



**Naushad Trading Company Limited v Mokuia (Appeal 047 of 2022)  
[2022] KEELRC 13352 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13352 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL 047 OF 2022  
AK NZEI, J  
DECEMBER 1, 2022**

**BETWEEN  
NAUSHAD TRADING COMPANY LIMITED ..... APPELLANT  
AND  
JEFFERSON NYABUTO OGARI MOKUA ..... RESPONDENT**

*(Being an intended Appeal against the Judgment and Decree of the Resident Magistrate Hon. G. Kiage, delivered on 8th day of July 2022 in Mombasa ELRC NO. 1004 of 2019)*

**RULING**

1. The application before me is the appellant's notice of motion dated July 28, 2022. The appellant/applicant is seeking the following orders:-
  - a. that this court be pleased to grant a stay of execution of the judgment dated July 5, 2022 and delivered on July 8, 2022 pending hearing and determination of the intended appeal herein.
  - b. that costs of the application be provided for.
2. The application is supported by the supporting affidavit of one Khatau Mahmood, the appellant's office administrator, sworn on July 28, 2022. Annexed to the affidavit is a copy of the lower court's judgment dated July 5, 2022 and shown to have been delivered by G Kiage – SRM at Mombasa on July 8, 2022 in Mombasa CMC-ELR Case No 1004 of 2019. It would appear as though the lower court's decree had not been extracted as at the time the application for stay of execution was filed, as none is annexed to the affidavit sworn in support of the application.
3. The order for stay of execution pending appeal is sought on the basis of an appeal that is shown to have been instituted *vide* a memorandum of appeal filed in this court on July 14, 2022. Although rule 8(1) provides that a memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment, none of the said documents, except the



lower court's judgment, was filed together with the memorandum of appeal. This court has, therefore, not seen the lower court's proceedings and documentary evidence produced at the trial by the parties herein.

4. It is improper for a party to file an application for stay of execution pending appeal on the basis of a bare memorandum of appeal, as an appellate court must be seized of all the matters of fact regarding the subject trial before it can be called upon to determine an application based on the appeal.
5. Execution of a court's decree is a lawful process that is legitimately taken out by a successful litigant, and a party seeking stay of the same must demonstrate that the stay sought is, indeed, deserved.
6. The *Employment and Labour Relations Court (Procedure) Rules, 2016* are silent on stay of execution pending appeal. This court has, over the years, resorted to the *Civil Procedure Rules* in situations where its rules are silent on any particular procedural matter. Order 42 rule 6(1) & (2) of the *Civil Procedure Rules* provide 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 if preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under sub rule (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.

(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.”

7. It is clear from the foregoing that an applicant seeking a stay of execution pending appeal must satisfy the court that substantial loss will result to the applicant unless the stay sought is granted. This can only be done on the basis of material placed before the court by the party seeking stay. It is not enough for an applicant to allege that the respondent will not be able to refund the decretal sum if the appeal succeeds. The burden is upon the applicant to prove that the respondent will not be able to refund any sum paid to him in satisfaction of the decree.
8. The court in *Indus Trading Limited & Another v Charles Aricha [2021] eKLR*, stated as follows:-

“...the applicants have not laid any basis for believing that the respondent will not be able to refund the decretal sum in question.



...the respondent has disclosed that he is not a man of straw. while he may have been having financial liabilities that eat into his gross income, that ought not to be taken against him. He is a successful litigant and is entitled to enjoy the fruits of his judgment. Accordingly, I am not satisfied that a substantial loss may result to the Applicants unless the order is made.”

9. In the *Indus Trading Case*, the court agreed with the opinion expressed in Bungoma High Court Misc. Application No. 42 Of 2011 – *James Wangalwa & Another v Agnes Naliaka Cheseto* that:-

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as a successful party in the appeal. This is what substantial loss would entail.”

10. It was stated as follows in the case of *Kenya Shell Limited v Kabiru* [1986] KLR 410 (Platt Ag. JA):-

“...if there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss, in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented.

Therefore without this evidence, it is difficult to see why the respondents should be kept out of their money.”

11. In the absence of any evidence of substantial loss that the appellant/applicant is likely to suffer if the orders of stay sought are not granted, the application dated July 28, 2022 must fail, and is hereby dismissed with costs.

12. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1<sup>ST</sup> DAY OF 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:

N/A for appellant/applicant

Mr Iddi respondent

