



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Freigh Forwarders Kenya Limited v Elsek & Elsek (K) Limited (Civil Case 56 of 2012) [2023] KEHC 3197 (KLR) (24 March 2023) (Ruling)

Neutral citation: [2023] KEHC 3197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 56 OF 2012
OA SEWE, J
MARCH 24, 2023**

BETWEEN

FREIGH FORWARDERS KENYA LIMITED PLAINTIFF

AND

ELSEK & ELSEK (K) LIMITED DEFENDANT

RULING

1. The Notice of Motion dated August 20, 2021 was filed by the plaintiff under Section 1A, 1B, and 3B of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya and Order 50 Rule 1 of the [Civil Procedure Rules, 2010](#) for orders that:
 - (a) The sum of Kshs 1,500,000/= deposited in Court on December 2, 2015 by the defendant/ judgment debtor herein as security be released to the plaintiff/decree holder; and,
 - (b) That the costs of the application be provided for.
2. The application was premised on the grounds that the plaintiff instituted the instant suit claiming from the defendant payment of amounts then due and outstanding together with cumulative interest thereon at the rate of 3% for every period of 45 days from January 24, 2021 till date of payment. The plaintiff thereafter requested for judgment in default of appearance which was entered against the defendant on March 28, 2012. The plaintiff averred that, since then, the defendant has made numerous applications to avoid payment and thereby delay execution; but that all those applications have been unsuccessful. The applicant pointed out that, on November 16, 2015, the Court ordered that the sum of Kshs 1,500,000/= be deposited in Court as security; which amount was deposited on December 2, 2015 and is still in the Court's possession to date.
3. The application was premised on the affidavit sworn on August 20, 2021 by the plaintiff's Chief Financial Officer, Mr Ketan Moolraj. He explained that the sums claimed herein were in respect of clearing and forwarding services rendered to the defendant by the plaintiff; and that judgment was



- entered for the plaintiff as prayed in the Plaint in default of appearance, but that the defendant has since frustrated all efforts by the plaintiff to realize the fruits of its judgment by making numerous applications for stay of execution. Mr Moolraj further averred that all those applications were ultimately dismissed.
4. At paragraph 7 of the Supporting Affidavit, the plaintiff averred that, in one such application, the defendant sought stay of execution; which was granted on November 16, 2015 by Hon Emukule, J on condition that a sum of Kshs 1,500,000/= be deposited as security by the defendant within 14 days of the order. Mr Moolraj further averred that the condition was duly complied with and that the sums have been in the custody of the Court to date. He explained that the stay orders were periodically extended by the Court until February 2017 when the defendant's application dated November 13, 2015 was determined in the plaintiff's favour vide the Ruling dated February 24, 2017. Thereupon the plaintiff was given the green light to proceed with execution.
 5. At paragraph 11 of the Supporting Affidavit, Mr Moolraj deposed that, being dissatisfied with the ruling dated February 24, 2017, the defendant filed a Notice of Appeal on March 3, 2017 along with yet another application for stay of release of the security pending the hearing and determination of the appeal to the Court of Appeal. The said application was likewise heard and allowed on July 12, 2017 on the following terms:
 - (a) That the undisputed sum of Kshs 1,601,190.19 be paid to the plaintiff forthwith but in any event within 30 days from the date of the order;
 - (b) The balance of the decretal sum as disclosed in the calculations by the plaintiff as at April 27, 2017, being Kshs 6,032,192/= and, being Kshs 2,931,002/= be deposited in an escrow account operated in the joint names of the advocates for the parties to be opened within 45 days from the date of the order;
 - (c) The defendant to file and serve a Record of Appeal in the Court of Appeal within 60 days from the date of the order;
 - (d) In default of compliance with any of the three foregoing conditions, the stay granted to lapse and the plaintiff be at liberty to execute.
 6. At paragraph 14 of the Supporting Affidavit, Mr Moolraj averred that when the deadline for payment of the undisputed sum of Kshs 1,602,190.19 lapsed, the plaintiff's advocates wrote to the defendant's advocates on August 23, 2017 and reminded them that the deadline imposed by the Court had passed and offered a settlement proposal of a lump sum payment of Kshs 3,580,000/=:, which included the release of the security deposit of Kshs 1,500,000/=: . Instead of a response, the defendant withdrew instructions from its advocates and thereafter refused to comply with the conditions set by the Court or the settlement proposal by the plaintiff. Thus, according to Mr Moolraj, the defendant has put up endless efforts to ensure that the plaintiff does not enjoy the fruits of its judgment. He further pointed out that the decretal sum together with interest, as of September 30, 2021, stood at Kshs 15,012,690.32 and continued to grow.
 7. In the premises, the plaintiff prayed that the security deposit be released to it as all attempts by it to execute or amicably settle the decree have failed. The plaintiff added that it is in the interest of fair administration of justice that the orders sought in the application dated 20th August 2021 be granted. In support of the averments set out in the Supporting Affidavit, the plaintiff annexed several documents including the Orders dated November 13, 2015 and the Ruling dated July 12, 2017.
 8. On behalf of the defendant, a Replying Affidavit was filed herein on November 22, 2021, sworn by the defendant's Finance Manager, Mr Shahame Aziz Mwidani. He averred that the application is nothing



but an attempt to render the defendant's appeal nugatory. At paragraph 8 of the Replying Affidavit, Mr Mwidani deposed that the defendant has always complied with all orders of the Court, including the order to deposit Kshs 1,500,000/= in court; and that it is in the interest of justice that the defendant be accorded an opportunity to either explore an amicable settlement with the plaintiff or be heard on appeal. At paragraph 9 of the Replying Affidavit, Mr Mwidani conceded that the stay orders have lapsed and blamed defendant's erstwhile advocate for non-compliance within the timelines given by the Court for which the defendant ought not to be punished.

9. Directions were thereafter given on November 1, 2021 that the application be canvassed by way of written submissions. In compliance, Mr Khamis for the plaintiff filed his written submissions on February 16, 2022. He proposed a single issue for determination, namely, whether the plaintiff is entitled to the security deposit. He submitted that upon failure by the defendant to comply with the orders of the Court given on July 12, 2017, the decretal sum, including the security deposit became due and payable forthwith. Counsel relied on *ICEA Lion General Insurance Company v Chris Ndolo Mutuku t/a Crystal Charlotte Beach Resort* [2020] eKLR for the proposition that the defendant was at liberty to seek enlargement of time to comply with the conditional orders for stay but failed to do so. In his view, it is pointless for the defendant to blame its advocates for its failure because a case belongs to the parties and not their advocates. For this proposition, counsel relied on *Hassan Mohamed Hussein & Another v Kenya Revenue Authority & Another* [2020] eKLR. He accordingly prayed that the application dated August 20, 2021 be allowed with costs.
10. It appears that no submissions were filed on behalf of the defendant, as their submissions are not on the file. I have nevertheless given due consideration to the averments set out in the parties' respective affidavits. The background of the application is manifest from the record, namely, that upon default judgment being entered in favour of the plaintiff, the defendant severally applied for stay of execution. One of the applications was heard and determined by Hon. Otieno, J. vide the Ruling dated July 12, 2017. That Ruling is explicit that stay of execution was granted on terms. The conditions were that:
 - (a) That the undisputed sum of Kshs 1,601,190.19 be paid to the plaintiff forthwith but in any event within 30 days from the date of the order;
 - (b) The balance of the decretal sum as disclosed in the calculations by the plaintiff as at April 27, 2017, being Kshs 2,931,002/= be deposited in an escrow account operated in the joint names of the advocates for the parties to be opened within 45 days from the date of the order;
 - (c) The defendant was to file and serve a Record of Appeal in the Court of Appeal within 60 days from the date of the order;
 - (d) In default of compliance with any of the three foregoing conditions, the stay granted was to lapse and the plaintiff be at liberty to execute.
11. The court further advised the parties to have the security deposit that had been deposited pursuant to the stay order of November 13, 2015 moved to the escrow account. The defendant has conceded in its Replying Affidavit that it did not pay the undisputed sum of Kshs 1,601,190.19 within 30 days from the date of the order. It also conceded that it failed to pay the balance of the decretal sum as disclosed in the calculations by the plaintiff as at April 27, 2017, in an escrow account operated in the joint names of the advocates for the parties within 45 days from the date of the order. Moreover, it is not clear whether the Record of Appeal was filed before the Court of Appeal within 60 days as ordered. In fact, the current status of the appeal has not been disclosed by either party.
12. At paragraph 11(iv) of the Ruling dated July 12, 2017, the Court was explicit that in default of compliance with any of the three conditions, the stay granted was to lapse and the plaintiff would be



at liberty to execute. In the premises, I am satisfied that, in the absence of an order for extension of time for compliance or an order of stay by the Court of Appeal as is the case, the plaintiff is entitled to the immediate release of the security deposit. Indeed, in *City Council of Nairobi v Judith A. Guserwa* [2006] eKLR, it was held that:

The application is opposed by the respondent on the ground that judgment was delivered on September 9, 2004 and all along the applicant did nothing until the time the respondent was in the process of execution and that is the time the applicant rushed to court. They were granted enlargement of time but on certain conditions which they failed to comply with. For the applicants again to be heard to seek enlargement of time amounts to abuse of the court process.

The applicant's application was granted on certain conditions and within a given time. Once the applicant failed to comply with those conditions within that given time, that leave lapsed and became inoperative after the 10 days condition granted by the court.

13. Similarly, in *Kwacha Group Companies v Pindoria Holdings Limited* [2022] eKLR, the position taken, with which I agree, was that:

“On perusal of the record a stay of execution was granted on condition that the decretal sum be deposited in a joint interest earning account and therefore it can be inferred that failure to deposit the decretal amount would render the order of stay of execution impertinent. There is a proviso to the stay orders which is that failure to deposit the decretal sum in the joint interest earning account within 45 days rendered the orders staying execution to have lapsed. The effect of that condition is that the respondent is at liberty to execute. The failure to comply with the court orders has the automatic remedy of execution of the decree as opposed to citation of the party in default for contempt or dismissal of the appeal.”

14. Accordingly, I find merit in the application dated August 20, 2021. The same is hereby allowed and orders granted as hereunder:

- (a) The sum of Kshs 1,500,000/= deposited in Court on December 2, 2015 by the defendant/judgment debtor herein as security be released forthwith to the plaintiff/decree holder; and,
- (b) That the costs of the application be borne by the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MARCH 2023

OLGA SEWE

JUDGE

CIVIL CASE NO. 56 OF 2012 RULING 2

