



**Odhiambo v Biodeal Laboratories Limited (Employment and Labour Relations Cause E567 of 2021) [2024] KEELRC 2389 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2389 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E567 OF 2021  
MN NDUMA, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**DR NELSON ODHIAMBO ..... APPLICANT**

**AND**

**BIODEAL LABORATORIES LIMITED ..... RESPONDENT**

**RULING**

1. By a notice of motion application dated 6/5/2024, the respondent/applicant sought the following reliefs:-
  1. Spent
  2. Spent
  3. That the court do issue an order of stay of the execution of its order of 5<sup>th</sup> October 2023 pending the hearing and determination of Court of Appeal Civil Appeal No. C0ACA/E978/2023 – Biodeal Laboratories Ltd v Nelson Odhiambo.
  4. Costs be in cause.
2. The application is premised on grounds 1 to 5 set out on the face of the notice of motion and buttressed in the supporting affidavit of Nihel Shah, a Director of the respondent the butt of which is that the applicant being dissatisfied with the judgment has filed an appeal before the Court of Appeal. That the decree holder has through Nairobi Connection Services Auctioneers in execution of the decree of this court of 5/10/2023 proclaimed the judgment debtor's goods. That the appeal has good chances of success and the applicant is ready and willing to furnish such reasonable security as the court may direct.



3. The application is opposed vide a replying affidavit of Dr. Nelson Odhiambo, the claimant/respondent who deposes that upon delivery of judgment on 5/10/2023, bill of costs dated 13/10/2023 was lodged and a ruling is pending on the bill of costs.
4. That the applicant meanwhile lodged a notice of appeal dated 5/10/2023 on 7/10/2023 before this court.
5. That consequently the respondent/applicant lodged an application dated 30/10/2023 under certificate of urgency before the Court of Appeal Nairobi for stay of execution pending appeal which application is C0ACAPPL/E505/ 2023 Bio Deal Laboratories V Dr. Nelson Odhiambo.
6. The Court of Appeal on 2/11/2023 gave directions on the notice of motion by the respondent/applicant where the application was not certified urgent. However, parties were directed to file and exchange responses and submissions and both parties have since complied with the Court of Appeal's directions by filing their respective submissions awaiting the hearing and determination of the application.
7. The claimant/respondent herein decided to instruct auctioneers to proclaim and attach the goods of the respondent/applicant in execution of the judgment of the court, the Court of Appeal having not issued any interim orders.
8. The respondent/applicant immediately moved the Court of Appeal through a letter dated 22/4/2023 and affidavit sworn by Mr. Nihel Shah attaching the warrant served from the auctioneers and requesting the Court of Appeal to reconsider the matter of urgency under Rule 49(5) of the Court of Appeal Rules 2022 and grant interim orders for stay pending hearing of the stay application.
9. The Court of Appeal heard counsel for both parties orally on 30/4/2024 and delivered a ruling on 3/5/2024 where the Court of Appeal declined to certify the matter as urgent once again and held that the reasons advanced by the respondent/applicant did not have merit including the issue of threat of execution hence there were no interim stay orders granted.
10. The applicant having failed at the Court of Appeal to secure interim orders filed this application seeking the same orders
11. That the matter being sub judice before the Court of Appeal makes this application a blatant abuse of the court process and the applicant is guilty of non-disclosure of material facts before this court that it was unable to secure interim orders for stay of execution before the Court of Appeal. That the applicant lacks clean hands and should not come to equity. That this application be dismissed accordingly.
12. The court has considered submissions by the parties and is satisfied that this application is an abuse of the process of this court having been filed while a similar application was pending before the Court of Appeal. The applicant also sought ex-parte interim orders that had been denied twice before the Court of Appeal.
13. Following the authority in HCJR/E045/2020 *Republic v Paul Kihara Kariuki and 2 others and Law Society of Kenya Ex-parte applicants*, the court finds that this matter is not only sub judice, but also this court lacks jurisdiction to entertain the present application since a similar and identical application is pending before the Court of Appeal for determination. That the application before the Court of Appeal was filed before the present one and the Court of Appeal twice declined to grant interim orders which were granted in this application ex-parte, by a duty judge, due to non-disclosure of material facts.
14. Accordingly, this court lacks jurisdiction to entertain a matter which has substantially been canvassed by the Court of Appeal and is pending determination by the Court of Appeal.



15. While observing that this application on the face of it lacks merit, the court nonetheless strikes the application out for lack of jurisdiction to entertain it while a similar matter is pending before the Court of Appeal.
16. Accordingly, the interim orders issued by the duty judge are discharged and the application is struck out with costs to the claimant/respondent.
17. The court has also considered the application dated 7/6/2023 urging the court to correct a mistake apparent on the face of the judgment to wit an arithmetical error in the deducting directly Kshs. 458,152 as a net amount from the decretal sum of Kshs. 1,597,993 which is a gross amount awarded by the court is an error that requires rectification by the court in terms of rule 74(1) (b) of the [ELRC \(Procedure\) Rules 2024](#).
18. In terms of this rule which is expressly the same as the previous rule 33(1)(b) of [ELRC \(Procedure\) Rules 2016](#), a court may correct a mistake obvious on the face of the record upon application by either party or in terms of Rule 75, correct such a mistake on its own motion and notify the parties of such rectification even where there has been no application by either of the parties.
19. Where an application is however filed by either of the parties, it is a procedural requirement to support the application by affidavit. Failure to file a supporting affidavit is, however, not fatal provided the court is satisfied that the judgment discloses on the face of it, a clerical mistake, incidental error or omission which the court may rectify on its own motion.
20. In the present matter, the court is not satisfied that the judgment of the court contains an error, mistake or omission or does not speak to the parties with sufficient clarity as to the decretal sum owed by the respondent /applicant to the claimant/respondent in the sum of Kshs. 1,139,841/=.
21. Accordingly, the application for review of the judgment dated 7/6/2024 is dismissed with no order as to costs.
22. For the avoidance of doubt the application dated 6/5/2024 is struck off with costs and one dated 7/6/2024 is dismissed with no order as to costs.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**Mathews Nderi Nduma**

**JUDGE**

Appearance:

Mr. Onyango for claimant/respondent

Mr. Silas Bihongo for respondent/applicant

Mr. Kemboi – Court Assistant

