



**Capital D Elegance Ltd v Masinde (Employment and Labour Relations  
Appeal E011 of 2021) [2022] KEELRC 1676 (KLR) (20 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1676 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E011 OF 2021**

**DN NDERITU, J**

**MAY 20, 2022**

**BETWEEN**

**CAPITAL D ELEGANCE LTD ..... APPLICANT**

**AND**

**FRANCIS OWUOR MASINDE ..... RESPONDENT**

**RULING**

**Introduction**

1. By way of a Notice of motion dated May 4, 2022 expressed to be brought under article 159 of *the Constitution* of Kenya, sections 3, 3A, and 75 of the *Civil Procedure Act*, Order 43 Rules 1, 2, and 3, Order 51 Rule 1 of the *Civil Procedure Rules*, section 3 of the *Judicature Act* and all other enabling provisions of the law, the appellant/applicant prays for:-
  - (1) That the application herein be certified urgent and the same be heard *ex-parte* in the first instance.
  - (2) That this honourable court be pleased to grant the applicant leave to appeal against its decision delivered virtually on April 26, 2022.
  - (3) That costs of this application be provided for.
2. The said application is based on the grounds on the face of the same and is supported by the affidavit of Tom Ndale, the human resources manager of the appellant/applicant, with one annexure thereto. The said annexure is a copy of the ruling by this court dated and delivered on April 26, 2022 against which the appellant/applicant is seeking leave to appeal.
3. In response to the said application the respondent swore a replying affidavit on May 9, 2022.



4. The said application was certified urgent on May 4, 2022 and when counsel for both parties appeared in court virtually on May 10, 2022 it was agreed by consent that a ruling be rendered on the basis of the materials placed before the court.
5. In essence, the appellant/applicant is seeking for leave from this court to appeal against the said ruling.

## II. The Law

6. For avoidance of doubt, the application giving rise to the ruling of this court of April 26, 2022 was expressed to be brought under Rules 3, 8, and 17 of the [Employment and Labour Relations Court Rules, 2016](#) and all other enabling provisions of the law. It is dated November 23, 2021.
7. In the said ruling this court indicated that the most appropriate provisions for such an application are to be found in Order 42 rule 6(1) and (2) of the [Civil Procedure Rules](#). Nonetheless, this court proceeded to consider the said application on merit and granted stay on conditions set out therein.
8. The appellant/applicant is not seeking for review, appeal, or setting aside of the orders granted in the stay application from this court. The appellant/applicant is only seeking for leave from this court to challenge the said ruling in the next court in the hierarchy, the Court of Appeal.
9. The said application has been filed within 14 days as required under Order 43 Rule 1(3) of the [Civil Procedure Rules](#). There was no delay in filing the same.
10. Section 75 of the [Civil Procedure Act](#) provides as follows:-

75.

- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other orders with the leave of the court making such order or of the court to which an appeal would lie if leave were granted -

(a) -----

(b) -----

(c) -----

(d) -----

(e) -----

(f) -----

(g) -----

(h) any order made under rules from which an appeal is expressly allowed by rules.

11. This court has deliberately blanked items (a) to (g) above as they are not relevant in the instant application. It is item (h) that appears to open a window to any applicant who is seeking for leave to appeal against any other order(s) not listed in items (a) to (g).
12. An order for stay of execution denied, refused, or granted under Order 42 Rules 6 of the [Civil Procedure Rules](#) is not one of the items listed in (a) to (h).



13. Order 43 of the *Civil Procedure Rules* provides for a list of orders and rules in respect of which an appeal shall lie as of right under section 75 (1)(h) of the Act, alluded to hereinabove.
14. This court notes that Order 42 rule 6 is not one of the provisions from which a dissatisfied party to an order may appeal against as of right.
15. However, Order 43(2) provides as follows:-
  - (2) An appeal shall lie with the leave of court from any other order made under these Rules.
16. From the foregoing, it is clear that this court, and indeed any other court, has powers to grant leave to a dissatisfied party to appeal against any order.
17. However, this court notes that no draft memorandum of appeal was annexed to the application seeking leave and hence this court is unable to assess, even remotely, the magnitude and scope of the grounds of the intended appeal or likelihood of an arguable appeal with a probability of success.
18. This court has already pronounced itself on the application for stay and the issue of the merits or demerits of the intended appeal against that ruling is not for this court to decide.
19. However, this court does not wish to stand on the way of the appellant/applicant seeking justice from the appellate court.
20. In the circumstances, the leave sought to appeal is hereby granted.

### **III. Costs**

21. As to costs for this application, the same shall abide with the outcome of the appeal pending before this court.

### **IV. Disposal**

22. This court has gone through the supporting affidavit to the application and the replying affidavit and weighed what is deponed therein against the applicable law as set out above.
23. This court is persuaded that there are good reasons for granting the leave sought, especially based on the right to be heard under articles 48 and 50(1) of the *Constitution* and the rules of natural justice, and hence the said application is allowed, with costs as ordered above.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 20<sup>TH</sup> DAY OF MAY, 2022.**

.....

**DAVID NDERITU**

**JUDGE**

