



**Nanjala Limited v Mayhouse Limited (Commercial Case 188 of 2019)
[2025] KEHC 77 (KLR) (Commercial and Tax) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 77 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 188 OF 2019
A MABEYA, J
JANUARY 16, 2025**

BETWEEN

NANJALA LIMITED PLAINTIFF

AND

MAYHOUSE LIMITED DEFENDANT

RULING

1. The defendant filed a Notice of Motion dated 3/10/2023 under the inherent powers of the Court seeking an order for vacating and/or setting aside of the interim orders of stay of execution issued by this Court on 18/5/2023.
2. The application was premised on the grounds set out on the face of the Motion and the affidavit sworn on 3/10/2023 by Rajni Shah, a former Director and shareholder of the defendant. He averred that the defendant holds a consent judgment against the plaintiff for Kshs. 31,500,374/= dated 4/11/2020, which required the plaintiff to make monthly payments of Kshs. 700,000/=, towards settling the said decretal sum.
3. That the plaintiff defaulted on these payments and as of 31/8/2023, the plaintiff owed the defendant Kshs. 3,220,000/=, according to a ruling by the Deputy Registrar, which the plaintiff has never appealed against. He contended that since that ruling, the plaintiff has only paid Kshs. 2,000,000/=, leaving an outstanding debt of Kshs. 3,320,000/= as of 30/9/2023. The defendant stated that the consent judgment allows for the execution of the full decretal sum in the event the plaintiff defaults on any monthly payments.
4. As a result of the foregoing, Mr. Shah asserted that the plaintiff no longer deserves the interim stay of execution orders granted on 18/5/2023 and urged this Court to set them aside and allow the defendant to execute for the remaining balance.



5. From the record, the Court did not see any response and/or opposition by the plaintiff to the application. On 4/3/2024, the Court gave directions for the application to be canvassed by way of written submissions. While the defendant's submissions dated 27/3/2024 were filed on 27/3/2024, there were none by the plaintiff on the Case Tracking System (CTS).
6. The defendant relied on the provisions of Order 40 Rule 7 of the Civil Procedure Rules 2010 and the case of *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another* [I990] eKLR and submitted that the plaintiff was dishonest when seeking the interim stay of execution. This is because, in the affidavit in support of its application for stay, the plaintiff incorrectly stated that it had been making monthly payments, whereas the Deputy Registrar in a ruling delivered on 12/6/2023 found it to be in default of Kshs. 3,320,000/= as of 3/10/2023.
7. Learned Counsel cited the case of *Ochola Kamili Holding Limited v Guardian Bank Limited* [2018] eKLR and further submitted that the plaintiff had not made any payments towards settlement of the decretal sum since January 2024 neither had it prosecuted its application. For this reason, counsel submitted that the plaintiff was abusing the interim orders for stay of execution to frustrate the defendant and obstruct justice, thus the said orders should be set aside.
8. Upon considering the instant application, the grounds on its face and the affidavit filed in support thereof, together with the written submissions by Counsel for the defendant, the issue that arises for determination is whether the interim orders of stay of execution issued by this Court on 18/5/2023 should be set aside.
9. This Court derives its discretion to set aside an ex parte order from the provisions of Order 51 Rule 15 of the Civil Procedure Rules 2010 which states that the Court may set aside an order made ex parte. Courts are however reminded to exercise this discretion judiciously, with the primary objective of ensuring that justice is served for all parties involved, as was held in *Zebedee Mmata Injera v Benson Anubi Luhong; Joanne C.K. Luhongo (Interested Party)* [2021] eKLR. In that case, it was held that: -

“... while Order 51 Rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte, the court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. That the court's discretion to set aside an ex parte ruling/judgment is not restricted, but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's favor or discretion to adduce sufficient and plausible reasons that are demonstrable, and persuasive to the court...”
10. In the present case, the application was unopposed in view of the failure by the plaintiff to respond to it. Be that as it may, the Court will still determine whether or not the defendant has made out a case to warrant the grant of the orders sought.
11. From the record, it is evident that the defendant obtained a consent judgment against the plaintiff on 5/11/2020 for Kshs. 31,500,374/=. The consent dated 4/11/2020 required the plaintiff to make monthly payments of Kshs. 700,000/= towards settlement of the decretal sum, and in default of any monthly instalments, the defendant was at liberty to execute for the full outstanding balance.
12. The defendant contended that the plaintiff defaulted on these payments thus it decided to exercise its right under the consent judgment and execute against the plaintiff for the entire outstanding balance.
13. Consequently, the plaintiff filed an application dated 17/5/2023 seeking inter alia, an order for stay of execution of the said decree pending the hearing and determination of the application and an order for taking of account to ascertain the outstanding balance. On 18/5/2023, the Court issued an order for



stay of execution pending the hearing and determination of the said application. On 23/5/2023 when the plaintiff's application came up for inter partes hearing, the Court directed that it be heard before the Deputy Registrar, who was to determine the accounts and certify the amount due.

14. The record shows that the Deputy Registrar undertook the exercise and delivered a ruling on 12/6/2023 wherein she found that as of 31/5/2023, the plaintiff was in default in the sum of Kshs. 3,220,000/=. There is no evidence of any appeal lodged against the said ruling by either the plaintiff or the defendant, thus the said finding by the Deputy Registrar remains valid. It was stated by the defendant that since the delivery of the said ruling, the plaintiff has only paid Kshs. 2,000,000/=-, leaving an outstanding debt of Kshs. 3,320,000/=- as of 30/9/2023.
15. In view of the plaintiff's default in making monthly payments towards settlement of the decretal sum and the ruling by the Deputy Registrar confirming that as at 31/5/2023, the plaintiff was in default in the sum of Kshs. 3,220,000/=-, which default the plaintiff has not demonstrated that it has rectified, this Court is of the view that the defendant has every right to execute for the outstanding balance of the decretal sum in line with the provisions of clause 4 of the consent judgment of 4/11/2020 adopted as by the Court on 5/11/2020.
16. In the premises, the Court agrees with the defendant that the plaintiff is undeserving of the interim orders of stay of execution granted by this Court on 18/5/2023, and finds that the said orders ought to be set aside in the interest of justice, and to allow the consent judgment entered on 5/11/2020 to be fully implemented. In any event, the orders have expired by effluxion of time as the accounts have since been undertaken before the Deputy Registrar as aforesaid.
17. The upshot is that the application is merited and the same is hereby allowed as prayed.
It is so ordered.

SIGNED AT NAIROBI THIS 9TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE

