



**Romollas Limtied v Mwashuma (Appeal E137 of 2023)
[2024] KEELRC 1550 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1550 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E137 OF 2023**

**AK NZEI, J
JUNE 20, 2024**

BETWEEN

ROMOLLAS LIMTIED APPELLANT

AND

RACHEAL MKAWUGHANGA MWASHUMA RESPONDENT

*(Being an appeal against the entire judgment of the learned Principal Magistrate
Hon. D.O. Mbeja delivered on 16/11/20w3 in Msa -ELRC No. E344 of 2022)*

RULING

1. The appeal herein is shown to have been instituted on 13/12/2023 vide an evenly dated memorandum of appeal. The appeal is expressed to be against the trial Court’s decree dated 16/11/2023 in Mombasa Chief Magistrate’s Court Employment Case No. E344 of 2022. The memorandum of appeal is not shown to have been accompanied by any of the documents mentioned in rule 8(4) of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) which, pursuant to the said Rule, must accompany the memorandum of appeal at the point of filing. The said Rules provides as follows:-

“

- “(4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.

Provided that where copies of proceedings are not filed with the memorandum of appeal, the Appellant shall file the such copies as soon as possible and within a reasonable time.”

2. On 27/12/2023, the appellant filed an evenly dated notice of motion seeking the following orders:-



- a. that the application be certified as urgent and be heard *ex parte* in the first instance, and service of the application be dispensed with in the first instance.
 - b. that there be a temporary stay of execution of the entire judgment delivered on 16/11/2023 in MC ELR Case No. E344 of 2022 (Mombasa) pending inter-partes hearing of the application.
 - c. that there be a stay of execution of the judgment of the Court delivered on 16/11/2023 in MC ELR Case No. E344 of 2022 (Mombasa) pending hearing and determination of the intended appeal.
 - d. that costs of the application do abide the outcome of the intended appeal.
3. The application is based on the supporting affidavit of Mustafa Kassamji, the appellant's director, sworn on 27/12/2023, and documents annexed to the affidavit included a copy of the memorandum of Appeal filed herein, a copy of a letter dated 20/12/2023 requesting for certified copies of the trial Court's proceedings, an extracted copy of the trial Court's decree (issued on 20/12/2023) and a copy of the Respondent's Advocates letter herein addressed to the Appellant's Advocates and dated 20/12/2023.
4. It is deponed in the said supporting affidavit:-
- a. that the Appellant had appealed against the trial Court's decree, that the appeal has overwhelming chances of success, and that the Respondent had, through its Advocates, threatened to execute for the entire decretal amount.
 - b. that if stay orders are not granted, the Respondent shall execute and the appeal will be rendered nugatory.
 - c. that the Appellant is financially stable and capable of paying the decretal amount and costs in the unlikely event that it loses the appeal, hence there is no need of an order to deposit the decretal sum in Court or a bank as doing so will only tie the funds that would otherwise be utilized to generate more income.
 - d. that the Appellant is, however, willing to comply with any conditions that the Court may set in granting the orders sought.
5. The application was placed before me on 28/12/2023 under a certificate of urgency and pursuant to the Court's Vacation Rules, and I made the following orders:-
- a) the application is hereby certified urgent, and is admitted for consideration during the current Court vacation.
 - b) there will be interim stay of execution of the Court's decree in Mombasa CMC ELR Case No. E344 of 2022 on condition that the Appellant/Applicant deposits the entire decretal sum in this Court within 14 days of today.
 - c. both the application and this order shall be served forthwith.
 - c. mention for directions and/or further orders on 29/1/2024."
6. The Appellant/Applicant did not deposit the decretal sum in Court, either as ordered by this Court on 28/12/2024 or at all. The legal import of this failure by the Appellant/Applicant to comply with this Court's said conditional order of stay is that the said order of stay lapsed within 14 days from the date of the order. For record purposes, the said period of 14 days lapsed on 27/1/2023 as for purposes



of Court proceedings, time does not run between the 20th day of December and the 13th day of January. This is pursuant to order 50 rule 6 of the [Civil Procedure Rules 2010](#).

7. On 29/1/2024, the Court directed parties herein to file written submissions on the application, and fixed the matter for mention on 4/3/2024. On 31/1/2024, the Appellant filed an evenly dated Notice of Motion seeking orders:-
 - a. that the application be certified urgent, and be heard ex-parte in the first instance.
 - b. that there be temporary stay of execution of the entire judgment delivered on 16/11/2023 in MC ELR Case No. E344 of 2022 (Mombasa) pending inter-partes hearing of the application.
 - c. that the Court set conditions, if any, to be fulfilled by the Appellant upon the Court granting prayer (b) above.
 - d. that the orders given by the Court on 29/1/2024, be varied and/or reviewed to the extent that the Appellant is allowed to deposit the entire decretal amount in Court upon the correct decree.
 - e. that the Court do declare which decree, dated 20/12/2023 or the one dated 24/1/2023 is correct.
 - f. that costs of the application be provided for.
8. The application is based on a supporting affidavit of Mustafa Kassamji sworn on 30/1/2024. It is deponed in the said affidavit that the reason why the conditional order of stay of execution given on 28/12/2023 was not complied with was because there were two (2) differing decrees of the trial Court.
9. The application dated 30/1/2024 was placed before me under a certificate of urgency on even date (31/1/2024), and I made the following orders:-
 - “(a) There being no urgency noted, the application shall be served within 5 days of today.
 - (b) Mention for further directions and/or orders on 12/2/2024.”
10. On 9/2/2024, the Respondent filed an evenly dated application (Notice of Motion) seeking the following orders:-
 - a. that there be a stay of further proceedings and/or hearing of the application dated February 6, 2024 filed in the magistrate’s Court in MC ELR Case N 344 of 2022 (*Rachel Mkawughanga Mwashuma v Romauas Ltd*) pending the hearing and final determination of this application and the applications before this Court dated December 27, 2023 and January 30, 2024.
 - b. that a declaration be given by this Court to the effect that the application dated February 6, 2024 pending before the trial Court is illegal as it is subjudice proceedings before this Court.
 - c. that the order of the Magistrate’s Court in MC ELR Case No. 344 of 2022 issued on February 6, 2024 and any other sub-sequential orders by the said Court be set aside.
 - d. that costs of the application be provided for.
11. The application is predicated on the Respondent/Applicant’s supporting affidavit sworn on 9/2/2024; whereby it is deponed that the application dated 6/2/2024 and filed by the Appellant in the trial Court is subjudice the proceedings herein and is an abuse of this Court; as matters/issues raised in the application filed in the trial Court are already before this Court.



12. The said application dated 9/2/2024 is opposed by the Appellant herein vide a replying affidavit of Mustafa Kassamji sworn on 15/2/2024.
13. The appellant's notice of motion dated 30/1/2024 is opposed by the Respondent vide her replying affidavit sworn on 9/2/2024. In opposition to the Appellant's Notice of Motion dated 27/12/2023, the Respondent filed grounds of opposition dated 11/1/2024.
14. On 19/2/2024, I directed that the 3 aforementioned applications be heard together, and directed parties to file written submissions thereon. Submissions have since been filed, and I have considered the same.
15. Decrees and orders of the trial Court, as well as those of this Court, are enforceable pursuant to the Rules made under the Civil procedure Act. Order 42 rule 6(1) & (2) of the Civil Procedure Rules provides as follows:-
 - “(1) No appeal or second appeal shall operate as a stay of execution of 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 application being made, to consider such application and to make such order thereon as may to it seem just and 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 such order set aside.
 - (2) No order for stay of execution shall be made under subrule (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 made by the applicant.”
16. It is clear from the foregoing provisions of the Civil Procedure Rules that a person who has appealed against a Court's decree can seek stay of execution of the impugned decree pending hearing and determination of his appeal either from the Court appealed from or the Court appealed to. There is, however, no provision for moving of the 2 Courts concurrently. A party who first applies for stay in the Court appealed from can, however, move the Court appealed to for stay pending appeal if the Court appealed from declines to grant stay; or for setting aside or variation of terms given by the Court appealed from in granting stay.
17. A party who chooses to first apply for stay of execution pending appeal in the Court appealed to cannot go back to the Court appealed from and seek stay after the Court appealed to has become seized of an application for stay. In the present case, the Appellant is shown to have gone back to the Court appealed from just days after this Court had on 28/12/2023 granted a conditional interim stay of execution pending appeal; and to have obtained stay orders without disclosing to the trial Court that it had already filed a similar application in this Court and obtained conditional stay. This was unlawful on the part of the Appellant, and bordered on dishonestly misleading the trial Court into issuing stay



orders. Needless to say, any stay orders issued by the trial Court after this Court's orders of 28/12/2023 granting conditional stay were in vain.

18. As already stated in this Ruling, the conditional interim stay orders of this Court dated 28/12/2023 lapsed on 27/1/2024 as no extension of the same was sought before the lapse, and none was therefore granted. Under Order 42 Rule 6(2) of the Civil Procedure Rules, stay of execution pending appeal cannot issue unless security for due performance of the decree is furnished. The Appellant chose not to comply with the Court's order of conditional stay. The allegation that there were 2 extracted decrees of the trial Court is neither here nor there, as the order for conditional stay was made by this Court based on an extracted decree of the trial Court that was annexed to the affidavit sworn in support of the application dated 27/12/2023. This Court's orders were not made in vain. The Appellant's application dated 27/12/2023 must fail, and is hereby dismissed with costs.
19. The application dated 30/1/2024 must also fail, as this Court cannot be called upon to review an order which had already lapsed by the time the application was filed, or to give orders regarding the correctness or otherwise of the trial Court's extracted decrees. The application dated 30/1/2024 cannot, therefore, be granted, and is hereby dismissed with costs.
20. Likewise, the Respondent's application dated 9/2/2024 must fail as any orders issued by the trial Court regarding stay of execution of the said Court's decree after this Court's orders dated 28/12/2023 were in vain. The application is hereby dismissed with costs.
21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH JUNE 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

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