



**Newspaper Transporters Limited (NTL Parcel Services) v Meri (Appeal E003 of 2023) [2023] KEELRC 963 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 963 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E003 OF 2023**

**AK NZEI, J  
APRIL 17, 2023**

**BETWEEN**

**NEWSPAPER TRANSPORTERS LIMITED (NTL PARCEL SERVICES)] ..... APPELLANT**

**AND**

**ATHMAN MANYIWA MERI ..... RESPONDENT**

*(Being an appeal from part of Ruling and Order of Hon. D.O. Mbeja – PM delivered on 29th December 2022 at Mombasa)*

**RULING**

1. The application before me is the Appellant’s Notice of Motion dated January 20, 2023, and the orders sought therein are as follows:-
  - a. that pending the hearing and determination of the application inter-partes, the Court be pleased to grant a temporary stay of execution of orders in the ruling of December 29, 2022 issued by Hon DO Mbeja in Mombasa CM – ELR Case No 110 of 2020 (Athman Munyiwa Meri v Newspaper Transporters Ltd), more specifically the order that half of the decretal sum be paid to the claimant within 30 days from the date of the ruling, failure to which execution to issue.
  - b. that in the alternative, this Honourable Court be pleased to issue an order that the entire decretal amount of ksh 735,275 awarded to the Respondent in Mombasa CM ELR Case No 110 of 2020 (Athman Manyiwa Meri v Newspaper Transporters Ltd) vide judgment of July 6, 2022 be deposited in a joint interest earning account in the names of the advocates for the parties herein.
  - c. that pending the hearing and determination of the appeal, the Honourable Court be pleased to grant a temporary stay of execution of the orders in the Ruling of December 29, 2022 issued by



DO Mbeja in Mombasa CM ELR Case No. 110 of 2020 (Athman Manyiwa Meri v Newspaper Transporters) more specifically the order that half of the decretal sum be paid to the claimant within 30 days from the date of the ruling, failure to which execution to issue.

2. The application is supported by the supporting affidavit of Dan Dwalo, the Appellant/Applicant's General Manager, sworn on 20/1/2023, and is expressed to be brought under Order 42 Rule 6 of the Civil Procedure Rules and Rule 32 of the Employment and Labour Relations Court (Procedure) Rules 2016, among other cited provisions. It is deponed in the said affidavit:-
  - a. that the Respondent herein was the claimant in Mombasa CM ELR Case No 110 of 2020 wherein judgement was delivered on July 6, 2022, awarding the Respondent ksh 735,275.
  - b. that being dissatisfied with the said judgment, the Appellant/Applicant herein, who was the Respondent in the said lower Court suit, filed this Court's appeal No E051.
  - c. that the Appellant/Applicant herein filed an application in the trial Court, seeking a stay of execution pending appeal.
  - d. that vide a ruling delivered on December 29, 2022, the trial Court allowed the application for stay of execution pending appeal on condition that the Appellant/Applicant paid half of the decretal sum to the claimant (the Respondent herein) and deposited the (other) half in a joint interest earning account in the names of the advocates within 30 days of the Ruling.
  - e. that dissatisfied with part of the said Ruling, the Appellant/Applicant file the appeal herein against the Ruling and the instant application for stay of execution, seeking stay of execution pending hearing of the appeal herein.
  - f. that the Appellant/Applicant has already commenced the process of opening a joint interest earning account for purposes of complying with the Court's direction of depositing the said amount.
  - g. that in the meantime, there is a real and imminent risk of the Respondent's Advocate commencing execution regarding the other half of the decretal sum despite pendency of the appeal, in which event the Applicant's business will be adversely affected.
  - h. that the Appellant has a good appeal with high chances of success, and stands to suffer irreparable damage unless the orders sought are granted as the Respondent will not be able to reimburse money paid to him, as the Appellant is not aware of the Respondent's financial status.
  - i. that if stay is not granted, the appeal herein, as well as the main appeal Mombasa ELRC Appeal No E051/2022, will be rendered nugatory.
3. The application is opposed by the Respondent vide a Replying Affidavit sworn by him on January 27, 2023. It is deponed in the said Replying Affidavit, inter-alia:-
  - a. that after the trial Court delivered its judgment on July 6, 2022, the Appellant/Applicant preferred an appeal, being this Court's appeal No E051 of 2022, challenging the said decision.
  - b. that pursuant to filing of the said appeal, the Appellant filed an application (in the trial Court) seeking a stay of execution pending appeal, on which a Ruling was delivered on December 29, 2022.



- c. that in its Ruling, and in exercise of its discretion, the trial Court ordered that a half of the decretal sum be released to the Respondent and the other half be deposited in an interest earning account. That exercise of the trial Court’s discretion cannot be the subject of appeal.
  - d. that the application herein is *res-judicata* as a similar application was heard by the trial Court.
  - e. that the application is against the tenets of Order 42 Rule 6(1) of the [Civil procedure Rules](#).
  - f. that the Appellant/Applicant has not complied with the conditions given by the trial Court, and has not demonstrated what loss it will suffer by releasing a half of the decretal sum to the Respondent.
  - g. that the Appellant/Applicant should obey Court orders, and should not dictate to the Court what should be done in its favour.
  - h. that the Appellant has not demonstrated any reason as to why it feels that the appeal will be rendered nugatory if execution proceeds.
4. Further to the foregoing Replying Affidavit, the Respondent also filed a Notice of preliminary Objection dated July 27, 2023, stating:-
- a. that the Notice of Motion dated 20/1/2023 is Res Judicata, hence an abuse of the Court’s process.
  - b. that the Notice of Motion dated 20/1/2023 is against the tenets of Order 42 Rule 6(1) of the [Civil Procedure rules 2010](#).
5. On January 30, 2023, I directed that the Respondent’s foregoing preliminary objection be treated as part of the Respondent’s response to the Appellant’s application. I further directed both parties to file written submissions on the application, which I have considered.
6. Just like this Court’s decrees, execution of the lower Court’s decrees is governed by the Civil Procedure Rules. Stay of execution of the lower Court’s decrees pending hearing and determination of appeal is provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#). Order 42 Rule 6(1) of the [Civil Procedure Rules](#) 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 is clear from the aforesaid provision that:-
- “.....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.”



8. I recently stated as follows in a similar situation in *Mohammed Nazir Abdulkader & Brothers v Jackson Charo Kazungu* [2022] eKLR:-

“the import of the foregoing provision is that if the Appellant/Applicant was aggrieved by the trial Court’s orders dated January 20, 2022 staying execution pending appeal, then he ought to have filed an application in this Court, being the appellate Court, to set aside that order and for any other appropriate order on the issue of stay of execution pending appeal. Such application ought to have been made in the appeal against the trial Court’s judgment/decree. That has not been done. There is no prayer for setting aside the trial Court’s orders of stay dated January 20, 2022 in the application before me. I will not say much about the validity or otherwise of the appeal herein at this stage.”

9. A worrying trend has emerged whereby Appellants from the subordinate Courts’ decrees divert from the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules* and file separate appeals against the trial Courts’ stay orders made under the clear provisions of Order 42 Rule 6(1) of the said Rules; and proceed to file applications for stay of execution pending appeal in those secondary appeals. Such secondary appeals are not against a trial Court’s decree, and such decree cannot be stayed whatsoever on the basis of such appeals. The appeal on the basis of which the application before me is presented in such an appeal. The Applicant seeks stay of execution of the trial Court’s decree pending hearing and determination of the secondary appeal herein. Stay of execution of the lower Court’s decree cannot, in the circumstances, issue. The appeal herein is not against the trial Court’s decree.

10. In my view, it is for a valid legal purpose that the words “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” are used in Order 42 Rule 6(1). In my view, the requirement for setting aside of an impugned order of the trial Court is meant to avoid a situation where the appellate Court may entertain an application, or may make orders that are res-judicata. The Applicant has not sought the setting aside of the trial Court’s orders dated December 29, 2022 or any part thereof.

11. In sum, I find no merit in the Appellant’s Notice of Motion dated January 20, 2023, and the same is hereby dismissed with costs.

12. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> APRIL 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.

Appearance:

.....for Appellant/Applicant

.....for Respondent

