



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Hotels and Allied Workers Union v Nyanza Club (Cause  
E004 of 2021) [2024] KEELRC 966 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 966 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E004 OF 2021**

**CN BAARI, J**

**MAY 2, 2024**

**BETWEEN**

**KENYA HOTELS AND ALLIED WORKERS UNION ..... CLAIMANT**

**AND**

**NYANZA CLUB ..... RESPONDENT**

**RULING**

1. This ruling relates to an application dated 29<sup>th</sup> September, 2023 by Nyanza Club, the Applicant/ Respondent herein, brought pursuant to Order 1 Rule 10 (2), Order 22 Rule 22 and Order 51 of the [Civil Procedure Rules](#) and Sections 1A, 1B, 3A of The [Civil Procedure Act](#). It seeks orders That: -
  - i. Spent.
  - ii. Spent.
  - iii. This Honourable court be pleased to set aside and/or stay and/or vary and/or review its Orders of the 26<sup>th</sup> September, 2023 and all consequential orders entered therein against the Applicant.
  - iv. Spent.
  - v. This Honourable Court be pleased to reinstate the Applicant's application dated the 7<sup>th</sup> August, 2023 for disposal on merit.
  - vi. Spent.
  - vii. This Honourable Court be pleased to direct that; David Evusa, Sellaawuor, Christine Adhiambo, Calvine Oketch, Abdullah Oluma, Michael Ayieko, Florence Owalla, John Aila, Lilian Auma, Godwin Ingara, Carolyne Nyaguchi, Moses Odindo, Risper Adongo, Kezi.A Akoth, Nicholas Ogwenyo, Edward Oyucho, Vincent Akarang.A, Willis Omega, Elly Masinde, Chrispinus Juma, Eugene Ogell0, David Okwaras, Joseph Oduor, Everlyne Achieng, Rose



Nyakwaka, Sarah Mukakim, Maurice Ondiko, Kennedy Ajulu, Nelson Mando, Stephen Ochieng, Maurice Ochidoi, Joseph Amin, Julius Ochieng And Evance Imbo Onyango, the employees of Applicant be enjoined in this suit as Interested Parties.

- viii. Spent.
  - ix. Spent.
  - x. This Honourable be pleased to set aside and vary its ruling dated the 27<sup>th</sup> April, 2023 in terms of prayer 11.
  - xi. This Honourable Court be pleased to order that the decretal amount already awarded by this Honourable Court be paid in monthly instalments of Kenya Shillings One Hundred Thousand (Kshs.100,000.00) as the Respondent/ Applicant lacks the financial muscles to pay the decretal amount at once.
  - xii. The costs of and occasioned by this application be in the cause.
2. The motion is supported by the grounds on the face and the affidavit of Catherine Sumba sworn on 29<sup>th</sup> September, 2023. The crux of the motion is that the Claimant/Respondent represented the Intended Interested Parties in this instant cause to its final conclusion and judgment was delivered in favour of the Claimant/Respondent as against the Respondent/Applicant on the 10<sup>th</sup> February, 2022 for an award of Kshs. 5,227,548.00.
  3. The Applicant avers that the Claimant/Respondent subsequently proceeded to extract warrants of attachment of movable property in execution of decree for money, and further instructed the firm of Eshikhoni Auctioneers to proclaim the said properties.
  4. It is its assertion that the said proclamation is an illegality for reasons that judgment was entered in this matter on the 10<sup>th</sup> February, 2022, and the Applicant's properties were proclaimed more than a year after judgment was entered.
  5. The Applicant further avers that the Intended Interested Parties work for the Respondent/Applicant and are aware of the financial constraints faced by the Respondent/Applicant, and have agreed that the decretal sum be paid in monthly instalments of Kenya Shillings One Hundred Thousand (100,000/-) from the month of July, 2023.
  6. It states that the Respondent has failed to consider the sentiments by the Intended Interested Parties despite there being a duly executed agreement between them, the Applicant and the Applicant's employees, yet they are supposed to represent the grievances and sentiments of the Intended Interested Parties.
  7. That on 29<sup>th</sup> September, 2023 the Respondent sent auctioneers to the Applicant's premises despite there being an agreement between the Respondent and the Applicant's workers on how the decretal amount should be paid.
  8. It avers further that the Applicant instructed the Firm of Ogejo, Omboto & Kijala Advocates to take up the matter instead of the Firm of Ngala Awino & Company Advocates, and did not take cognizance of the fact that the matter came up on the 26<sup>th</sup> September, 2023 for hearing of the Applicant's application dated 7<sup>th</sup> August, 2023 when interim orders were vacated and the Application dismissed. It pleads that the mistake of an Advocate should not be visited on the Client.
  9. That unless the orders sought herein are granted, the Applicant and the Intended Interested Parties stand to suffer irreparable loss and damage.



10. The Claimant/Respondent opposed the motion vide a replying affidavit sworn by one Chadwick Oloto Ngonzo on 12<sup>th</sup> October, 2023.
11. The Claimant/Respondent states that the reasons advanced by the Applicant are not sufficient to meet the threshold to grant any stay, set aside and/or review of the orders dated 27<sup>th</sup> April, 2023.
12. The Claimant/Respondent states that on 27<sup>th</sup> April, 2023, this court made a ruling in favour of the Applicant allowing it to pay the decretal sum in instalments, despite the Applicant not having furnished the court with her other accounts at Stanbic bank A/C No. 01000042xxxxx and Prime Bank A/C No. 30000xxxxx, hence the court was not seized of the proper financial status of the Applicant leading to the court making uninformed decision.
13. It further avers that litigation of this matter should come to an end and the Applicant ordered to comply with this honourable court orders of 27<sup>th</sup> April, 2023.
14. The Claimant/Respondent avers that the Applicant has obtained a defective consent from its members as a result of threats, undue influence and duress without involving its officials hence, the consent is made in bad faith and only meant to defeat the course of justice. That it was not involved in arriving at the consent.
15. Parties canvassed the motion through written submissions which have been duly considered.

### **Determination**

16. Under the instant motion, the Applicant seeks firstly, the review of the orders of this court dismissing their application for non-attendance on 26<sup>th</sup> September, 2023. The application dated 31<sup>st</sup> July, 2023 was scheduled for hearing interparties on 26<sup>th</sup> September, 2023. At the call-over, only the Claimant/Respondent was represented, the Applicant was not. The Court placed the file aside until 10:26am in the hope that the Applicant or their counsel will attend court for the hearing. They did not, and the result was the dismissal of the application.
17. It is this order of dismissal that the Applicant now seeks review of. Section 16 of the *Employment and Labour Relations Court Act* and Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, empowers this court to review its judgments, awards, orders or decrees.
18. Rule 33 states:
  - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
    - a. if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
    - b. on account of some mistake or error apparent on the face of the record;
    - c. if the judgment or ruling requires clarification; or
    - d. for any other sufficient reason.
19. The Applicant has attributed the non-attendance to mistake of counsel and which they aver should not be visited upon an innocent litigant. In the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* (2019] eKLR, also cited by the Applicant, the court held that an application for



review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.

20. Further, the Applicant has not alleged there being any new evidence, mistake or error in the decision sought to be reviewed or any other sufficient cause as to warrant the review of the decision of this Court.
21. The Court further notes that yet another application by the Applicant was dismissed for non-attendance on 26<sup>th</sup> July, 2023, which points to the Applicant's disinterest in this matter and should not be heard to further seek to delay the execution of the judgment rendered herein.
22. In the final analysis, I find no grounds to warrant the review and/or setting aside of the orders of 26<sup>th</sup> September, 2023.
23. On whether the Court should enjoin the Intended Interested Parties to this suit as named under prayer 7 of this instant application, the Claimant/Respondent submitted that the persons named as Intended Interested Parties are its members. By virtue of their membership to the Claimant's union, they, without a doubt have a stake in the claim herein, and which would ordinarily entitle them to joinder.
24. In the case of *Judicial Service Commission v. Speaker of The National Assembly & 8 Others*, [2014] eKLR. The court cited the definition of 'interested party' in *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (hereafter the "*Mutunga Rules*") thus:

“Rule 2 of the *Mutunga Rules* defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation.”
25. Joinder to a suit, does not issue as of right, but is at the discretion of the Court, hence, sufficient grounds must be laid to show that the Applicant deserves to be joined to the suit.
26. The Applicant submitted that the Claimant/Respondent represented the Intended Interested Parties in this suit to its logical conclusion. It is thus not denied that the suit herein was heard, and has been determined and the Court has rendered its final orders.
27. In determining whether or not to join a party to a suit, the court considers the prejudice to be suffered by the intended Interested Party in case of non-joinder, and which prejudice must be demonstrated to the satisfaction of the Court.
28. In *Trusted Society of Human Rights Alliance v. Mumo Matemu* (2014) eKLR, the Supreme Court in its judgment stated that an Interested Party is the one who has a stake in the proceedings and would be affected by the decision of the Court when it is made, either way.
29. The case having been heard and a verdict rendered, goes to confirm that the Intended interested Parties will not suffer any prejudice should they not be joined, a decision already having been rendered in their favour.
30. It is also suspect that the employer is the one seeking to have her employees joined to the suit, and not the employees themselves seeking joinder. The persons named as Intended Interested Parties have not filed any evidence to show that it is their wish that they be joined in the suit.



31. In view of the foregoing, the Applicant has not satisfied this Court that the Intended Interested Parties have met the requirements for joinder in these proceedings as Interested Parties, and their prayer for joinder is declined.
32. Finally, on whether the court should grant stay of execution of the judgment and decree in this matter, and order that the decretal sum be paid in monthly instalments of KShs. 100,000, this court had earlier determined a similar application, vide a ruling dated 27<sup>th</sup> April, 2023.
33. In that ruling, the Court issued orders on how the decretal sum should be liquidated, and the Applicant has not led any evidence to demonstrate compliance with those orders.
34. This Court is thus functus officio in as far as this issue is concerned and those orders can only be varied by the Court of Appeal.
35. The Applicant's prayer for stay of execution is further premised on the reason that the judgment and decree subject herein, is already beyond one year and should not have been executed the way it did.
36. Order 22 Rule 18(1) provides thus on execution of decrees: -
  - (1) Where an application for execution is made—
    - (a) more than one year after the date of the decree;
    - (b) against the legal representative of a party to the decree; or
    - (c) for attachment of salary or allowance of any person under rule 43, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him:

Provided further that no such notice shall be necessary on any application for the attachment of salary or allowance which is caused solely by reason of the judgment-debtor having changed his employment since a previous order for attachment.
  - (2) Nothing in subrule (1) shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.
  - (3) Except as provided in rule 6 and in this rule, no notice is required to be served on a judgment debtor before execution is issued against him.”



37. Odunga J in *Reuben Nyanginja Ndolo Vs Dickson Wathika Mwangi & 3 Others*, Election Petition No. 11 of 2008, set out the rationale for the requirement of a Notice being issued before execution, when a decree was more than one year old as follows: -

“The requirement for Notice To Show Cause serves two purposes in my view: First, it serves to give notice to the Judgment debtor to pay the decretal sum in cases where as a result of the lapse of time, he may have forgotten about the existence of the decree altogether; secondly, the requirement for notice to show cause is also meant to put the decree holder on notice that if he delays in pursuing his rights, the process of execution will be subjected to the said notice”.

38. The requirement for notice was affirmed in the case of *Mini Bakeries (K) Ltd Vs George Ondieki Nyamanga*, Civil Appeal No. 18 of 2013 where Sitati J. had this to say on Order 22 rule 18: -

“What I discern from the above provisions is that a notice to show cause is issued where an application for execution is made after more than one year after the date of the decree”.

39. In light of the foregoing, it is clear that Notice to Show Cause should as a matter of law issue where the decree subject of execution is more than a year.

40. Although it is not clear when the decree in the matter was drawn, the judgment was delivered on 10<sup>th</sup> February, 2022, which by simple arithmetic is way beyond one year.

41. I however note from the court record that the Applicant was granted a stay of execution on 26<sup>th</sup> June, 2023 and which stay, was lifted on 26<sup>th</sup> July, 2023 for non-attendance of the Applicant/Respondent when the application was scheduled for hearing.

42. The stay of execution granted on 26<sup>th</sup> June, 2023, then brings into play the proviso to Order 22 Rule 18 which states: -

“Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom the execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him”.

43. In my view, the last order against the Applicant/Respondent was made on 26<sup>th</sup> July, 2023, and which then confirms that the Claimant/Respondent is still within one year, and did not need to issue notice of the execution.

44. The application for stay is further declined premised on the fact that the Applicant/Judgment debtor has since the delivery of the judgment herein, and even after being allowed to pay the decretal sum in instalments, not demonstrated that it has made a single instalment in respect of the decretal sum.

45. It is indeed true that the role of this court is to do justice to both parties, and not just to the Applicant. The Applicant/Respondent I must say, has exhausted its bonga points in this court, and the Claimant/decree holder must finally be allowed to enjoy the fruits of its judgment.

46. I concluded by finding the motion dated 29<sup>th</sup> September, 2023, devoid of merit and is for dismissal.



47. It is dismissed with costs to the Claimant.

48. It is ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2<sup>ND</sup>  
DAY OF MAY, 2024.**

**C. N. BAARI**

**JUDGE**

**Appearance:**

Mr. E. Ngame present for the Claimant/Respondent

Ms. Okidi h/b for Mr. Okwemba for the Respondent/Applicant

Erwin Ongor -C/A

