



**Portlink Transport Ltd v Arwonda (Miscellaneous Application  
E080 of 2022) [2023] KEELRC 1523 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1523 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E080 OF 2022**

**AK NZEI, J  
MARCH 9, 2023**

**BETWEEN**

**PORTLINK TRANSPORT LTD ..... APPLICANT**

**AND**

**HARRISON SIMIDI ARWONDA ..... RESPONDENT**

**RULING**

1. The application before me is the Applicant's Notice of Motion dated 23<sup>rd</sup> December 2022, wherein the following orders are sought:-
  - a. that the application be certified urgent and be heard ex-parte in the first instance.
  - b. that the Court be pleased to issue a stay of execution of the judgment delivered on 2<sup>nd</sup> November 2022 in Mombasa PMCCC No. 624 of 2019 (Harrison Simidi Arwonda -vs- Portlink Transport Limited) pending hearing and determination of the application.
  - c. that the Honourable Court be pleased to issue a stay of execution of the judgment delivered on 2<sup>nd</sup> November 2022 and consequential orders pending hearing and determination of the intended appeal therefrom.
  - d. that the Honourable Court be pleased to grant the Applicant leave to file an appeal out of time against the judgment of the Honourable Principal Magistrate Maureen Nabibya delivered on 2<sup>nd</sup> November 2022 in Mombasa PMCCC No. 624 of 2019 (Harrison Simidi Arwonda -vs- Portlink Transport Limited).
  - e. that costs of the application be provided for.
2. The application is supported by a supporting affidavit of Austin Seth Olale, the Applicant's Human Resource Manager, sworn on 23<sup>rd</sup> December 2022. It is deponed in the said affidavit:-



- a. that the Applicant inadvertently issued instructions to their Advocates on record to file an appeal against the judgment after the time for filing appeal had lapsed.
  - b. that the advocate in personal conduct of the matter was on maternity leave from 26<sup>th</sup> September 2022, and due to lack of proper communication, the Applicant was not made aware of the time for filing appeals.
  - c. that the Applicant believes that the one-month delay is not inordinate and is excusable.
  - d. that the Applicant is apprehensive of execution of the judgment which was delivered on 2<sup>nd</sup> November 2022 if the same is not stayed, and that the Applicant stands to suffer immense prejudice and damage.
  - e. that the Applicant has been served with warrants of attachment and proclamation dated 21/12/2022, and is afraid that it might lose its properties if stay is not granted.
  - f. that the intended appeal has high chances of success.
3. The Applicant did not annex the judgment sought to be appealed against to the application. Nevertheless, the application was presented before the Duty Judge at Nairobi on 23<sup>rd</sup> December 2022, and the application was certified urgent and orders were granted in terms of prayers (a) & (b) above.
  4. The application is opposed by the Respondent vide a Replying Affidavit sworn on 19<sup>th</sup> January 2023, to which a copy of the judgment of the Hon. M.L. Nanibya, PM in Mombasa CMC ELR Case No. 624 of 2019 (Harrison Simidi Arwonda -vs- Portlink Transport Limited), delivered signed and dated 27<sup>th</sup> October 2022, is annexed.
  5. Parties will forever be bound by their pleadings. The Applicant seeks a stay of execution of a judgment dated 2<sup>nd</sup> November 2022 and seeks leave to appeal against the same judgment. The Applicant has not demonstrated that any judgment was delivered by the lower Court on 2<sup>nd</sup> November 2022 in Mombasa PMCC No. 624 of 2019. This Court cannot give orders on the basis of a non-existent judgment and/or decree.
  6. Secondly, this Court, as an appellate Court, can only stay execution of a lower Court's decree on the basis of an appeal filed against such judgment. In the present case, no appeal has been preferred to this Court against the lower Court's judgment in Mombasa PMCCC NO. 624 of 2019 (Harrison Simidi Arwonda -vs- Portlink Transport Limited).
  7. The *Employment and Labour Relations Court (Procedure) Rules* 2016 are basically silent on execution of decrees, but Rule 32 thereof saves the provisions of the *Civil Procedure Rules* on execution of orders and decrees to this Court's said Rules as follows:-

“ 32.

- (1) The Registrar shall issue an order in execution of a decree.
- (2) Rules on execution of an order or decree shall be enforceable in accordance Civil Procedure Rules.”



8. Pursuant to Rule 32 of this Court’s Rules, this Court’s jurisdiction to hear and to determine an application for stay of execution pending hearing and determination of an appeal against a lower Court’s decree flows from 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.”

9. It is evident from the foregoing Rule that this Court can only grant stay of execution pending appeal on the basis of an existing appeal. The Court cannot give an anticipatory order of stay of execution. The prayer for stay of execution pending hearing and determination of a non-existent appeal must, therefore, fall by the way side.

10. Similarly, the prayer for leave to appeal against a judgment of the lower Court delivered on 2<sup>nd</sup> November 2022 must fail. The Applicant has not demonstrated that there exists a judgment and/or decree of the lower Court dated 2<sup>nd</sup> November 2022.

11. It is my finding that the Applicant’s application dated 23<sup>rd</sup> December 2022 lacks merit and is hereby dismissed with costs to the Respondent.

12. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> MARCH 2023**

**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 Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

**Appearance:**

.....for Applicant

..... for Respondent

