



**Kenya Shoe & Leather Workers Union v Modern Soap Factory (Cause
615 of 2014) [2023] KEELRC 1686 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1686 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 615 OF 2014
AK NZEI, J
JULY 10, 2023**

**BETWEEN
KENYA SHOE & LEATHER WORKERS UNION CLAIMANT
AND
MODERN SOAP FACTORY RESPONDENT**

RULING

1. The application before me is the respondent's Notice of Motion dated February 28, 2023. The respondent/applicant seeks the following orders:-
 - a. that the application be certified urgent and notice to the claimant be dispensed with in the first instance.
 - b. that the Court do issue an order of stay of execution of the judgment and decree herein pending the hearing and determination of the application.
 - c. that the execution levied by the claimant in the proclamation and attachment of the respondent's properties by the claimant made on February 24, 2023 be set aside for being unlawful and contra statute, and that costs of the Auctioneers, if any, be met by the claimant.
 - d. that there be a stay of execution of the judgment and decree herein pending the determination of the intended appeal by the respondent against the judgment delivered herein on the January 19, 2023 on such terms as appear just and proper, and
 - e. that costs of the application be in the cause.
2. The application, expressed to be brought under rules 31 and 32 of the *Employment and Labour Relations Court (Procedure) Rules* 2016, sets out on its face the grounds upon which it is presented, and is premised on the supporting affidavit of Poojan Kanabar, the respondent/applicant's Managing Director, sworn on February 28, 2023.



3. When the application was presented to me in chambers under a certificate of urgency on March 3, 2023, I certified the same as urgent and granted an interim order of stay of execution of this court's decree, on condition that the respondent/applicant deposited the judgment sum (ksh. 199, 550) in court within 14 days of the order. The amount was subsequently deposited in this court.
4. On April 17, 2023, I granted the claimant/respondent 7 days to file and to serve a replying affidavit, upon which both parties would have 7 days to file and to exchange written submissions on the application. The claimant/respondent did not file any response to the application.
5. It is deponed in respondent/applicant's the said supporting affidavit that being aggrieved by this court's judgment delivered on January 19, 2023, the respondent/applicant intends to appeal therefrom, and has filed a Notice of Appeal and has applied for the judgment and a typed copy of the proceedings to facilitate lodging of the appeal. It is further deponed on behalf of the respondent/applicant: -
 - a. that the claimant, having been awarded costs, is yet to tax its bill of costs, and that in law, no execution could issue until taxation is done.
 - b. that the intended appeal is meritorious and has good prospects of success.
 - c. that on February 24, 2023, the respondent, without any prior notice, was served with a proclamation of attachment by Sure Auctioneers for an unsubstantiated amount of ksh. 205,448,000.
 - d. that contrary to the laid down principles of law, the claimant has proceeded to execute (against) the respondent without first drawing a draft decree for the respondent's approval before endorsement by the Deputy Registrar, and that there is no drawn decree capable of being executed.
 - e. that unless the Court stays execution pending hearing and determination of the application and hearing and determination of the intended appeal, the claimant shall levy execution, and the Applicant's appeal will be rendered nugatory; particularly in view of the fact that the proceedings herein are brought by the claimant allegedly on behalf of its members. That if the funds are paid to the members, they will become beyond the reach of the court as well as the applicant.
 - f. that substantial loss may result to the Applicant if a stay of execution is not granted pending determination of the intended appeal.
 - g. that the respondent/applicant is prepared to give appropriate security as may be directed by the court.
6. The claimant did not file any response to the application, either as directed by this court or at all. Rule 17(9) of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides that a party may respond to an application by filing grounds of opposition verified by an affidavit. In the present case, the claimant did not file response to the application, either as directed by the court or as provided by the rules. Indeed, on May 24, 2023, the claimant/respondent told the Court that it had not filed a replying affidavit, that it had only filed written submissions; and prayed for a Ruling date.
7. The respondent/applicant's application herein stands unopposed. what the claimant/respondent referred to as written submissions, shown to be dated 20th April 2023, cannot be considered to be a response to the application, in view of the clear and unambiguous provisions of Rule 17(9) of this *Court's Rules* and this court's specific directions given on April 17, 2023 granting the claimant 7 days to file and serve a replying affidavit.



8. The Court of appeal stated as follows in the case of *Daniel Torotich Arap Moi -vs- Mwangi Stephen Murithi & another* [2014] eKLR:-

“Submissions cannot take the place of evidence what appeared in submissions could not come to his aid. Such cause only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented...”
9. Still on the same point, the Industrial Court (Rika J) stated as follows in the case of *Union of Domestic Hotels, Education Institutions and Hospital Workers [kudbeiba] -vs- North Beach Hotel* [2015] eKLR:-

“...the court has time and again stated that closing submissions should not serve as a forum for adducing additional evidence, it is simply a forum for urging one’s case on the basis of the recorded evidence....”
10. Without response to the application herein, the claimant/respondent’s purported written submissions on the application are not legally anchored on anything, and cannot be a substitute for response to the application. As earlier stated in this ruling, the application is unopposed.
11. The respondent/applicant lamented, in the affidavit sworn in support of the application, that execution herein was improperly taken out, and that the claimant’s properties had been proclaimed for attachment without a decree being drawn for approval by the Applicant and endorsement by the Court’s Deputy Registrar. This is a valid argument. I have perused the Court’s record and I have not seen a decree. On record is an application for execution of a decree filed by the claimant/respondent on February 20, 2023 and copies of a warrant of attachment of movable property in execution of a decree for money and a copy of a warrant of sale of property in execution of a decree for money, both issued on February 22, 2023. There is nothing on record to show that a decree was drawn and issued by the Deputy Registrar before execution could be taken out.
12. Rule 31 of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides as follows:-
 1. “The Registrar shall draw, seal and issue an order or decree of the court.
 2. An order or decree shall be drawn in accordance with the decision of the court and shall specify clearly in paragraphs the reliefs sought and granted, any other determination and costs, if any
 3. An order or decree shall specify the date on which the Judgment was delivered.”
13. Rule 32 of the rules on the other hand provides:-
 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*.”
14. Order 22 rule 6 of the *Civil procedure Rules* 2010 provides as follows:-

“where the holder of a decree desires o execute it, he shall apply to the Court which passed the decree, or, if the decree has been send under the provisions hereinbefore contained to



another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A”.

15. It is clear from the foregoing provisions of this Court’s Rules and the [Civil Procedure Rules](#) that execution cannot issue until the decree is drawn, sealed and issued by the Registrar (Deputy Registrar), as what is supposed to be executed is the decree as drawn, sealed and issued, but not the judgment delivered by the court. An application for execution of a decree can only be lodged with the court by a holder of a decree, and a decree holder is the winning party to whom a duly drawn and sealed decree of the court has been issued by the Registrar.
16. Any execution purportedly taken out before issuance of a decree by the Court’s Registrar/Deputy Registrar is pre-mature and is an irregularity such is the execution taken out in the present case. Any Auctioneer’s charges arising from such a premature and irregular attachment can only be paid by the party who instructed the Auctioneer.
17. On whether stay of execution should be granted pending hearing and determination of the intended appeal, I have noted from the record herein that the respondent/applicant filed a Notice of Appeal on January 31, 2023. This was within 14 days of delivery of this Court’s judgment, which was delivered on January 19, 2023. Under order 42 rule 6(4) of the [Civil Procedure Rules](#), an appeal to the Court of Appeal is deemed to have been filed when, under the Rules of that Court, a notice of appeal is filed. I am satisfied that there is on record herein a valid notice of appeal.
18. Order 42 rule 6(1) & (2) of the [Civil Procedure Rules](#) Provides:-
 - “(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.
 - (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 given by the applicant.”
19. The respondent has already deposited the judgment sum in this court in compliance with this Court’s Orders as stated in paragraph 3 of this ruling. The claimant, which is yet to tax the awarded costs, has its members’ interests substantially secured by the said deposit in the event of the intended appeal failing. I find no reason why stay of execution pending appeal should not be granted in the present case.



20. The Court of Appeal (Madan JA) stated as follows in *Butt-vs- Rent Restriction Tribunal* [1979] eKLR:-

“if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful, may not be nugatory. A stay that would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be better remedy, will become available to the applicant at the conclusion of the proceedings. It is in the discretion of the court to grant or refuse stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule, ought to exercise its best discretion in a way so as to prevent the appeal, if successful, from being nugatory, per Brett LJ in *Wilson -vs- Church* (No. 2) 12 Ch D(1870) 454 at P459. In the same case, Colton LJ, said at P.458:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court has to see that the appeal if successful, is not nugatory.”

21. The claimant, which did not oppose the application, has not demonstrated, or even alleged, that if the sum involved is paid, the same will be refunded by its members (the grievants herein) if the intended appeal succeeds. It was stated as follows in *Biiy -vs- National Union of Nurses* [2022] KEERC 3864 (klr) 27 July 2022 (ruling):-

“ 31. The above principle was further states in *Abn Amro Bank Vs. Lenond Foods Limited* Civil Application No 15 of 2000 where the Court of appeal held that:

“the legal burden still 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 unto him and the appeal was to succeed. The evidential burden would be very easy for the respondent to discharge. He can simply show what assets he has such as land, cash in bank and so on.”

22. I find merit in the respondent’s notice of motion dated February 28, 2023, and the same is hereby allowed in the following terms:-

- a. there will be a stay of execution of this court’s decree pending hearing and determination of the intended appeal.
- b. the sum of ksh. 199,530 already deposited in this court shall remain so deposited pending hearing and determination of the intended appeal.
- c. the claimant/respondent shall pay the Auctioneer’s charges, if any.
- d. each party will bear its own costs of the application.

23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH 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:

Mr. Maina for claimant

Mr. Odenyo for respondent

