



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ali v Grain Industries Limited (Cause 3 of 2020)  
[2023] KEELRC 1826 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1826 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 3 OF 2020**

**AK NZEI, J  
JULY 13, 2023**

**BETWEEN**

**ISMAIL AHMED ALI ..... CLAIMANT**

**AND**

**GRAIN INDUSTRIES LIMITED ..... RESPONDENT**

**RULING**

1. Record herein shows that judgment was delivered on 13/5/2022 whereby the Claimant was awarded Ksh. 2,808,871 with interest accruing thereon at Court rates as from 1/7/2022. The Claimant was also awarded cost of the suit, and the Respondent was ordered to deliver to the Claimant a certificate of service as per Section 51 of the (Employment) Act by 31/5/2022. The Claimant's awarded costs are shown to have been subsequently taxed and thereupon certified by this Court's Deputy Registrar at Ksh 402,661 vide a Certificate of Costs dated 19/12/2022 and issued on 12/1/2023.
2. The Court's record further shows that on 26/5/2022, the Respondent filed a Notice of Appeal stating that it was dissatisfied with the Ruling of Honourable Justice Ongaya given at Mombasa on 13<sup>th</sup> May 2020 and intended to appeal to the Court of Appeal against the same.
3. On 27/1/2023, the Respondent filed an evenly dated urgent application by way of a Notice of Motion seeking the following orders:-
  - a. that the Court be pleased to order a temporary stay of execution and proclamation served by Fantasy Auctioneers pending hearing of the application.
  - b. that there be a stay of execution and proclamation by Fantasy Auctioneers pending hearing and determination of the appeal.
  - c. that costs of the application be provided for.



4. The application, expressed to be brought under order 42 rule 6 (2) and (3) of the Civil Procedure Rules and sections 1A,1B and 3A of the Civil Procedure Act is predicated on the supporting affidavit of Mohammed Nabil, the Respondent's legal officer, sworn on 27/1/2023. It is deponed in the said supporting affidavit:-
  - a. that being dissatisfied with the Court's judgment delivered by the Honourable Justice Ongaya on 13/5/2022, the Respondent/Applicant lodged a Notice of Appeal, and has since applied to be furnished with certified copies of the Court's proceedings and judgment.
  - b. that the Claimant has commenced execution proceedings by serving the Respondent/Applicant with a Notice of Proclamation dated 23/1/2023.
  - c. that no prejudice will be occasioned to the Claimant/Respondent if the orders sought are granted as the Respondent/Applicant is willing and agreeable to deposit the entire decretal sum in Court as security pending hearing and determination of the application and the intended appeal.
  - d. that the Respondent/Applicant has an arguable appeal which is not frivolous, with high chances of success.
  - e. that if stay is not granted, the intended appeal will be rendered nugatory.
  - f. that it is in the interest of justice that there be a conditional order of stay of execution.
5. Documents annexed to the said supporting affidavit include a proclamation issued to the Respondent/Applicant by Fantasy Auctioneers on 23/1/2023 and warrants of attachment of movable property in execution of a decree for money and warrant of sale of property in execution of decree for money both issued by this Court's Deputy Registrar to Fantasy Auctioneers on 17/1/2023. The total decretal sum stated on the said warrants is kshs. 3,438,491.67.
6. The application was presented to me in Chambers under a Certificate of Urgency on 27/1/2023. I certified the same as urgent and granted on interim order of stay of execution of the Court's decree herein, on condition that the Respondent/Applicant deposited the entire decretal sum in Court within 14 days of the order.
7. The application is opposed by the Claimant/Respondent vide a replying affidavit sworn by him on 21/2/2023. It is deponed in the said replying affidavit:-
  - a. that the Respondent/Applicant has never filed a Notice of Appeal against the judgment delivered on 13/5/2022 as what was filed was a Notice of Appeal against a Ruling delivered on 13/5/2020.
  - b. that this Court's judgment was delivered on 13/5/2022, and that the Respondent/Applicant has not filed a Notice of Appeal regarding the same.
  - c. that under the Court of Appeal Rules, if an appeal is not lodged within 60 days of lodging the Notice of Appeal, the Notice of Appeal is deemed to be withdrawn.
8. Both parties filed written submissions on the application pursuant to the Court's directions in that regard, which I have considered.
9. When considering an application for stay of execution of this Court's decree pending hearing and determination of an appeal to the Court of Appeal, this Court is guided by both the Employment and Labour Relations Court Act, the Employment and Labour Relations Court (Procedure) Rules 2016,



and the Civil Procedure Rules. Section 13 of the Employment and Labour Relations Court Act states that a judgment, award, order or decree of the Court shall be enforceable in accordance with the rules made under the Civil Procedure Act. rule 32(2) of this Court's Rules provides that a decree of this Court shall be enforceable in accordance with Civil Procedure Rules.

10. Order 42(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 if preferred may apply to the appellate Court to have such order set aside.”

11. Rule 6(2) provides as follows:-

“(2) (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 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.”

12. On the other hand, rule 6(4) provides that for purposes of the rule (rule 6), an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court, a notice of appeal has been given.

13. The import of the foregoing subrule [6(4)], in my view, is that before this Court can order a stay of execution of its decree pending appeal, it must be satisfied that a valid notice of appeal has been given/ filed, within 14 days of the decree or order intended to be appealed against.

14. The Notice of Appeal filed in this Court by the Respondent/Applicant states:-

“Take notice that the respondent herein, grain industries limited, being dissatisfied with the Ruling of the Honourable Justice Byram Ongaya given at Mombasa on 13<sup>th</sup> May 2020 intends to appeal to the Court of Appeal against the said judgment...”

15. It is clear from the foregoing that the Notice of Appeal filed by the Respondent/Applicant on 26/5/2022 and endorsed by this Court's Deputy Registrar on 27/5/2022 DOES NOT relate to this Court's judgment delivered by the Honourable Justice Byram Ongaya on 13<sup>th</sup> May 2022. The intended appeal is shown to be against “a Ruling delivered on 13<sup>th</sup> May 2020”, while this Court's judgment was delivered on 13<sup>th</sup> May 2022.

16. I do agree with the Claimant that the Respondent did not, and has not filed a Notice of Appeal against this Court's judgment delivered on 13/5/2022. There is nothing upon which an application for stay



of execution of this Court's decree pending appeal can be founded. The Notice of Motion dated 27/1/2023 is without basis, and I order that the same be, and is hereby dismissed. The interim stay orders given by this Court on 27/1/2023 are hereby vacated.

17. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13<sup>TH</sup> JULY 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 the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Ms. Tulu for Claimant

Nr. Nabil for Respondent

