



**Auto Continental Limited v Chome (Miscellaneous Application
E052 of 2022) [2024] KEELRC 946 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 946 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E052 OF 2022**

**M MBARÚ, J
APRIL 11, 2024**

BETWEEN

AUTO CONTINENTAL LIMITED APPLICANT

AND

FRANKLINE NGALA CHOME RESPONDENT

RULING

1. The applicant filed an application dated 31st January 2024 seeking for orders that;
 - a. This court be pleased to make an Order directing the Branch Manager NCBA Bank – Moi Avenue Branch Mombasa to release the sum of Ksh.1, 621,497 together with all accrued interests to the firm of Ernest Mogaka & Associates, which sums are jointly held as security in the account no. xxxx between Stephen Jumbale & Co. Advocates & Ernest Mogaka & Associates pending the disposal of the appeal, ELRCA E053 of 2022 Mombasa.
 - b. The costs of this application be awarded to the applicant.
2. The application is supported by the affidavit of Ernest Mogaka Advocate for the applicant and on the grounds that the respondent herein obtained judgment in CMERLC No. 722 of 2019 on 18 February 2022 for the sum of Ksh.1,464,392.67 together with costs and interests. The sum of Ksh.1, 621,497 was deposited at the NCBA Bank, Moi Avenue Branch Mombasa in a joint account between the firms of Stephen Jumbale & Co. Advocates and Ernest Mogaka & Associates pursuant to a court order on 20 July 2022 in ELRC Misc. No.E052 of 2022.
3. The sums were deposited as security pending the hearing of the appeal ELRCA 053 of 2022. The appeal was determined and the ruling was rendered on 22 June 2023. The sum deposited in the joint account belongs to the decree-holder, Frankline Ngala Chome represented by the firm of Ernest Mogaka & Associates. The respondent has since refused to cooperate to have these monies released to the applicant hence this application.



4. In reply, the respondent filed the Replying Affidavit of Arif Pasta the director of the appellant, and aver that the instant application is an abuse of court process. The orders sought should not be issued. The funds deposited were pending hearing and determination of the appeal ELRCA No.53 of 2022 meaning that they are not available to the parties after the finalization of the appeal.
5. After the appeal ELRCA No.53 of 2022 was dismissed, the respondent filed a Notice of Appeal which in essence reactivated the appeal, and as such the same is still pending for determination before the Court of Appeal. The filing of a Notice of Appeal is a continuation of the appeal and so, ELRCA No.53 of 2022 cannot be deemed to have been finalized by the ruling delivered on 22 June 2023.
6. Both parties attended and made oral submissions supported by skeleton written submissions.
7. The applicant submitted that ELRCA No.53 of 2023 has since been dismissed. The sum deposited as security in a joint account was to secure the hearing and determination of the appeal which is finalized and hence, the security deposit now belongs to the decree holder the applicant herein. The respondent has refused to cooperate to have the sums released and hence is seeking an order from the court to direct the subject bank to release the same to the applicant.
8. In the case of *Eastland Hotel Limited v Wafula Simiyu & Co. Advocates* [2015] eKLR the court held that the conditional stay granted pending the hearing of the appeal for a security deposit in a joint interests earning account lapsed with the delivery of judgment. A conditional despite is discharged and becomes due and payable upon the fulfillment of the condition.
9. The respondent submitted that the security deposit related to the judgment delivered in Mombasa CMERCL No.722 of 2018 allowed the parties to proceed with the hearing in ELRCA No. 53 of 202. A ruling issued by the court. Aggrieved, the respondent has since filed a Notice of Appeal seeking to challenge the orders of this court. This appeal is yet to be heard.
10. In the case of *Gacigi Gecaga (Suing on her behalf and as a next friend of Bethuel Mareka Gecaga) v Gateway Insurance Co. Ltd & 2 Others* [2018] eKLR the court held that under Order 42 rule 6(4) of the *Civil Procedure Rules*, an appeal to the Court of Appeal is deemed as filed when under the Rules of that Court Notice of Appeal has been filed.

Determination

11. On 15 July 2022, this court issued orders to the effect that;
 - a. The judgment sum now fixed at Ksh.1, 621,497.67 be deposited in an interest earning account opened in the joint names of the parties; and advocates and be deposited by 23.09.2022.
 - b. Subject to order (1) above, there be a stay of execution of the decree by the trial court herein and a Memorandum of Appeal be filed and served by 22.07.2022.
 - c. ...
12. These orders were premised on the application of Order 42 Rule 6(1), Order 50 Rule 6, and Order 51 Rule 1 of the *Civil Procedure Rules*.
13. Both parties agreed to the extent that in a ruling delivered on 22 June 2023, the appeal was dismissed with costs.
14. The security deposit was to secure the hearing and determination of the present appeal.
15. The Notice of Appeal to the Court of Appeal though allowed under the *Civil Procedure Rules* and Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 the stay of execution



herein was addressed upon the ruling on 22nd June 2023. Whether there is a stay of execution or not before the Court of Appeal, is regulated under different rules of procedure.

16. The essence of Order 42 rule 6(1) is to ensure a party is protected by the court pending moving the appellate court. Order 42 rule 6(1) requires that;

No appeal or a second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order, but the Court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred, shall be at liberty, on an application being made, to consider such application and to make such orders thereon as may to it seem just, any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have the orders set aside.

17. Upon the ruling delivered on 22 June 2023, the respondent had the right to seek a stay pending its appeal to the Court of Appeal. A Notice of Appeal cannot operate in place and instead of stay. The other option was for the respondent to move to the appellate court and obtain an order of stay of execution. None of these options have been put into motion.

Why is Order 42 rule 6(1) of the Civil Procedure Rules important?

18. The answer is found under Order 42 rule 6(2) thereof which provides that;

Order 42, rule 6 (2)

No order for stay of execution shall be made under sub-rule (1) unless:-

- a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
19. These were the consideration given by the court in its orders of 15 July 2022. They cannot suffice and be applied pending an appeal to the appellate court, the Court of Appeal.
20. The court reading of the ruling in the Gacigi Gecaga case, cited by the respondent, the facts therefrom and herein are different. The principles applied cannot be similar in this case.
21. Accordingly, the application dated 31st March 2024 is found with merit and is hereby allowed;
- a. An Order is hereby granted directing the Branch Manager NCBA Bank – Moi Avenue Branch Mombasa to release the sum of Ksh. 1,621,497 from account No.xxxx held between Stephen Jumbale & Co. Advocates & Ernest Mogaka & Associates to the firm of Ernest Mogaka & Associates representing the applicant herein;
 - b. The bank (a) above to release all the interests earned from account No. xxxx held between Stephen Jumbale & Co. Advocates & Ernest Mogaka & Associates to the firm of Ernest Mogaka & Associates representing the applicant;
 - c. Interests (b) to cover due costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 11 DAY OF APRIL 2024.



M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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and

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