. Following the interparties hearing of this application, this court be pleased to grant an order of stay of execution of the judgment and decree made herein on 4 September 2023 pending the hearing and determination of the appeal.
 4. Costs of this application be provided for.
2. The application is supported by the affidavit of Kavel R. Patel the chief operating officer and on the grounds that on 4 September 2023, the trial court delivered judgment in favour of the respondent on the erroneous basis that the applicant had not adduced any evidence in support of its case nor filed any written submissions. The appellant filed an application dated 2 October 2023 seeking a review and setting aside of the judgment and decree on the grounds that the trial court made an error on the face of the record in that the trial court failed to appreciate that the applicant had fully defended the suit by filing a Memorandum of Response, witness statement and list of documents. The applicant called a witness to defend the suit who gave oral testimony and produced the documents in evidence.



3. In his affidavit, Patel avers that on 7 December 2023, the trial court delivered a ruling and dismissed the applicant's application for review and the stay orders issued have since lapsed. The applicant is desirous of filing its appeal and seeking a stay of execution pending the hearing of the appeal.
4. A Memorandum of Appeal has been filed. The appeal has a high chance of success, it raises triable issues and should be heard before the respondent is allowed to proceed with the execution proceedings.
5. In response, the respondent filed his Replying Affidavit and aver that the orders sought are untenable and vexatious and abuse of the court process in light of the rules of practice and procedure with regard to appeals and review. The application is only meant to delay the respondent from enjoying the fruits of his judgment.
6. The respondent aver that he filed his claim before the trial court on 7 November 2018 for unlawful termination of employment on 12 October 2017. Judgment was delivered on 4 September 2023 in his favour for payment of;
 1. Notice pay at Ksh.12,000;
 2. Unpaid leave Ksh.38,000;
 3. Severance pay Ksh.27,692;
 4. Compensation Ksh.144,000;
 5. Underpayments Ksh.476,000Total Ksh.697, 692.
7. The appellant filed Mombasa ELRCA E103 of 2023 and a notice of motion application dated 2 October 2023 seeking an order of review of the same judgment under ELRCA E103 of 2023 scheduled for mention on 13 May 2023 for taking hearing directions.
8. The trial court delivered a ruling on 7 December 2023 where the applicant was seeking a review and the same was dismissed leading to ELRCA E103 of 2023. Subsequently, the applicant appealed ELRCA E004 of 2024. The Memorandum of Appeal in both appeals is a replica of each other. The applicant is now seeking to mislead the court to grant different orders and has thus failed to disclose material facts and the existence of another appeal on the same subject matter. This makes the application incurably defective and should be dismissed with costs.
9. Both parties attended and agreed to address the appeal by way of written submissions.
10. The applicant submitted that the judgment of the trial court delivered on 4 September 2023 is erroneous as the basis of the award was that the respondent did not defend the suit. The record has a response filed together with statements and the respondent called a witness who gave oral testimony. Following the judgment, the applicant filed an application seeking review and the ruling was delivered on 7 December 2023 and dismissed the application hence this appeal.
11. The applicant submitted that there are substantive issues raised in the appeal and unless there is a stay of execution the applicant will suffer loss and damage. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the court held that the issue of substantial loss is the cornerstone of an application seeking a stay for execution pending the hearing and determination of an appeal. In the case of *Benisa Limited v John Ngotho Miana* [2022] eKLR the court held that it is unreasonable to expect the applicant to know the resources owned by a respondent to address the damage to be suffered if the decretal sum is paid and he is unable to repay.



12. The applicant submitted that the court was moved without delay and immediately after the subject ruling was delivered. The applicant is willing to comply with any conditions granted in terms of a security deposit once the stay is granted.
13. The respondent submitted that following judgment by the trial court on 4 September 2023, the applicant filed ELRCA E103 of 2023. The applicant also filed a review application dated 2 October 2023 and a ruling was delivered on 7 December 2023 therefrom has filed this appeal ELRCA E004 of 2024. The previous appeal is still pending determination. The Memorandum of Appeal herein is a replica of the other appeal.
14. The respondent submitted that the application is without merit and should be dismissed. Stay for execution pending appeal must consider the greater hardship to be caused to each party as held in *JK Industries v Kenya Commercial Bank Ltd & another* [1987] eKLR. A stay of execution application is not subject to appeal as this is a discretionary order.
15. Where this is addressed the applicant must demonstrate what loss is to be suffered as held in *Kenya Shell Ltd v Kiburu & another* [1986] eKLR. The court should seek to balance the rights of the parties and consider that the party with a valid judgment has a legitimate expectation to enjoy the fruits of his judgment. Hence, substantial loss in its various forms is the cornerstone for granting a stay. Without evidence of what loss is to be suffered, an applicant fails in a cardinal principle.
16. The respondent submitted that a party cannot appeal and seek a review of the same judgment at the same time. In the case of *Ferrotech Industries Ltd v Mwadziwe Ali Hare* the court held that a party must decide on whether to lodge an appeal or move the trial court for review of its orders. The rules of procedure do not contemplate one moving the court under both fronts. Taking one limb of the judgment and applying for a review while another limb is taken for appeal would lead to anarchy. Order 80 of the *Civil Procedure* allows a party to lodge an appeal or a review and both cannot apply concurrently.
17. In this regard, the applicant has failed to address the threshold for the grant of orders of stay of execution and the application should be dismissed with costs.

Determination

18. The issue for determination is whether the applicant should be granted an order of stay of execution of the judgment and decree made herein on 4th September 2023 pending a hearing and determination of this appeal.
19. The above words are emphasized and underlined because there is no judgment herein. The subject judgment was delivered in the lower court in Mombasa CMELRC No.386 of 2018 on 4 September 2023.
20. What exists for this appeal is an appeal against the ruling of 7 December 2023 in Mombasa CMELRC No.386 of 2018 per the Memorandum of Appeal filed herein on 1st February 2024.
21. The judgment on 4 September 2023 and the ruling on 7 December 2023 have each resulted in an appeal. One cannot replace the other and be applied as the foundation for seeking a stay of execution of the subject judgment, which is not the subject of the appeal herein.
22. As correctly submitted by the respondent, the applicant herein also filed Mombasa ELRCA E103 of 2023. This is an appeal from the judgment in Mombasa CMELRC No.386 of 2018.
23. Indeed, this appeal is a replica of the previous appeal save, in the end, the applicant is seeking that;



- (b) The Ruling delivered on 7th December 2023 be set aside in its entirety;
24. The foundation of the Memorandum of Appeal is that;
- Being an appeal against the entire ruling delivered on 7th December 2023, dismissing the applicant's application for Review dated 2nd October 2023 ...
25. The subject appeal arises from the ruling seeking a review of the judgment delivered on 4 September 2023 now subject to Mombasa ELRCA E103 of 2023.
26. Should stay of execution issue following an application declining a review? To allow the orders sought, the applicant would revert to the position subsisting as of 4 September 2023. The outcome of the judgment of the trial court is now the subject of Mombasa ELRCA E103 of 2023.
27. I have had a chance to peruse Mombasa ELRCA E103 of 2023. This matter was mentioned on 12 February 2024 and allocated another mention date for 13 May 2024. Both parties are aware of these facts. The respondents have addressed these facts at length in his Replying Affidavit. The applicant has not mentioned the existence of this first appeal at all.
28. Following the judgment of the lower court on 4 September 2023 there is an appeal. Following the same judgment, the applicant filed an application dated 2nd October 2023 seeking a review and on 7 December 2023, the trial court in its ruling declined to review its judgment.
29. Whether they file an appeal or an application for review is a matter closely guarded and addressed by the court over time. Whereas Section 17 of the *Employment and Labour Relations Court Act*, 2011 allow a party to file an appeal against orders of the court and by extension the subordinate courts granted jurisdiction to hear and determine employment claims, where a party opts to apply for review, the same cannot be juxtaposed. One has to give way for the other.
30. The Essence of Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 is to allow a party who finds an error apparent on the record, a mistake or a discovery of a new matter to move the trial court and seek a review. It cannot suffice that there is an appeal and an application for review from the same orders/decision/judgment.
31. The gist of Section 80 of the *Civil Procedure Act* is as outlined by the trial court in the ruling of 7 December 2023. The learned magistrate outlined the provisions of the law and the implications of Section 80 of the *Civil Procedure Act*.
32. In the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR the court in addressing the provisions of Section 80 of the *Civil Procedure Act* with regard to whether to file an appeal or an application for review held that;
33. In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of review up to appeal and now wishes to go back to the same order she sought review of and failed and to try her luck with an appeal. The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail. The applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to.



34. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and the evidence
35. Further, in the case of *Madowo v Oluja & another* (Civil Appeal E557 of 2022) [2023] KEHC 1205 (KLR) (Civ) (24 February 2023) (Ruling) the court held that;

Order 45, Rule 1 (a) and (b) sets out the conditions that an applicant in an application for review must satisfy to get the application granted. Order 45, Rule 1 (2) expresses thus;

A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.

... the same express that a party cannot seek both a review and an appeal in respect to the same ruling/order or judgment. In my view, to seek both a review and an appeal would constitute an abuse of the court process and be akin to forum shopping before the courts.

36. In this regard, the appellant, upon seeking a review of the impugned judgment of 4 September 2023 which review was denied on 7 December 2023; lost its right of appeal against the said judgment. To urge the current appeal and seek a stay for execution is an abuse of the court process. There is material non-disclosure of the existence of the Mombasa ELRCA E103 of 2023. Such denies the applicant proper standing before this court to urge the current application. To go into the merits of whether to grant a stay of execution or not on this background would not meet the ends of justice. This position is buttressed in the case of *Serephen Nyasani Menge v Risab Onsase* [2018] eKLR and the Court of Appeal in the case of *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR that;

Under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of *Martha Wambui v Irene Wanjiru Mwangi & Another* (2015) eKLR, the court stated that “From the above provisions of section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure rules*, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...

37. Having exercised the right to appeal from the judgment delivered on 4 September 2023, the applicant went ahead and applied for review which was declined on 7 December 2023. To appeal as herein done cannot suffice.



38. Accordingly, the application dated 9 February 2024 is hereby dismissed. The effect is that the appeal herein also suffers the same fate. It cannot stand as couched as analyzed above. The respondent is awarded the costs of these proceedings.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18 DAY OF APRIL 2024.

M. MBARÚ JUDGE

In the presence of:

Court Assistant: Japhet

..... and

