



Sinzore v Meswo Pioneer Health Sacco (Miscellaneous Civil Application E124 of 2024) [2024] KEHC 6313 (KLR) (3 June 2024) (Ruling)

Neutral citation: [2024] KEHC 6313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E124 OF 2024
RN NYAKUNDI, J
JUNE 3, 2024**

BETWEEN

TRACY SINZORE CLAIMANT

AND

MESWO PIONEER HEALTH SACCO RESPONDENT

RULING

1. Before me for determination is a notice of motion application dated 12th April, 2024 brought under the provisions of Order 42 Rule 6(1)(2) of the Civil Procedure Rules, Section 1(a) and 1(b) of the Civil Procedure Act. The applicant seeks reliefs as follows:
 - a. Spent.
 - b. That there be a stay of execution herein pending the hearing and determination of this application.
 - c. That there be a stay of execution pending the hearing and determination of Eldoret Civil Appeal No. 87 of 2024.
 - d. That costs of this application be provided for.

2. The application is anchored on 8 substantive grounds and an affidavit in support sworn by Betina Iravonga on 12th April, 2024. The grounds are enumerated as follows:
 That judgment was delivered herein on 22nd October, 2023 in favor of the Claimant/Respondent in the tune of Kshs. 665,000/= all-inclusive of the decretal sum plus costs.
 That I was arrested and committed to civil jail on 28/2/2024 on condition that I raise Kshs. 300,000/= and give to the claimant as a condition of being released from the civil jail.



That other officials of the Respondent/Applicant herein assisted in raising the aforesaid amount and the same was paid to the Claimant/Respondent through her advocates on record.

That on 29/2/2024, a consent was entered into confirming the payment of the same and also proposing to clear the balance by 31.3.2024 thus securing her release from the civil jail.

That upon realizing that the respondent would be unable to comply with the terms of the consent on the stipulated time, I approached my advocates on record and requested them to file an application seeking to review the consent as well as orders to the effect that the respondent be allowed to liquidate the balance of the decretal sum through monthly installments of Kshs. 100,000 on the 30th of every subsequent month.

That the application was filed and a ruling dismissing the same was delivered to that effect on 11/4/2024.

That the Claimant/Respondent is likely to execute to the decree and the Respondent/Applicant stands to suffer substantial loss.

That the Respondent/Applicant is ready and willing to liquidate the balance of the decretal sum through monthly installments of Kshs. 100,000/=.

3. In response to the application, the Claimant deponed that the application is fatally incompetent and ought to be dismissed with costs.
4. The Claimant argued that contrary to the applicant's assertions in paragraph 3 of their replying affidavit, judgment (a consent judgment) was entered on 29th of August 2023 in which the applicant themselves agreed to pay the entire decretal amount plus costs and interests of Kshs. 665,000/= on or before the 22nd of October, 2023. That when the two months lapsed, they defaulted and never made any attempts to reach out on either herself nor her advocate.
5. She further deponed that upon arrest and committal of one of their secretaries Betina Iravonga on 28th March 2024, the Respondent was able to raise Kshs. 300,000/= as directed by the court within an hour from the time of the said committal, a move that clearly indicated their financial stability. That on 29th March, 2024, a day after committal, the respondent officials indicated to her advocate that they would settle the balance of Kshs. 365,000/= two weeks from that very day as they were awaiting some payment from NHIF which was almost due.
6. She deponed that her advocate engaged her and they agreed to allow the respondent a month instead of two weeks which idea was highly appreciated by them. That subsequently another consent was recorded and filed in court with the Respondents undertaking to clear the balance on or before 31st March, 2024. That all the two consents were recorded in this matter were signed willingly and without coercion and in fact as per their terms. That barely a week after the said consent was recorded and their secretary released from civil jail, the Respondent/Applicant served her advocate with a notice of motion dated 8th march, 2024 seeking to have the balance of Kshs. 365,000/= liquidated in monthly installments of Kshs. 100,000/=. This was served simultaneously with a mention notice of 25th March.
7. According to the Respondent, the matter was mentioned in court on 25th March, 2024 and on 4th April, 2024 but the Respondent/Applicant had not yet filed their application in court while her advocate had already filed her replying affidavit and that all this time the respondent was blaming the e-filing system failure.
8. That a ruling was delivered on 11th April, 2024 dismissing the application. After the said ruling her advocate reached out on counsel for the Respondent who reverted with a request to have the decretal



amount be cleared before end of April, 2024. She considered the respondent's request and therefore did not proceed with execution.

9. She added that on 1st May, 2024, her advocate tried reaching out the Respondent's advocate but her calls were ignored which move prompted them to have Drillion Amasakha arrested and committed to civil jail over Kshs. 365,000/= plus costs of execution of Kshs. 15,000/= all totaling to Kshs. 380,000/= on 2nd May, 2023. That on the very same day after her advocate had already left in the evening, counsel for the respondent visited the police station where the treasurer was and presented a temporary stay order issued on 18th April, 2024 and managed to have the treasurer released without the knowledge of her advocate and without a release order.
10. The Respondent is of the view that whereas the aggrieved respondents had a right to appeal, it would have been proper practice to have either her or the advocate notified of the stay order as her advocate would not have proceeded with the arrest. That service of the stay order more than two weeks after the same were issued and after the arrest and committal of the Respondent's treasurer is a clear indication of the Respondent's ill motives towards her when they should just repay what rightfully belongs to her in good faith.
11. In sum, the respondent depones that the application dated 12th April, 2024 is meant to derail her efforts of recovering the fruits of her judgment in this matter.
12. Both parties filed their submissions which I have considered together with the authorities cited therein.
13. On the first limb of substantial loss, the Respondent submitted that the applicant has nowhere in their supporting affidavit demonstrated the kind loss that they would suffer should the court deny the orders sought. It was submitted that the Claimant/Respondent has suffered and continues to suffer much due to the Applicant's endless delay tactic. On this, counsel cited the decision in Michael Ntouthi Mitheu versus Abraham Kivondo Musau (2021) eKLR and Michael T/A Machira & Co advocates versus East African Standard (No. 2) (2002).
14. It is submitted for the Claimant/Respondent that the Applicant/respondent has been treating patients on NHIF which is slowly remitting funds is not sufficient proof of substantial loss. The Respondent is still running its business efficiently and failure to have the Claimants money refunded on grounds of slow remission of funds by NHIF which allegation hasn't been proved is baseless. The claimant urged the court to find the application unmerited and consequently dismiss it.
15. On the issue of security, it is submitted for the Claimant/Respondent that the applicants have nowhere demonstrated any willingness to deposit any. That the aspect of security in this kind of application is very crucial as envisaged under Order 42 Rule 6(2) of the Civil Procedure Rules. In support of this position, she cited the decisions in Gianfranco Manenthi & another versus Africa Merchant Assurance Company Ltd (2019).
16. The Claimant/respondent in concluding urged this court to find the instant application unmerited as it is merely intended to cause unnecessary delay with endless litigation. They prayed that the same be dismissed.

Analysis and determination

17. Having gone through the application, the response and the rival submissions, the only issue I find for determination is whether the applicant has met the threshold for grant of stay of execution.



18. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -

“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 orders set aside.

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 1st 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.
19. Therefore, under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:
- a. Substantial loss may result to him unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
20. These principles were enunciated in *Butt vs Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -
- a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.
 - b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
 - c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either



party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

21. The element on substantial loss requires the applicant to clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd vs Kibiru and Another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows: -

“The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts....”

The learned judge continued to observe that: -

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. 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.

22. The applicant has argued that the Claimant/Respondent is likely to execute the decree and the Respondent/Applicant stands to suffer substantial loss. The Respondent on the other hand maintains that the applicant has not in any way demonstrated the kind of loss that she would suffer if stay orders are granted.
23. The present case simply involved a settlement agreement between the parties that was recorded as a consent order by the court. Such a consent order was designed to allow the parties settle the dispute on such terms as are negotiated and agreed upon by the parties who were likely to have the issues at stake heard and determined on the merits by a court of law under Article 50(1) of *the Constitution*. My reading of the terms of the consent dated 22nd August, 2023 is clear in its terms with no ambiguity or breach of any legal policy known in law. It is trite that a consent judgment or order is meant to be the formal result and expression of an agreement already arrived at between the parties to proceedings embodied in a suit filed in court. The fact of the consent duly negotiated and agreed upon by the parties places those parties into a binding covenant enforceable as a judgment of the court. The position law is that once the consent has been completed and adopted by the court, it must be obeyed until one can have it set aside in proceedings duly constituted for the purpose. It appears to me that the real unhappiness of the appellant is entirely on not honouring the terms of the consent dated 22nd August, 2023. Further, it is clear that clause (3) of the consent expressly provided that the total amount of Kshs. 665,000/= which was inclusive of costs was to be paid within 60 days from the date of the consent. The completion date on the settlement of terms was 22nd October, 2023. The preliminary observation is that Kshs. 300,000/= was paid on 28th March, 2024 and the balance was to be settled within 2 weeks from the date of release of the Appellant’s secretary by the name of Betina Iravonga. In contrast to the agreed reviewed terms of the consent, no such evidence exist that the balance of the liquidated amount was settled within the two-week period covenanted by the parties. What happened was a certificate of urgency filed on 12th April, 2024 seeking stay of execution pending the hearing and determination of Eldoret Civil Appeal No. E087 of 2024. It cannot be denied that all justiciable issues



as between the appellant and the respondent had been settled by way of the two consents filed and adopted by the trial court. Thus, it is strictly incorrect for the intended appellant to argue that the court exercises jurisdiction on appeal while the consent orders remain intact in compliance with the fidelity of the law. The jurisdiction of a court is its authority derived either from *the Constitution* or statute to hear and determine a dispute that is brought before it. The powers of a court constitute its capacity to give effect to its determination of the issues by making or granting the orders or reliefs sought by the successful party to the dispute. Yes, I take cognizance that the right of appeal is a Constitutional imperative but the same court has also powers to exercise its discretion on the conceptual framework of whether the intended appeal has high chances of success. I have until this point been able to appreciate the memorandum of appeal on the premise that I accept the appellant's submissions that the consent order is impeachable and if stay is not granted, substantial loss would be occasioned. Interestingly for me, the appellant's submissions seem however to run contrary to the well-established principles that consent orders are neither reviewable nor set aside unless there is cogent evidence on fraud, mistake, misrepresentation, non-disclosure of material facts, duress, coercion, for being in violation of public policy or simply there was no meeting of minds of the parties involved prior and during the signing of the consent subsequently adopted a court order. I have serious difficulty with concluding that the stand taken by the appellant to stay execution of the terms of the consent is meritorious within the scope of the law. As of necessity there is no sound judicial basis for the exercise of discretion to grant stay of execution pending the hearing and determination of the appeal which I have already made an observation that it lacks high chances of success. This is a principle that is well established and largely uncontroversial. A court of law duly established under Art 50(1) of *the Constitution* enjoys such powers which are inherent in its jurisdiction in order to enforce its rules or practice and to suppress any abuses of its process and to defeat any attempted thwarting of its processes. I do not think that there can be any dispute that it is common for courts to grant consent orders or judgments in order to give effect to the parties' settlement of disputes. The court's jurisdiction has discussed elsewhere in this ruling to interferer with consent judgments is generally a very limited one. Those exceptional circumstances which justify the setting aside the consent have not been met by the appellant.

24. For all the above reasons, the application is dismissed. The usual consequential orders of the consent be enforced notwithstanding the adverse effect it might have as adverted to the appellant. The appellant shall meet the costs of this application and any incidentals that may have been incurred by the respondent in prosecuting this matter.

25. It is hereby so ordered.

DATED AND SIGNED AT ELDORET THIS 3RD DAY OF JUNE, 2024

.....

R. NYAKUNDI

JUDGE

MISC. CIVIL APPLICATION NO E124 OF 2024	0
--	---

