



**Abdulkader & Brothers v Kazungu (Appeal E008 of 2022)
[2022] KEELRC 12878 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12878 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E008 OF 2022
AK NZEI, J
OCTOBER 6, 2022**

**BETWEEN
MOHAMED NAZIR ABDULKADER & BROTHERS APPELLANT
AND
JACKSON CHARO KAZUNGU RESPONDENT**

(Appeal from the decision of the Magistrate's Court – Hon. D.O. Mbeja, dated 20th January 2022 in CM-ELRC Case No. 476 of 2019))

RULING

1. The application before me is the Appellant's Notice of Motion dated 3rd February 2022, wherein the following orders are sought:-
 - a. that the Court be pleased to grant stay of execution of the Ruling delivered on 20th January 2022 by Hon. D.O. Mbeja pending hearing and determination of this application.
 - b. that this Honourable Court be pleased to grant stay of execution of the Ruling delivered on 20th January 2022 by Hon. D.O. Mbeja pending the hearing and determination of this appeal.
 - c. that this Honourable Court be pleased to issue temporary injunction restraining the Respondents, their agents, employees or other persons whether acting on their own behalf from selling by public auction or private treaties the Applicant's property.
2. The application is expressed to be brought under Order 42 Rule 6, Order 51 Rules 1&3 of the Civil Procedure Rules 2010, Sections 1A,1B & 3A of the Civil Procedure Act, and is opposed by the Respondent whose Counsel, Clemence Masinde Advocate, filed a Replying Affidavit on 2nd March 2022, sworn by her on 24th February 2022.



3. From what I can gather from the material placed before me, the respondent holds a decree of the Lower Court, issued against the Appellant herein in Mombasa C.M.ELR Case No. 476 of 2019 (Jackson Charo Kazungu vs Mohammed Nazir Abdulkader & Brothers, from which the Appellant/Applicant depones to having appealed vide Civil Appeal No. E018 of 2021, which he refers to as the substantive appeal. I have also gathered from the record before me that on filing the said appeal, the Appellant/Applicant filed an application in the trial Court seeking stay of execution of the said decree pending appeal. This he did under Order 42 Rule 6 of the Civil Procedure Rules. Vide a Ruling delivered on 20th January 2022, the Lower Court granted the Appellant/Applicant a stay of execution pending appeal, “on condition that the Applicant deposits the entire decretal amount in Court and clears all outstanding auctioneers costs within 21 days of the Ruling, in default execution to issue...”
4. The Lower Court stated as follows in its said Ruling:-

“the Applicant has given an undertaking and demonstrated willingness to abide by any conditions set out by this Court as to security, which is one of the requirements set out under Order 42(6).”
5. Proceedings before this Court are governed by the Employment and Labour Relations Court (Procedure) Rules 2016. The said Rules are, however, silent on stay of execution pending appeal. Where this Court’s Rules of Procedure are silent, the Court’s practice has been to turn to the provisions of the Civil Procedure Rules on the specific matter in issue.
6. Order 42 Rule 6(1) provides as follows:-

“(1) No appeal or second appeal shall operate as a stay of execution or 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.”
7. It is clear from the foregoing that by dint of Order 42 Rule 6(1) that:-

“...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.”
8. The import of the foregoing provision is that if the Appellant/Applicant was aggrieved by the trial Court’s Order dated 20th January 2022 staying execution pending appeal, then he ought to have filed an application in this Court, being the appellate Court, to set aside that order and for any other appropriate order on the issue of stay of execution pending appeal. Such an application ought to have been made in the appeal against the trial Court’s Judgment/decree. That has not been done. There is no prayer for setting aside the trial Court’s Orders of stay dated 20th January 2022 in the application before me. I will not say much about the validity or otherwise of the appeal herein at this stage.
9. In view of all the foregoing, it is my finding that there is no proper application before me, and that Orders sought by the Applicant are not capable of being granted.



10. Consequently, and having considered submissions by Counsel for the parties herein, the Notice of Motion application dated 3rd February 2022 is hereby dismissed with costs. The orders of interim stay of execution in Mombasa C.M. ELR Case No. 476 of 2019 given by this Court on 10th February 2022 are hereby vacated.

11. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Owino. for Appellant /Applicant

Ms. Nasimiyu for Respondent

