



**Khisa v Teachers Service Commission (Employment and Labour Relations
Claim E006 of 2022) [2024] KEELRC 1380 (KLR) (10 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1380 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CLAIM E006 OF 2022**

**JW KELI, J
JUNE 10, 2024**

BETWEEN

HENRY FESTO KHISA CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

Coram:-

C/A - Lucy Macheso

For Applicant/Respondent - Manyasa

For Claimant/Respondent - Akenga Kimutai & Associates

1. Before the Court for determination is the Respondent's application under Certificate of Urgency dated 24th May 2024. The Applicant seeks the following Orders: -
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to find and declare that the mode of execution of Decree and in particular the warrants of attachment dated 20th May 2024 and Notice of proclamation of goods dated 23rd May 2024 issued by Armok Auctioneers is illegal and irregular hence null and void.
 4. Spent



5. The Honourable Court be pleased to order a stay of execution of the judgment and all consequential orders of this Honourable Court delivered on 30th May 2023 pending the hearing and determination of the appeal.
6. Cost of the application be provided for.
2. The application was premised on the grounds that the stay granted by the court on delivery of the decision on the 30th May 2023 of 30 days had since lapsed. That the applicant had filed a notice of appeal and made a formal request for typed proceedings. That a bill of taxation was made and a ruling delivered on the 8th of May 2024 in the absence of the Respondent.
3. That on the 20th May 2024 the respondent/ judgment creditor unlawfully and unprocedurally instructed Armok Auctioneers to attach the property of the Applicants. The applicant contended the process was unlawful for the failure of the judgment debtor to serve it with a certified copy of the judgment, a certified copy of the Decree as required under Order 22 Rule 6 of the [*Civil Procedure Rules*](#), a certified copy of the court's certificate of Order against Government as required under section 21 of the [*Government Proceedings Act*](#) and Order 29 Rule 3 of the [*Civil Procedure Act*](#).
4. The Application was supported by the affidavit of Evaleen Mitei dated 24th May 2024 and filed with the Application who annexed, among others, copies of warrants of attachment and notice of proclamation of goods as annexure EM-5.
5. The applicant further contended that the mode of execution was contrary to the provisions of section 21 of the Teachers Service Act No. 20 of 2021 as read together with Order 29 rule 2 of the [*Civil Procedure Rules*](#).
6. That it was in the interest of justice and fairness that the orders sought be issued as the execution was contrary to the law and the intended appeal would be rendered nugatory if successful on appeal. The Applicant stated that under section 21 of the [*Teachers Service Commission Act*](#) and Article 260 of the Constitution, the Applicant was exempted from depositing security of costs as it was capable of satisfying the decree should the appeal not succeed.
7. Pursuant to the Court Order of directions dated 28th May 2024, I granted an interim stay pending hearing interpartes hearing. The applicant through Mulaku Advocate holding brief for Manyasa Advocate informed the court that having served the application there was no response. The application was thus unopposed.

Decision

8. The court discerned that there were two issues to address in the application namely stay of the ongoing execution process for being unlawful and the stay to operate until the determination of the intended appeal.

Whether the execution process was unlawful

9. The Applicant contended that the application was unlawful for non-compliance with the provisions of Order 22 Rule 6 of the [*Civil Procedure Rules*](#), Section 21 of the [*Government Proceedings Act*](#) as read together with Order 29 Rule 2 of the [*Civil Procedure Rules*](#).
10. Order 22 rule 6 reads: -

“ 6. Application for execution [Order 22, rule 6.]



Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof;,"

There was no evidence on record of the Court Decree having been extracted for execution to proceed.

11. The Applicant invoked Section 21(4) of the [Government Proceedings Act](#) which provides
- “(4) Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no persons shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such of any money or costs .”
12. The applicant further invoked the provisions of section 21 of the [Teachers Service Commission Act](#) to state that execution could not issue against it for attachment of property. The provision states:-
- “21. Proceedings against the Commission shall be deemed to be proceedings against (1) the Government and shall be subject to the [Government Proceedings Act](#).”

13. The applicant further invoked the provisions of Order 29 Rule 3 of the [Civil Procedure Rules](#) to wit:-
- “Any application for a certificate under section 21 of the [Government Proceedings Act](#) (Cap. 40) (which relates to satisfaction of orders against the Government) shall be made to a registrar or, in the case of a subordinate court, to the court; and any application under that section for a direction that a separate certificate be issued with respect to costs ordered to be paid to the applicant shall be made to the court and may be made ex parte without a summons, and such certificate shall be in one of Form Nos. 22 and 23 of Appendix A with such variations as circumstances may require.”

The applicant contended that there was no compliance for lack of certificate under this provision.

14. Pursuant to the foregoing, I hold that the execution of money decree against the Applicant is governed by the [Government Proceedings Act](#) and the provisions of Order 21 Rule 4 as read together with Order 29 Rule 3 of the [Civil Procedure Rules](#). The Judgment debtor followed execution vide attachment of the Respondent’s property contrary to the law hence the process was unlawful and it is so decreed.

Whether the stay of execution should be in place pending the determination of the intended appeal

15. On the application for an Order of stay pending appeal, on record is a notice of appeal dated 12th June 2023 and filed in court on 12th June 2023 by the Applicant. There is also a request to the deputy registrar of the court for typed and certified copies of the judgment and proceedings for purposes of the appeal.
16. The Court of Appeal has settled the principles for grant of stay of execution in the case cited by Justice Ongudi in [MFI Document Solutions Ltd v Paretto Printing Works Limited](#) [2021] eKLR of [Butt v](#)



Rent Restriction Tribunal [1982] KLR 417 where the Court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held that: -

- “ 1. the power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle is 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 that appeal court reverse the judge’s discretion. (*sic*) (trial court judgement).
3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.
4. 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 with cause the order for stay of execution to lapse”.

17. The applicant stated that under section 21 of the Teachers Service Act Act and Article 260 of the Constitution, the applicant was exempted from depositing security of costs as it was capable of satisfying the decree should the appeal not succeed.

18. The court upholds the decision in Butt v Rent Restriction Tribunal [1982] KLR 417 that :

“The general principle is 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 that appeal court reverse the judge’s discretion.”

The stay of execution pending the determination of the intended appeal is granted to preserve the subject matter and not to render any successful appeal against the judgment nugatory.

19. In a nutshell the application dated 24th May 2024 is allowed as follows:-

- a. That this Honourable Court hereby declares that the mode of execution of the Decree in the suit and in particular the warrants of attachment dated 20th May 2024 and Notice of proclamation of goods dated 23rd May 2024 issued by Armok Auctioneers is illegal and irregular hence null and void.
- b. An order of stay of execution of the judgment and all consequential orders of this Honourable Court delivered on the 30th May 2023 pending the hearing and determination of the appeal is hereby issued.
- c. Since the judgment remains unsatisfied, I make no order as to costs.

20. Right of appeal.

21. It is so Ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT ON 10TH JUNE 2024 AT KAKAMEGA
J.W. KELI**



JUDGE

In the presence of:-

C/A Macheso

Applicant- Mulaki h/b Manyasa

Respondent/ Claimant- Absent

