



REPUBLIC OF KENYA



KENYA LAW
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**Meru Greens Horticultural EPZ Ltd v Ruby Ranch Limited (Civil Suit
E062 of 2018) [2022] KEHC 12935 (KLR) (31 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL SUIT E062 OF 2018
A MABEYA, J
AUGUST 31, 2022**

BETWEEN

MERU GREENS HORTICULTURAL EPZ LTD PLAINTIFF

AND

RUBY RANCH LIMITED DEFENDANT

RULING

1. This is a ruling on the plaintiff's application dated 21/4/2021. The same was brought under Order 22 Rule 25, Order 51 Rules 3,4,13(3), 14(4) & 15 and Order 21 rules 8 & 12 of the *Civil Procedure Rules* 2010.
2. The Motion sought the following prayers: -
 - “1) Spent
 - 2) There be a stay of any further execution of the partial/preliminary decree dated 14/4/2020 and issued on 29/5/2020 and/or seizure of the Applicant's assets proclaimed on 19/4/2021.
 - 3) There be a stay of any further execution of the partial/preliminary decree herein dated 14/4/2020 and issued on 29/5/2020 and/or seizure of the Applicant's assets proclaimed on 19/4/2021 pending the hearing and determination of the rest of the main suits by both parties herein.
 - 4) Alternatively, the partial/preliminary decree herein dated 14/4/2020 and issued on 29/5/2020 and all subsequent orders be set aside.
 - 5) The ex parte proceedings and orders herein dated 13/4/2021 plus all the subsequent orders be set aside and the Applicant herein be granted leave to file



replies to the application dated 9/3/2021 and the same be heard inter partes on its own merits.

6) Alternatively, the application dated 9/3/2021 be deemed spent in view of Prayer/Order 3 above.

7) Costs be provided for.”

3. The grounds for the application were set out in the body of the Motion and the supporting affidavit of Gerald Muthomi Mutuambugu sworn on 21/4/2021.
4. The grounds included that; the plaintiff only learnt of the application dated 9/3/2021 and the partial/preliminary decree on 13/4/2021 when the defendant’s advocates sent an email; that the said application was to be heard on the same date, 13/4/2021 at 9.00 am, which time had already passed by the time the email was sent and received.
5. That on Monday 19/4/2021, the plaintiff was accosted by auctioneers armed with warrants of attachment and sale pursuant to the orders issued on 13/4/2021. The auctioneers proclaimed some of the plaintiff’s goods and that unless a stay is granted, the auctioneer would seize and sell the proclaimed goods.
6. The plaintiff pleaded that it would be in the interests of justice to stay the execution of the partial/preliminary decree pending the full determination of the suit to ascertain the rights and liabilities of both parties inter se to discern who owes the other how much before execution.
7. The defendant opposed the application vide a replying affidavit sworn on 15/6/2021 by Kenneth Wilson, its advocate.
8. It was averred that on 14/4/2020, the Court allowed the defendant’s application of 27/8/2018 that sought judgment on admission. Pursuant thereto, the defendant extracted the partial decree and applied for leave to enforce the partial decree.
9. That on 15/3/2021, Muriu Mungai & Company, Advocates effected service of a hearing notice and the said notice of motion upon the plaintiff’s advocates on record. That on 13/4/2021, there was non-attendance by the plaintiff and being satisfied with service, the Court allowed the application.
10. The defendant contended that the plaintiff was aware of the hearing date. That the partial decree conformed with the ruling of 14/4/2020. In the premises, a failure (if any) to serve a draft decree on the plaintiff’s advocate for approval, could not be a ground to set aside this court’s orders.
11. That the plaintiff has illegally barred the auctioneers from carting away the goods despite the proclamation and that the plaintiff has come to the court with unclean hands and should not be granted the orders sought.
12. In further opposition to the application, Lydia W. Kinyua, a process server employed in the law firm of Muriu Mungai & Company Advocates LLP lodged a further affidavit sworn on 15/6/2021.
13. She averred that she effected service of the notice of motion dated 9/3/2021 and the hearing notice of 13/4/2021 on the plaintiff through its advocate’s email address. That on 13/4/2021, she belatedly noticed that she had not attached the Supporting Affidavit to the subject application and proceeded to send the same via email to the plaintiff’s advocate.
14. She pleaded that it was therefore not true that the plaintiff’s advocate was not aware of the hearing date of the notice of motion dated 9/3/2021.



15. The Court has considered the parties' affidavits and the record.
16. The plaintiff essentially seeks to have the partial decree dated 14/4/2020 stayed pending determination of the rest of the suit or in the alternative, the setting aside of the decree and the ex-parte proceedings of 13/4/2021.
17. This being an application to set aside orders made ex-parte for non-attendance, the principles applicable are; the application must be made timeously, the reason for non-attendance and the prejudice, if any, that might be suffered by the opposite party.
18. In the present case, the proceedings impugned took place on 13/4/2021. The present application was made on 21/4/2021, 7 days later. The application was, in the circumstances, made timeously.
19. On the reason for non-attendance, the plaintiff contends that it was not aware of the hearing of the application dated 9/3/2021. Conversely, the defendant averred that the plaintiff was served with the application and its hearing notice but failed to show up. As proof of service, the defendant attached an affidavit of service to its replying affidavit as 'KW1'.
20. The Court has considered the said affidavit of service. Lydia W. Kinyua, the process server swore that she caused the hearing notice and notice of motion to be served upon the plaintiff's advocate via its last known email address.
21. The evidence on record indicates that the plaintiff's advocates were served with the application and hearing notice via an email dated 15/3/2021. However, the supporting affidavit to the application was not attached in the email. The process server averred that this was an error and sent the supporting affidavit to the plaintiff via an email dated 13/4/2021, which was unfortunately the day of hearing of the application.
22. The court notes that the plaintiff's advocates were served both times via the same email address. It is therefore strange for the plaintiff to contend that it did not receive the first email which had the application and hearing notice but received the second one that sent the supporting affidavit.
23. Although the supporting affidavit was not attached to the first notice, the plaintiff's advocates were aware of the application and hearing date. They ought to have appeared before court to express their concerns.
24. In the Motion of 9/3/2021, the plaintiff sought leave to execute the partial decree of 14/4/2021. The decree emanated from a judgment on admission for Kshs.13,200,000/-.
25. On 13/4/2021, when the matter was heard, the Court was satisfied that the application was served and that there was no response to it. It therefore allowed the application.
26. The 3rd limb is the prejudice to be suffered by the defendant if the orders sought are allowed. The defendant has in its favour a judgment. It should not be prevented from enjoying the fruits thereof. Allowing the application would be to keep the defendant from enjoying the fruits thereof which would be in contravention of Article 159 of *the Constitution* which dictates that justice should not be delayed. Justice delayed is justice denied!
27. Accordingly, I see no merit in the application dated 21/4/2022 and I dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF AUGUST, 2022.

A. MABEYA, FCI Arb



JUDGE

