



**Lee Construction Company Limited v Obare ((Sued as Personal Administrator of the Estate of Stella Nyaboke Nyameino - Deceased)) (Civil Appeal E005 of 2023) [2023] KEHC 4139 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4139 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E005 OF 2023  
WA OKWANY, J  
MAY 11, 2023**

**BETWEEN**

**LEE CONSTRUCTION COMPANY LIMITED ..... APPELLANT**

**AND**

**ELKANA OMWERI OBARE ..... RESPONDENT**

**(SUED AS PERSONAL ADMINISTRATOR OF THE ESTATE OF STELLA NYABOKE NYAMEINO - DECEASED)**

*(Being an Appeal against the Judgment of Hon. Ombija (Mr.) – RM Keroka dated and delivered at Keroka on the 8th day of February 2023 in the original Keroka Principal Magistrate’s Court Civil Case No. 216 of 2017)*

**RULING**

1. The ruling is in respect to the application dated March 15, 2023 wherein the Applicant/Appellant seeks, *inter alia*, orders for stay of execution pending appeal.
2. The application is supported by the affidavits of the Applicant’s Human Resource Consultant Ms Wangechi Mwangi and Applicant’s Advocate Mr Herbert Nyamurongi. The application is premised on the following grounds: -
  1. The appellant (hereinafter referred to as “the applicant”) being aggrieved with the whole of the judgment delivered on February 8, 2023 in Keroka PMCC No 216 of 2017 lodged the appeal herein.
  2. After lodging the appeal herein, the applicant lodged in the trial court, being the court of first instance, an application dated March 9, 2023 seeking orders of stay of execution — as is prescribed.



3. On March 13, 2023 the trial magistrate, having entertained the said application *ex-parte*, in the first instance granted the application, strangely ordering that stay of execution do issue for a period of 30 days effective February 9, 2023 being the date when judgement was delivered. The application was not fixed for inter partes hearing, the essence of the orders of the trial magistrate being that the application was determined at *ex parte* stage leaving the applicant exposed to execution proceedings
4. The applicant's counsel, on March 14, 2023, perturbed by the said orders sought audience with the trial magistrate and pointed out to him the fact that the orders issued on March 13, 2023, were inoperable and that the same had unduly sealed the applicant's fate as it was thereby exposed to execution and that the orders did not make room for inter partes hearing.
5. The trial magistrate on March 14, 2023, issued fresh orders, obliterating the court record bearing his initial orders of March 13, 2023, declining to certify the application as urgent and in the same breath directing the applicant to approach this honourable court for stay orders in light of its appeal.
6. The applicant was by orders, purportedly issued on March 13, 2023, but in fact issued on March 14, 2023 effectively impeded from accessing the trial court for an order of stay of execution making it necessary to approach this honourable court.
7. The applicant is presently exposed to an order of stay of execution for no mistake of their own. The application dated March 9, 2023 was determined at *ex parte* stage by orders of the trial court for no known just cause.
8. This honourable court has supervisory jurisdiction over the actions of courts subordinate to it including the Magistrate's court at Keroka.
9. The quantum of damages awarded is a colossal Kshs 2,177,550/= which may not be restituted by the respondent in the event that the same is paid under sanction of execution proceedings.
10. In the event that a stay of execution is not granted: -
  - (a) The applicant's properties shall be (inevitably) proclaimed for attachment with the result that the applicant will be condemned to bear avoidable and otherwise unnecessarily aggravated litigation costs in the nature of auctioneers' fees.
  - (e) The applicant may be constrained to pay the sum awarded without chance of recovery of the same in the very likely event that his appeal succeeds
  - (f) In the very likely event that the appeal pending before this honourable court succeeds, the same shall be rendered merely academic.
  - (g) The applicant shall suffer substantial loss as the sum of Kshs 2, 177,550/= exclusive of costs and interest is a manifestly colossal sum.
6. As a sign of good faith and so as to comply with the requirement of provision of security for the due performance of any eventual decree which may be passed, the applicant is ready, willing and offers to deposit in this honourable court a bank guarantee for the sum of Kshs 2,177,550/=.
7. The security offered by the applicant is the least disadvantageous form of security it is able to give so as to secure performance of any eventual decree.



8. Appreciating that the security proposed to be offered shall be subject to final disposal orders of this honourable court the same shall be effectively within the reach of both parties — none of the parties shall in the circumstances be prejudiced.
  9. The applicant has a plausible appeal which should be preserved - allowing this application will afford the applicant reasonable opportunity to ventilate its constitutional right of access to justice through the filed appeal.
  10. This application has been preferred with due promptitude as orders of the trial court were issued on March 14, 2023, backdated to March 13, 2023.
  11. Execution will in all reasonableness be undertaken should this honourable court not grant an order staying execution pending inter partes hearing of the instant application - hence the need to entertain this application on priority basis. The instant application shall otherwise be rendered sterile in the event that execution proceeds.
  12. It is of utmost importance that the substance of litigation between the parties be preserved. This honourable court has inherent jurisdiction to issue such orders as will secure and/or further justice to the parties.
3. The Respondent opposed the application through his replying affidavit sworn on March 28, 2023 wherein he avers that the application is malicious and is solely intended to frustrate his enjoyment of the fruits of his judgment. He states that the applicant has not demonstrated that it will suffer any substantial loss if the orders sought are not granted. He further states that he is opposed to the proposal to deposit a bank guarantee as security and insists that the Appellant should instead pay him at least half of the decretal amount and deposit the other half in a joint interest earning account.
  4. The application was canvassed by way of written submissions which I have considered.
  5. The main issue for determination is whether the Applicant has made out a case for the granting of orders for stay of execution pending appeal.
  6. I note that judgment was entered before the trial court in favour of the Respondent for the sum of Kshs 2,177,550/=
  7. The Applicant is apprehensive that its appeal may be rendered nugatory unless the orders sought herein are granted. The Applicant further states that it stands to suffer substantial loss unless stay is granted owing to the colossal sum awarded to the Respondent.
  8. The Applicant indicated that it is willing to offer security in the form of a bank guarantee for the said decretal sum of Kshs 2,177,550/=.
  9. Courts have taken the position that in an application for stay of execution pending an appeal, it is necessary to consider the rights of an Appellant to appeal, if he is dissatisfied with the judgment, and the rights and interest of a decree-holder who ought not to be prejudicially precluded from enjoying the fruits of their judgment. This principle was aptly enunciated in the case of *RWW vs EKW* [2019] eKLR, as follows:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who



should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

10. In balancing the rights of the parties herein, I find that it will be fair and just to allow the application dated March 15, 2023 but on the following conditions: -

- a. That the Applicant shall, within 30 days from the date of this ruling pay to the Respondent half of the decretal sum being Kshs 1,088,775/= to the Respondent and deposit a bank guarantee in court for the remaining half.
- b. That in the event of failure to comply with the order in (a) above, the stay orders issued herein shall automatically stand vacated and the Respondent shall be at liberty to proceed with the execution.
- c. The costs of this application shall be abide the outcome of the appeal.

11. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS  
THIS 11<sup>TH</sup> DAY OF MAY 2023.**

**W. A. OKWANY**

**JUDGE**

