



**Mohammed Nazir & Brothers v Kazungu (Appeal E008 of 2022)  
[2023] KEELRC 45 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 45 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E008 OF 2022  
AK NZEI, J  
JANUARY 19, 2023**

**BETWEEN**

**MOHAMMED NAZIR & BROTHERS ..... APPELLANT**

**AND**

**JACKSON CHARO KAZUNGU ..... RESPONDENT**

*(Being an appeal from the decision of Hon. D.O. Mbeja – PM dated  
20th January 2022 in Mombasa CM-ELR Case No. 476 of 2009)*

**RULING**

1. Vide a ruling dated October 6, 2022, this court dismissed the appellant/applicant's notice of motion dated February 3, 2022 wherein the following orders had been sought:-
  - a) a stay of execution of the ruling delivered on January 20, 2022 by Hon. D.O. Mbeja pending hearing of the application.
  - b) a stay of execution of the Ruling delivered on January 20, 2022 by Hon. D.O. Mbeja pending hearing and determination of the appeal herein.
  - c) a temporary injunction restraining the respondents, their agents, employees or other persons whether acting on their own behalf from selling by public auction or private treaties the applicant's property.
2. The said application had been filed pursuant to the trial court's Ruling delivered on January 20, 2022 granting the applicant conditional stay of execution of the trial court's decree in Mombasa CM ELR Case No. 476 of 2019 pending hearing and determination of this court's Appeal No. E018 of 2021. The trial court granted a stay of execution pending hearing and determination of the said appeal on condition that the applicant deposited in court the entire decretal amount and cleared all outstanding



- auctioneers' costs within twenty one days of the said Ruling delivered on January 20, 2022, in default of which execution would issue.
3. The applicant did not comply with the said condition, and did not file any application in this court's Appeal No. E018 of 2021 pursuant to Order 42 Rule 6(1) of the *Civil Procedure Rules*. Instead, the Applicant filed the present appeal against the trial Court's Ruling dated January 20, 2022, and subsequently filed the aforementioned Notice of Motion dated February 3, 2022, which I dismissed with costs vide this court's Ruling dated October 6, 2022, for reasons which are set out in the said Ruling.
  4. On October 17, 2022, the appellant/applicant filed herein yet another application dated October 14, 2022, seeking orders:-
    - a) that execution of the judgment delivered on February 24, 2021 and decree therefrom and all consequential orders arising therefrom be stayed pending hearing and determination of the appeal herein.
    - b) that costs of the application be in the cause.
  5. This is the application before me, and is expressed to be brought under Order 42 Rule 6, Order 22 Rule 22 of the *Civil Procedure Rules* and sections 3A and 63E of the *Civil Procedure Act*. The application is supported by a supporting affidavit of one Mohammed Quresh Arbaz sworn on October 14, 2022.
  6. The respondent opposed the application vide a replying affidavit sworn by Clemence Masinde Advocate on October 29, 2022. It is deponed in the said replying affidavit:-
    - a) that the applicant was granted a conditional stay of execution pending appeal by the trial court in the said court's ELR Cause No. 476 of 2019 but did not comply with the condition, instead opting to file herein an application dated February 3, 2022, which this court dismissed with costs.
    - b) that execution has since re-issued, and that the application under consideration is frivolous and an abuse of this court's process.
  7. On October 24, 2022, I directed the applicant to file written submission on the application dated October 14, 2022 within specific timelines, upon which the respondent would also file written submissions. The applicant did not file any submissions, and consequently the respondent did not file any.
  8. As stated in this court's Ruling delivered herein on October 6, 2022, the applicant was on January 20, 2022 granted by the trial court a conditional stay of execution pending appeal. The conditional stay was granted pursuant to Order 42 Rule 6 of the *Civil Procedure Rules*. The applicant did not comply with the condition for stay by depositing the entire decretal amount and outstanding auctioneer's costs in court, as ordered. An application "for stay of execution of the trial court's Ruling dated January 20, 2022 granting a conditional stay of execution pending appeal against the said Ruling" was dismissed by this court on October 6, 2022 as already stated in this Ruling.
  9. The applicant has come back to this court seeking a stay of execution of the lower court's decree pending hearing and determination of the appeal herein. I have already stated in this Ruling that the appeal herein is not against the trial court's decree, but against the trial court's ruling granting the applicant a conditional stay of execution of the trial court's decree pending hearing and determination of this court's appeal No. E018 of 2021, which is the appeal against the trial court's decree.



10. It is always advisable for parties to court cases and their Advocates to read courts' judgments and Rulings once these are delivered. That way, institution of frivolous proceedings and/or applications will, possibly, be avoided. I doubt that the applicant read this court's Ruling delivered on October 6, 2022, and particularly paragraph 8 thereof.
11. I do agree with the respondent that the application dated October 14, 2022 is frivolous. The same is devoid of merit, and is hereby dismissed with costs.
12. Hearing of the appeal herein shall be fast-tracked. The appeal shall be mentioned in court on February 15, 2023 for directions.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF JANUARY 2023**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

N/A for Appellant/Applicant

N/A Respondent

