



**Patel t/a Akshar Ventures v Mabinda (Appeal E007 of 2023)
[2023] KEELRC 1736 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1736 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL E007 OF 2023
MA ONYANGO, J
JULY 13, 2023**

BETWEEN

RAJESH PATEL T/A AKSHAR VENTURES CLAIMANT

AND

MICHAEL ANDIBA MABINDA RESPONDENT

RULING

1. The application before me for determination is dated 25th February, 2023. It is filed under certificate of urgency and seeks the following orders:-
 1. Spent
 2. Pending the hearing and determination of this application interparty, the Court be pleased to stay any further proceedings and/ or execution in Eldoret ELRC Cause No E155 of 2021 Michael Andiba Mabinda v Rajesh Patel t/a Akshar Ventures and in particular stay execution of the judgment and any consequential orders emanating therefrom issued on 23rd January, 2023.
 3. Pending hearing and determination of this application interparty the Court be pleased to set aside the directions issued by the Senior Principal magistrate in Eldoret ELRC Cause NC). E155 of 2021 Michael Andiba Mabinda v Rajesh Patel t/a Akshar Ventures on or about 17th February, 2023 as the application dated 30th January, 2023 and certify the matter as urgent and issue stay orders in the matter.
 4. The Court be pleased to stay any further proceedings and/ or execution in Eldoret ELRC Cause No E155 of 2021 Michael Andiba Mabinda v Rajesh Patel T/a Akshar Ventures and in particular stay execution of the judgment and any consequential orders emanating therefrom issued on 23rd January, 2023 pending the hearing and determination of the appeal.



5. Costs for the application be provided for.
2. The application, is made Under Articles 40, 50(1) and 159 165 (7) of the Constitution of Kenya sections 1A, 1B 63E and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, Order 22(r.22) and Order 51(r.18) order 40 Rule 2 of the Civil Procedure Rules, 2010 and all enabling provisions of the law
3. The application is supported by the grounds on the face thereof and the affidavit of Rajesh Patel, the applicant.
4. In a nutshell, the applicant states that Michael Andiba Mabinda filed Eldoret ELRC Cause No E155 of 2021 against the Appellant on 28th October, 2021 but the applicant was never served with the pleadings. That the applicant learned about the existence of the suit when it received a mention notice dated 15th November, 2022.
5. He thereupon engaged an advocate who upon perusing the court file found that the suit was scheduled for judgment on 23rd January, 2023. That since the file was in the Magistrate's chambers for purposes of writing the judgment he was unable to file an application to arrest the proceedings.
6. The applicant filed an application immediately the file was released by the trial magistrate seeking that the application be certified urgent and stay of execution pending hearing and determination of the application. That the trial Magistrate fixed the application for hearing on 21st March, 2023 without granting interim orders as prayed, thus exposing the Applicant to execution.
7. The application is opposed by the Respondent through the replying affidavit of Michael Andiba sworn on 13th March in which he states that the appeal herein is incompetent as no leave has been granted by the Magistrate's Court.
8. The Respondent further depones that this court has no jurisdiction to entertain an application for stay of execution of proceedings as the impugned order is a negative order which is incapable of execution.
9. The Respondent depones that there is no justification for grant of stay orders in proceedings while the applicant has filed an application to set aside the Judgment, that the grant of the orders would occasion the Respondent greater injustice and that stay of the lower court's decree cannot be granted when the appellant has not filed an appeal against the decree.
10. The application was disposed of by way of written submissions.
11. The issues for determination based on the pleadings and submissions, are whether there is automatic right of appeal where a court declines to certify a matter urgent, and whether the orders of stay sought in the application are merited.
12. Order 43 Rule 1 of the Civil Procedures Rules sets out circumstances when appeals from orders lie as of right. Rule 2 thereof provides that an appeal shall lie with leave of the court from any other order made under the rules.
13. In the instant application the Appellant seeks stay of orders of the Trial Court declining to certify his application urgent.
14. When a party approaches the court with an application under certificate of urgency, the court will consider whether there is urgency based on the evidence before it. In the instant case the trial court considered the evidence before it and declined to certify the application urgent.



15. As submitted by the Respondent, the decision to admit a matter to urgency and grant a stay *ex tempore* is a matter of discretion and the challenge of a discretionary power has to be substantiated by the Appellant.
16. Further, for this court to grant stay of execution it must be satisfied that there is an arguable appeal. In the instant case it is my view that the appeal is not sustainable as it does not fall as of right. The Applicant ought to have obtained leave from the trial court before moving to this court on appeal.
17. I have further noted from the record that at the time of filing the application before the trial court seeking stay of execution there was no immediate threat of execution as the Applicant had not been served with Notice of Entry of Judgment and a Certificate of Costs had not been issued. There was thus no urgency to warrant *ex tempore* stay orders.
18. It is for the foregoing reasons that I find the application and appeal herein to have been prematurely filed. I therefore dismiss the application and direct that the costs of this application be in the cause.
19. The parties are referred back to the trial court to pursue the appellant's application therein.
20. Taking into account the time lapse between the time of filing, the instant application and the fact that the decree may well be now ripe in execution, I order *status quo* pending further orders of the trial court.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 13TH DAY OF JULY, 2023

MAUREEN ONYANGO

JUDGE

