



**Dakawou Transport Limited v Kithuku (Appeal E060 of 2024)
[2024] KEELRC 1571 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1571 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E060 OF 2024**

**M MBARŪ, J
JUNE 20, 2024**

BETWEEN

DAKAWOU TRANSPORT LIMITED APPELLANT

AND

SAMMY MUNYOKI KITHUKU RESPONDENT

RULING

1. The appellant filed an application dated 12th April 2024 seeking orders;
The court be pleased to grant an order of stay of execution of the judgment and decree of Hon. D.O. Mbeja delivered on 29 February 2024 in Mombasa CMELRC E0393 of 2021 ... and all consequential orders thereof herein pending the hearing and determination of the appeal.
2. The application is supported by the affidavit of Patrick Kinyanjui the transport and logistics manager of the appellant and aver that on 29 February 2024, the trial court in Mombasa CMELRC E393 of 2021 delivered judgment and awarded the respondent Ksh.957,981 including costs and interests at rates from the date of filing suit. The appellant only received the notice of the judgment on 26 March 2024 when the previous advocates for the appellant forwarded a copy of the judgment. Being aggrieved by the judgment, a Notice of Appeal was filed and an application for typed proceedings was filed on 5 April 2024. This appeal was filed on 11 April 2024.
3. Mr Kinyanjui aver in his affidavit that the delay in filing Notice of Appeal and request for proceedings was due to the delay on the part of the appellant's previous advocates in issuing notice to the respondent. The mistake of the advocate should not be visited upon the appellant who is an innocent litigant. The delay in filing the Notice of Appeal and request for typed proceedings and the appeal was occasioned by a CTS downtime from 27 March 2024 hence making it difficult to file the appeal on time.



4. The delay in filing the appeal is not inordinate. The appellant has an arguable appeal with a high chances of success. The respondent has moved to execute the judgment through notice of attachment dated 9 April 2024 and unless the orders sought are issued, the appellant will suffer loss and damage that is not compensable in damages.
5. In reply, the respondent filed his Replying Affidavit and aver that the trial court delivered judgment on 29 February 2024 in Mombasa CMELRC No.393 of 2021. The firm of Hassan Alawi & Co. Advocates represented the appellant in the matter.
6. On 4 April 2024 the appellant, through his advocates, C & K Advocates LLP applied for leave to come on record for the appellant after judgment had been delivered. On 5 April 2024 the law firm was granted ex-parte orders to come on record for the appellant and on 22 April 2024 the matter was scheduled for hearing but the court was not sitting.
7. On 9 May 2024, the appellant's advocate filed a Notice to Withdraw the application dated 4 April 2024 which was allowed and hence the appellant abandoned their application and had no advocate on record and the substantive orders sought had not been granted.
8. The respondent aver in reply that the application together with the intended appeal violated the provisions of Order 9 rule 9 of the *Civil Procedure Rules*. The respondent will be highly prejudiced if the orders sought are granted as he holds a valid judgment and was in the process of execution and there are no stay orders. The instant application should be dismissed with costs.
9. The appellant filed a Further Affidavit of Patrick Kinyanjui who aver that on 28 April 2024, the appellant gave instructions to the firm of C & K Advocates LLP to come on record after judgment and to seek a stay of execution of the judgment of the trial court pending the hearing of the intended appeal. The firm filed an application dated 4 April 2024 and the trial court allowed the advocates to come on record and placed the matter for hearing on 22 April 2024 but the respondent applied for the Decree and Warrants for Attachment forcing the appellant to take further action to preserve the subject of the suit.
10. Under Order 42 rule 6 of the *Civil Procedure Rules*, the trial court has original jurisdiction to hear an application for stay of execution. Noting the likelihood of execution, the appellant filed the instant application and hence withdrew its application before the trial court. Consent was filed by the previous advocates with the current advocates to come on record for the appellant and hence addressed Order 9 Rule 9 of the *Civil Procedure Rules*.
11. The appellant is properly represented before this court having filed the necessary consent between its advocates and the orders that should be issued.
12. Both parties attended and made oral submissions. The respondent filed written submissions which are analysed and the single issue which emerges for determination is whether the court should grant a stay of execution of the judgment in Mombasa CMELRC E393 of 2021 pending hearing of the appeal herein and who should bear costs.
13. Concerning the application of Order 9 Rule 9 of the *Civil Procedure Rules*, every party has a right to legal representation in court under the provisions of Section 22 of the *Employment and Labour Relations Court Act*, 2011. The appeal herein is separate and different from Mombasa CMELRC E393 of 2021. Even though the appeal arises from such a suit, the appellant has the right to secure its advocates for the appeal. Moving forward with advocates attending before the lower court for the appeal is not mandatory. The motions of Order 9 rule 9 end with the suit filed before the lower court. The appellant cannot be restricted in filing an appeal to the advocates attending before the trial court.



14. On whether an order of stay of execution of the judgment delivered on 29 February 2024 in Mombasa CMELRC E393 of 2021 should be issued, the Memorandum of Appeal herein being the anchor to the orders sought, relates to the stated judgment. It was delivered on 29 February 2024. The Memorandum of Appeal was filed on 11 April 2024.
15. Under the provisions of Section 17 of the [Employment and Labour Relations Court Act](#), 2011 and Rule 8 of the [Employment and Labour Relations Court \(Procedure\) Rules](#), 2016 an appeal to the court should and ought to be filed within 30 days from the order/judgment sought to be appealed against. The appeal herein was filed within 21 days from the date of the impugned judgment, taking into account Order 50 rule 1 of the [Civil Procedure Rules](#). There was no delay in the appellant securing its rights of appeal.
16. In that regard, the respondent holds a valid judgment from the trial court while the appellant has the right of appeal to this court. The Memorandum of Appeal raises key questions of law and fact. To allow the appellant to urge its appeal and to secure the respondent during the hearing and determination of the appeal, Order 42 rule 6 requires that there be a security deposit. This is to secure the rights of each party, one to have the appeal heard and the other to ensure that upon the determination of the appeal, the subject of the appeal is not dissipated. These principles were enunciated in [Butt v Rent Restriction Tribunal](#) [1979] where the Court of Appeal held that what ought to be considered in determining whether to grant or refuse a stay of execution pending appeal is that;
 - a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.
17. These principles are reiterated in the case of [James Wangalwa & Another v Agnes Naliaka Cheseto](#); in [Kenya Shell Limited v Kibiru](#) [1986] KLR 410; and case of [Gianfranco Manenthi & Another v Africa merchant Assurance o Ltd](#) [2019] eKLR.
18. The appellant moved this court instantly upon the judgment of the trial court. In submissions, the appellant is willing to deposit security for the due performance of the judgment on conditions allowed by the court and offers to deposit the decretal sum in a joint interest-earning account. To secure each party's rights and meet the ends of justice, the court finds a balance in that, a security deposit of 50% of the judgment sum of Ksh.957, 981 is imperative.
19. Accordingly, the application dated 12 April 2024 is with merit and an Order of stay of execution of judgment in Mombasa CMELRC E393 of 2021 is hereby issued; the appellant shall deposit 50% of Ksh.957, 981 in a joint interest-earning account held by both parties within 30 days; file the Record



of Appeal and serve; mention on 22 July 2024 for taking hearing directions. Costs to abide by the outcome of the appeal.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 20TH DAY OF JUNE 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... **and**

