



**Okanga v Mombasa Island Cargo Terminal (Cause 10 of 2019)
[2023] KEELRC 3150 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3150 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 10 OF 2019
AK NZEI, J
NOVEMBER 23, 2023**

BETWEEN

JAMES AGGREY OKANGA CLAIMANT

AND

MOMBASA ISLAND CARGO TERMINAL RESPONDENT

RULING

1. The Application before me is the Respondent's Notice of Motion dated 29/5/2023, expressed to be brought under order 42 rules 6 & 7, order 22 rule 22 and order 51 rule 1 of the Civil Procedure Rules and sections 1A and 1B of the Civil Procedure Act. The following orders sought in the application:-
 - a) spend
 - b) spend
 - c) that there be a stay of execution of the judgment dated 4th May 2023 pending hearing and determination of the intended appeal in the Court of Appeal.
 - d) that costs of the application be provided for.
2. The application is premised on the supporting affidavit of Teddy Onyango sworn on 29/5/2023 wherein it is deponed:-
 - a) that the Respondent/Applicant is aggrieved by the Judgment of this Court, and has lodged an appeal against the same.
 - b) that there is a likelihood that the Claimant/Respondent will execute the Court's decree before determination of the appeal.
 - c) that it would be difficult to recover the cash from the Claimant if the appeal is successful.



- d) that the appeal has high chances of success and will be rendered nugatory unless a stay is granted.
 - e) that the Respondent/Applicant is ready and willing to abide by any conditions that the Court may direct.
 - f) that the Respondent will be greatly prejudiced should the application not be allowed and execution proceeds.
3. Documents annexed to the said supporting affidavit include a Notice of Appeal shown to be dated 18/5/2023 and filed herein on 19/5/2023.
 4. The application is opposed by the Claimant/Respondent vide his replying affidavit sworn on 19/6/2023. It is deponed in the said affidavit that the Respondent/Applicant has not demonstrated that it is likely to suffer substantial loss should the Court decline to grant an order of stay of execution, that the application is vexatious and an abuse of this Court's process; and is based on flimsy, hollow and unsubstantiated grounds which cannot elicit this Court's discretion to warrant a stay of execution.
 5. It is further deponed by the Claimant/Respondent that he stands to be greatly prejudiced should the application be granted as having been terminated wrongfully, he deserves compensation.
 6. Both parties filed written submissions on the application pursuant to the Court's directions in that regard, which I have considered.
 7. The *Employment and Labour Relations Court (Procedure) Rules* are basically silent on execution of this Court's decrees and those of the lower Courts when this Court exercises its appellate jurisdiction. Rule 32 of the *Rules*, however, saves the provisions of the *Civil Procedure Rules* on execution of decrees and orders in this Court's said *Rules*. Further, section 13 of the *Employment and Labour Relations Court Act* provides that a judgment, award, order or decree of this Court shall be enforceable in accordance with the rules made under the *Civil Procedure Act*. It is worthy noting that the *Civil procedure Rules* are the Rules made under the Civil Procedure Act.
 8. The Respondent/Applicant is seeking a stay of execution of this Court's decree pending hearing and determination of an appeal that the Respondent/Applicant states that it intends to file in the Court of Appeal.
 9. Order 42 Rule (6) (1) & (2) 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.
 - (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.”

10. Order 42 rule 6(4) of the Civil Procedure Rules on the other hand provides as follows:-

“(4) For the purpose of this rule, an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that Court, notice of appeal has been given.”

11. Under rule 75(2) of the Court of Appeal Rules 2010, a notice of appeal shall be lodged within fourteen days of the date of the decision against which it is desired to appeal.

12. This Court’s judgment against which the Respondent/Applicant desires to appeal was delivered on 4th May 2023. I have noted from the Court’s record herein that a Notice of Appeal dated 18/5/2023 was lodged in this court’s Registry on 19/5/2023, and was paid for on the same date at 08:59:23. This was on the 16th day from the date of this Court’s judgment. It follows that the Respondent/Applicant has not demonstrated that it has a valid appeal on the basis of which an application for stay of execution pending appeal can be considered, and on the basis of which the orders sought herein can be granted.

13. On the foregoing basis, the Respondent/Applicant’s Notice of Motion dated 29/5/2023 must fail, and is hereby dismissed with costs.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD NOVEMBER 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 Respondent fees.

AGNES KITIKU NZEI

JUDGE

