



**Mombasa Coffee Limited v Shuke (Appeal E075 of 2022)  
[2023] KEELRC 555 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 555 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E075 OF 2022**

**AK NZEI, J  
MARCH 2, 2023**

**BETWEEN**

**MOMBASA COFFEE LIMITED ..... APPELLANT**

**AND**

**MTENZIE MWAGAMBO SHUKE ..... RESPONDENT**

*(Being an appeal from the judgment of Principal Magistrate's Court at Mombasa  
Hon D O Mbeja dated September 30, 2022 in CMCC-ELRC no E150 of 2021)*

**RULING**

1. The appeal herein was filed on October 28, 2022, and is expressed to be an appeal against the judgment of Mombasa Principal Magistrate (Mr DO Mbeja) in CM -ELR Cause no E0150 of 2021 dated September 30, 2022. On November 8, 2022, the appellant filed a Notice of Motion dated November 7, 2022 under a certificate of urgency seeking orders:-
  - a. that this court be pleased to issue interim orders of stay of execution of the judgment and decree of D O Mbeja -PM entered on September 30, 2022 in Msa CM -ELR Case no E0150 of 2021 pending the hearing and determination of the application.
  - b. that this court be pleased to issue an order of stay of execution of the judgment and decree of D O Mbeja PM entered on September 30 2022 in Msa CM ELR Case No. E0150 of 2021 pending the hearing and determination of the appeal herein.
  - c. that costs of the application be provided for.”
2. On November 9, 2022, I declined to either certify the application as urgent or to issue interim stay of execution *ex-parte*, as no urgency was demonstrated, in the first place. I directed that the application be served, and fixed the same for taking of directions thereon on November 23, 2022, on which dated



I gave directions on disposal of the application by way of written submissions and fixed the matter for mention on December 13, 2022 for fixing of a ruling date.

3. Before the said date, however, the respondent took out execution proceedings in the lower court suit and had the appellant's movable properties proclaimed, prompting the appellant to file yet another application, dated December 1, 2022, in which orders sought are similar to those sought in the earlier application dated November 7, 2022.
4. The aforesaid second application (dated December 1, 2022) was presented to me under a certificate of urgency on December 2, 2022, and I granted interim stay of execution of the lower court's decree. Parties had, prior to December 1, 2022, filed submissions on the Notice of Motion dated November 7, 2022. The Notice of Motion dated December 1, 2022 served its purpose when interim orders of stay of execution were issued on December 2, 2022, and I deem it to have been subsumed into the Notice of Motion dated November 7, 2022, which is now before me for ruling.
5. The *Employment and Labour Relations Court (Procedure) Rules* are basically silent on stay of execution of this court's orders and decrees, but rule 32 of the Rules saves the provisions of the *Civil Procedure Rules* on execution of decrees and orders of this court in this court's said Rules. Rule 32 of the Employment and Labour Relations Court (procedure) Rules 2016 Provides as follows: -
  - (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 with Civil Procedure Rules."
6. On the other hand, execution of the lower court's orders and decrees is basically governed by the Civil Procedure Rules. Stay of execution pending hearing and determination of an appeal is particularly governed by 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 is preferred may apply to the appellate court to have such order set aside.
7. It must be appreciated that execution of a court's decree is not an unlawful process or occurrence. It is a lawful process initiated by a successful litigant. That is why, in my view, order 42 rule 6 (2) of the Civil Procedure Rules states:-
  - (2) No order for stay of execution shall be made under sub-rule (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."
8. It was deponed on behalf of the appellant/applicant that the respondent will not be able to refund the decretal sum if the appeal herein succeeds, as he is a man of straw. The respondent has neither refuted



the claim by the appellant/applicant nor demonstrated ability to refund the decretal sum if the same is paid to him and the appeal herein succeeds at the end of the day.

9. The application herein was filed timeously, and it has been deponed on behalf of the appellant/applicant that the appellant/applicant is willing to furnish security for due performance of the decree; and to comply with such conditions/ terms as this court may determine in granting the stay sought, including depositing part of the decretal sum in court or in an interest earning account held jointly by counsel for both parties herein. The appellant has, however, not demonstrated what effects it will suffer if the entire decretal sum is deposited.
10. It was stated as follows in the case of *Charles Mutethia Mutea & Another vs Ibrahim Mutua* [2009] eKLR:-

“but the critical consideration is whether the applicants may stand to lose should they pay the decretal sum over to the respondent and eventually the appeal were to succeed. It is this loss that must be prevented. How does this loss occur.” It will occur when the decretal sum is paid over to a party in whose favour judgment has been passed, who has no means to refund the same in case the appeal is successful.

In other words, if the person in whose favour a judgment has been passed is capable of refunding the decretal sum, then the courts will normally not stay execution.

The other consideration in balancing the interest of the parties is whether the payment of the decretal sum will have the effect of crippling the operations or business of the applicant. It is now settled that once the applicant raises doubt about the respondent’s financial status, the legal burden remains on the applicant but the evidential burden would then have shifted to the respondent to show that he would be in a position to refund the decretal sum if it is paid out to him and the pending appeal were to succeed.”

11. As already stated in this ruling, the respondent did not disclose his financial status, and did not demonstrate ability to refund the decretal sum should the appeal herein succeed. It was stated as follows in the case of *Grace Wangechi Gikunju & Another vs Samuel Kongori Njoki* [2022] eKLR:-

“the duty to prove that the respondent is in a position to refund the money was on him as it is him who knows the resources there are in his possession -see *National Industrial Credit Bank Ltd vs Aquinas Francis Wasike & Another (supra)*. The respondent did not discharge that burden. All that he said is that he runs a business without disclosing the type of business he is involved in. This was not sufficient to prove that he was not a man of straw. He had therefore not shown that he is in a position to refund the money in case the appeal succeeds. The apprehension by the Appellant that they stand to suffer substantial loss is well founded.”

12. Further, I have perused the memorandum of appeal filed herein, and the appeal is, in my view, arguable. It cannot be said to be frivolous. It is worth a day in court.
13. Having said that, I find merit in the appellant/applicant’s Notice of Motion dated November 7, 2022, and the same is allowed in the following terms:-
  - a. there will be a stay of execution of the lower court’s decree in Mombasa CM ELR Case no E150 of 2021 on condition that the entire decretal sum amounting to ksh 1,343,959.67 is deposited in an interest earning bank account held jointly by counsel for both parties herein, within twenty one (21) days of this ruling.



- b. the appellant shall file a complete record of appeal herein within sixty (60) days of this ruling, failing which the stay granted herein shall lapse.
- c. Costs of the application will be in the appeal.

14. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2<sup>ND</sup> MARCH 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:**

.....for appellant

..... for respondent

