



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Grain Industries Limited (Cause 3 of 2020)
[2024] KEELRC 1370 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1370 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 3 OF 2020**

AK NZEI, J

JUNE 6, 2024

BETWEEN

ISMAIL AHMED ALI CLAIMANT

AND

GRAIN INDUSTRIES LIMITED RESPONDENT

RULING

1. This Ruling determines the Respondent's Notice of Motion dated 22/9/2022, vide which the Respondent seeks the following substantive orders:-
 - a. that the purported decree, the proclamation notices and the warrants of arrest issued herein be reviewed, varied and/or set aside ex-dibito justitiae, and a fresh decree be re-drawn and approved in accordance with the judgment dated 13/5/2023 and Order 21 Rule 8.
 - b. that the Court be pleased to review, vary and set aside the ruling delivered on 13/7/2023 dismissing the Respondent's application for stay of execution dated 27/1/2023.
 - c. an order of stay be issued to stay the execution of the judgment dated 13/5/2022 pending hearing and determination of the appeal in Mombasa Court of Appeal Civil Appeal No. E043 of 2023 and/or pending the hearing and determination of the application in Mombasa Court of Appeal Civil Application No. E083 of 2023.
 - d. that costs of the application be awarded to the Respondent.
2. The application is expressed to be brought under Sections 3A, 34,80,99 and 100 of the *Civil Procedure Act*, Section 16 of the *ELRC Act* and Orders 22 Rule 22(1) and Order 45 Rule 6 of the *Civil Procedure Rules*, and Rules 33(2), 33 and 34 of the *ELRC Procedure Rules*. The application is based on the supporting affidavit of Mohammed Nabil Advocate sworn on 22/9/2023 and a further affidavit sworn on 13/10/2023, and is opposed by the claimant vide his replying affidavit sworn on 11/10/2023.



3. That the Respondent/Applicant is calling upon this Court to review and/or vary proclamations and notices issued by Auctioneers is amazing as that is not within this Court's province. Further, the call to this Court to review and/or vary warrants of arrest issued herein is frivolous as no warrants of arrest are shown to have been issued in this matter, either in execution of the Court's decree herein or at all. Even when such warrants are issued, a Court of law can only be called upon to review, vary or set aside, as may be appropriate, the order on which such warrants are anchored. That is not the case in the present case.
4. On the prayer for review, variation and/or setting aside of this Court's Ruling delivered on 13/7/2023 dismissing the Respondent's application dated 27/1/2023 seeking an order of stay of execution pending appeal, it ought to be noted that as stated in this Court's said Ruling, the Respondent never filed a Notice of Appeal regarding this Court's judgment delivered on 13/5/2022 (Byram Ongaya, J), and that as provided in Order 42 Rule 6(4) of the *Civil Procedure Rules*, it is the Notice of Appeal that institutes an appeal to the Court of Appeal. This Court cannot grant an order staying execution of its decree unless there is a Notice of Appeal and/or a valid Notice of Appeal on record regarding the decree intended to be appealed against.
5. Order 42 Rule 6(4) provides as follows:-
 - “(4) An appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that Court, a notice of appeal has been given.”
6. This Court stated as follows in its Ruling sought to be reviewed, varied or set aside:-
 - “13. The import of the foregoing subrule [(6 (4))], in my view, is that before this Court can order a stay of execution of its decree pending appeal, it must be satisfied that a valid notice of appeal has been filed and/or given, within 14 days of the decree or order intended to be appealed against.
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15..... It is clear from the foregoing that the Notice of Appeal filed by the Respondent/Applicant on 26/5/2022 and endorsed by this Court's Deputy Registrar on 27/5/2022 does NOT relate to this Court's judgment delivered by the Honourable Justice Byram Ongaya on 13th May 2022. The intended appeal is shown to be against “a ruling delivered on 13th May 2020,” while this Court's judgment was delivered on 13th May 2022.
 16. I do agree with the claimant that the Respondent did not, and has not filed a Notice of Appeal against this Court's judgment delivered on 13/5/2022. There is nothing upon which an application for stay of execution of this Court's decree pending appeal can be founded.

The Notice of Motion dated 27/1/2023 is without basis, and I order that the same be, and is hereby dismissed. The interim stay orders given by this Court on 27/1/2023 are hereby vacated.”
7. The situation regarding the alleged notice of appeal alleged to have been filed by the Respondent/Applicant on 26/5/2022 remains as it was when the foregoing Ruling was delivered.



8. This Court’s power to review its own decrees or orders is provided for in Rule 33(1) of the [Employment and Labour Relations Court \(Procedure\) Rules](#) 2016 which provides:-

“ 33.

- (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
- (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.”

9. The Respondent/ Applicant has not demonstrated the existence of and/or discovery of any new or important matter that was not within its knowledge when the order dismissing its application dated 27/1/2023 was made. The Respondent has also not demonstrated the existence of any mistake or error that is apparent on the face of the record, on the basis of which the Order and/or Ruling in issue can be reviewed by this Court. If the Respondent/Applicant was, for any reason, aggrieved by this Court’s refusal to grant a stay of execution pending appeal and dismissal of its application dated 27/1/2023, it ought to have applied for stay of execution pending appeal in the Court appealed to pursuant to Order 42 Rule 6(1) of the [Civil Procedure Rules](#) which 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 if preferred may apply to the appellate Court to have such order set aside.”

10. For the foregoing reasons, the prayers for review are without merit, and are hereby declined. The prayer for stay of execution pending appeal is also declined; the issue of stay of execution pending appeal having been considered by this Court and determined on merit vide its ruling delivered on 13/7/2023.
11. The issue of whether or not the decree herein ought to be re-drawn to accord with the Court’s judgment herein has been addressed in this Court’s Ruling delivered today in determination of the Claimant’s Notice of Motion dated 17/7/2023.



12. In sum, and having considered rival submissions filed by both parties herein, I find no merit in the Respondent's Notice of Motion dated 22/9/2023, and the same is hereby dismissed.

13. Each party will bear its own costs of the application.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6TH 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:

.....Claimant

.....Respondent

