



**Uzuri Industries Limited v Shilunji & another (Employment and Labour Relations Appeal E203 of 2022) [2023] KEELRC 799 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 799 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E203 OF 2022**

**M MBARŪ, J  
MARCH 27, 2023**

**BETWEEN**

**UZURI INDUSTRIES LIMITED ..... APPELLANT**

**AND**

**JOHNSTONE ASELI SHILUNJI ..... 1<sup>ST</sup> RESPONDENT**

**BETABASE AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The ruling herein relates to two applications dated November 21, 2022 and December 5, 2022 both by the appellant. The first application is filed under the provisions of Section 1A, 1B, 3A, 75, 78, 79G of the *Civil Procedure Act* and Order 42 rule 1(3) and (6) and Rule 26 of the *Civil Procedure Rule* and Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and seeking for orders that;

1. Spent.
2. A temporary injunction do issue restraining the respondents, its servants, agents or employees from attaching, removing from the applicant's offices and or selling the assets pending the hearing and determination of this application.
3. The court be pleased to stay execution of the judgment and decree made in CMEL Cause No 2328 of 2019 by Hon DO Mbeja on July 7, 2021 pending hearing and of this application.
4. The court be pleased to stay execution of the judgment and decree made in CMEL Cause No 2328 of 2019 by Hon DO Mbeja on July 7, 2021 pending hearing and of this appeal;



5. The court be pleased to grant leave to the appellant to appeal out of time against the judgment by the Hon DO Mbeja on July 7, 2021 in CMEL Cause No 2328 of 2019;
  6. Said leave does operate as stay of all proceedings pending hearing and determination of this application;
  7. Costs of this application be provided for.
2. The application is supported by the Supporting Affidavit of Mahesh Kumar and on the grounds that the lower court delivered judgment awarding the 1<sup>st</sup> respondent Ksh 636,276.88 and costs and who then instructed the 2<sup>nd</sup> respondent to raid the offices of the appellant and who proceeded and proclaimed goods on November 19, 2022 and which goods are worth more than Ksh 1,183,596.56 and if stay of execution is not granted the appellant shall suffer loss and damage and the intended appeal rendered nugatory.
  3. In his supporting affidavit, Kumar avers that he is the general manager of the appellant and following judgment in CMEL 2328 of 2019 the 1<sup>st</sup> respondent has proceeded with execution despite being served with Notice of Appeal on July 21, 2021.
  4. The appellant is dissatisfied with the judgment of the lower court where the 1<sup>st</sup> respondent was awarded Kshs 636,276.88 and then he instructed the 2<sup>nd</sup> respondent who proclaimed its goods worth over one million Shillings despite being served with the stay order herein. The intended appeal is with merit and a draft of which is attached and hence seek leave for extension of time to file the same. Following judgment, the appellant applied for certified copies of proceedings and judgment which have not been issued and hence was unable to proceed with the appeal.
  5. The 2<sup>nd</sup> application is seeking for orders that;
    1. Spent.
    2. The court be pleased to find and hold the respondents in contempt of court's orders dated November 28, 2022;
    3. This court be pleased to hold that as a consequence of their acts of contempt the contemnors shall be detailed in prison for a period of six (6) months or such period that the court may please.
    4. The court be pleased to compel the contemnors to obey the said court order dated October 28, 2022;
    5. The respondents be condemned to pay costs.
  6. The application is supported by the Supporting Affidavit of Mahesh Kumar and on the grounds that upon moving the court with regard to application dated November 21, 2022 following judgment in CMEL No 2328 of 2019 in interim orders were issued on November 29, 2022 but the 2<sup>nd</sup> respondent proceeded and raised the appellant's premises and proclaimed its goods on November 19, 2022 worth ksh 1, 183,596.56. Such raid was contrary to the orders issued herein by the court staying such execution and despite affixing the Orders on the premises and calling the advocate for the 1<sup>st</sup> respondent; the 2<sup>nd</sup> respondent proceeded with the attachment. This is in contempt of court and should be punished for such contempt.



7. The appellant also avers in his affidavit that despite the respondents being aware of the court orders, they carried away its goods and such is prejudicial as this violated the orders in force and should be punished for contempt.
8. In reply, the 1<sup>st</sup> respondent filed the Replying Affidavit of Daniel Rakoro advocate and who avers that judgement in CMEL No 2328 was delivered on July 7, 2021 and the appellant only filed the Notice of Appeal on July 16, 2021 and in a letter dated July 19, 2021 applied for typed proceedings and judgment. On July 26, 2021 the respondent requested the appellant for a copy of the judgment but there was no response and which the respondent applied for on August 4, 2022 and advised the appellant that it was ready for collection upon payment.
9. Due to inaction by the appellant, the 1<sup>st</sup> respondent applied for the decree which was issued on November 8, 2022 and then instructed the 2<sup>nd</sup> respondent for execution and who proclaimed on November 19, 2022 and gave the appellant 7 days' notice of attachment.
10. Mr Rakoro avers that the 1<sup>st</sup> respondent only became aware of the lower court application seeking stay on November 28, 2022 which had no hearing date and again received application herein of the same date seeking stay of execution.
11. The lower court allocated a hearing date for December 7, 2022 and this court allocated a hearing date for December 8, 2022 and then parties were engaged on phone for a settlement but there was no agreement.
12. On November 29, 2022 counsel was called by counsel for the appellant requesting that the proclaimed goods should not be carried away by the 2<sup>nd</sup> respondent but this had already been done and by the time the interim orders were served, execution had taken effect.
13. There is no contempt since the appellant only moved the court with inordinate delay and without alerting the respondents of the interim orders save to engage them for a possible settlement.
14. The 2<sup>nd</sup> respondent filed Grounds of Opposition that the application filed is bad in law and in abuse of court process and should be dismissed since the application seeking stay of execution should have been filed before the lower court upon judgment on July 7, 2021 and no reason is given as to why such matter was not immediately addressed. There is no draft Memorandum of Appeal to support any matter of an intended appeal and in any event such appeal should be filed within 30 days from the date judgment of the lower court issued which has not been addressed.
15. The appellant has failed to satisfy the provisions of Order 42 rule 6 and no effort is taken to demonstrate such matter and the application should be dismissed with costs.
16. With regard to the application on alleged contempt, there is no evidence of service upon the 2<sup>nd</sup> respondent and where service was effected, this was after the proclaimed goods had already been taken with the knowledge of the appellant. Proof of service with regard to alleged contempt of court orders must be proved.
17. The appellant filed Supplementary Affidavit of Mahesh Kumar who avers that upon judgment before the lower court on July 7, 2021 the appellant filed Notice of Appeal and applied for typed proceedings and judgment but these were not addressed or issued despite attending at the registry and was surprised that judgment had been issued to the 1<sup>st</sup> respondent upon which execution proceeded. The notice of the 2<sup>nd</sup> respondent of November 19, 2022 seeking to attach its properties was addressed immediately when the appellant moved and filed application herein and before the trial court. When interim orders



were issued, the appellant found the offices of the respondents closed and therefore affixed the orders at the door and later served a physical copy.

18. Mr Kumar avers that the goods attached are worth over one million and the decretal sum of Ksh 636, 276.88 and upon the court orders herein for the same to be returned to the appellant, there was discovery that some goods were not returned or accounted for and which the 2<sup>nd</sup> respondent should address.
19. The appellant has a good appeal which will be rendered nugatory if the respondent's actions of contempt are not addressed or stay of execution pending leave to file appeal is allowed and upon which the appellant shall file the appeal.
20. The parties attended and made their oral submissions. Determination
21. The issues which emerge for determination herein are multiple, the two applications put together and these are;  
Whether there is contempt of court following orders issued on November 28, 2022; Whether the court should grant leave to file appeal out of time;  
Whether the court should stay execution of judgment in CMEL No 2328 of 2019 pending hearing of the intended appeal; and  
Who should pay costs.
22. The foundation of the applications herein is judgment in CMEL No 2328 of 2019 delivered on July 7, 2021.
23. Upon this judgment, the appellant dissatisfied with the orders therefrom had a right of appeal and pursuant to Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 had a right of appeal to this court within 30 days.
24. The appellant's case is that upon the judgment, Notice of Appeal was filed on July 21, 2021.
25. A letter seeking for typed proceedings and judgment was done and dated July 19, 2021.
26. After such matters, the appellant does not seem to have done anything else. There was no action to secure the right of appeal by seeking stay of the judgment of July 7, 2021 until the 1<sup>st</sup> respondent moved and instructed the 2<sup>nd</sup> respondent to proceed with execution and notice of proclamation issued on November 19, 2022 when the appellant filed application before the trial court and to this court and subject matter herein. The delay to secure the right of appeal as required under Order 42 rule 6(2) of the Civil Procedure Rules is not addressed at all. The appellant does not explain why it took over a year to secure its rights.
27. The gist of Order 42 rule 6(2) is that;
  - (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 Applicants 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 Applicants
28. An applicant must demonstrate that unless the order of stay of execution is granted there shall be substantial loss, and if the decretal sum is paid there is no chance of the decree-holder to repay



back or that there is no financial ability to repay and denial of stay will render the appeal nugatory. Fundamentally an applicant must also offer security for the due performance of the judgment as held in Edward Kamau & Another v Hannah Mukui Gichuki & Another [2015] eKLR, National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR and National Water Conservation & Pipeline Corporation v Ngatunyi Enterprises Limited [2016] eKLR.

29. In this regard, there is no evidence of substantial loss to the appellant, either in the matter of paying the damages awarded which would cause difficulty to itself, or because it would lose its money, if payment was made, since the 1<sup>st</sup> Respondent would be unable to repay the decretal sum plus costs.
30. This then ties up with the matter of leave to file appeal out of time. without satisfying the court as to why it took over a year to move and secure its rights either before the trial court or this court upon judgment on July 7, 2021 until execution proceedings commenced, the appellant has also failed to demonstrate a crucial element necessary to enjoy the discretion of the court to extend time to file appeal out of time.
31. Under Section 79G of the Civil Procedure Act, which stipulates that;  
  
Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:  
  
Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal.
32. The appellant's case is that judgement of the lower court was delivered on July 7, 2021. There was no stay of execution proceedings before the lower court until after November 19, 2022 when proclamation notice issued. The delay is not explained and it is inordinate.
33. With regard to contempt of court orders of November 28, 2022 indeed the appellant's advocate did not contest the respondent's assertion that despite securing the orders from court, there was no service until after execution had completed. The service done by affixing orders at the doors and attached as 'HM1', 'HM2' have no time, date, place or any distinctive marks that these documents are at the offices of the respondents and that there was knowledge of such matter so as to infer wilful and deliberate disobedience.
34. The 2<sup>nd</sup> respondent has since adhered to the court directions issued on January 23, 2023 for good order and to ensure that the court is able to address instant applications and for such adherence to the Rule of Law, and the appellant having failed to state what goods were not accounted for, the application is found without merit and shall meet the costs of both respondents.
35. Accordingly, application dated November 21, 2022 and December 5, 2022 are without merit and are hereby dismissed; the appellant shall meet costs due to the respondents.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MARCH, 2023.**

**M. MBARÚ JUDGE**

**In the presence of:**

**Court Assistant: Japhet Muthaine**

..... **and** .....

