Owiti v Highlight Travel Limited (Employment and Labour Relations Cause E699 of 2021) [2025] KEELRC 3129 (KLR) (11 November 2025) (Ruling)

Neutral citation: [2025] KEELRC 3129 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E699 OF 2021

HS WASILWA, J

NOVEMBER 11, 2025

BETWEEN

JOHN MARKS OWITI ..... CLAIMANT

AND

HIGHLIGHT TRAVEL LIMITED ..... RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 11th June 2025 seeking orders that: -
    1. spent
    2. pending the hearing and determination of this Application, there be a stay execution of the judgment dated 4 April 2025, any resultant decree, the warrants of attachment and the proclamation notice both dated 9 June 2025, and all consequential processes.
    3. this Honourable Court be pleased to set aside, recall or nullify the decree, the warrants of attachment and the proclamation notice both dated 9 June 2025.
    4. the costs of Lizzma Auctioneers be borne by the Claimant.
    5. there be a stay of execution of the Judgment dated 4 April 2025 and any resultant decree pending the hearing and determination of the intended appeal.
    6. the costs of this Application be provided for.

Respondent/Applicant's Case

2. The Applicant avers that on 16th June 2025, its movable property is in danger of being carted away by Lizzma Auctioneers on instructions of the Claimant based on irregular/illegal warrants of attachment and a proclamation notice both dated 9th June 2025.

3. It contends that unless this court intervenes and issues the orders sought, the Claimant will sell its property based on an irregularly issued decree; and illegal warrants of attachment that do not properly identify it or attach the purported decree.

4. It is the Applicant's case that the illegal execution proceedings will render its intended appeal against the judgment dated 4th April 2025 nugatory and make recovery difficult in case its intended appeal is successful.

5. The Applicant avers that it has filed its notice of appeal within the prescribed period, and requested a certified copy of the judgment and typed proceedings to enable it to file its appeal, which has high prospects of success, as soon as possible.

6. The Applicant asserts that it is ready, willing and able to abide with any conditions the court may issue for stay of the judgment and the execution proceedings as would reasonable and just in the circumstances.

Claimant/Respondent's Case

7. In opposition to application, the Claimant/Respondent filed a replying affidavit dated 1st July 2025.

8. The Claimant/Respondent avers that he has a right to reap the fruits of judgment once a lawful judgment and decree have been issued by the court and there's nothing illegal with executing a lawful decree. The execution was thus lawful on account that there was a lawful judgment and decree issued by the court.

9. The Claimant/Respondent avers that the judgment was delivered on 4th April 2025 in the presence of counsel for both parties. Additionally, the case number, case parties and the amount captured in the warrants is in consonance with the amount set out in the court decree and the same has not been disputed.

10. The Claimant/Respondent avers that on 16th June 2025, the Respondent/Applicant drew two cheques, one addressed to his counsel on record of Kshs. 1,896,445 and another addressed to the auctioneer of Kshs. 100,000 as auctioneers' fees.

11. On 17th June 2025, the auctioneer collected the cheque addressed to the Claimant's counsel and handed over to the counsel 's assistant to bank the cheque. By the time the interim orders of the were issued, the execution had successfully been completed and the cheque banked. However, on 19th June 2025, the Claimant's counsel on record received notification from the bank that the Applicant's cheque had bounced and informed the Claimant.

12. The Claimant/Respondent avers that the Respondent/Applicant illegally applied the orders retrospectively to stop the clearance of the cheques thus causing the cheques to bounce.

13. It is the Claimant/Respondent's case that the Respondent/Applicant's bouncing cheque has ruined the reputation of his counsel before its bank. Further, the bank surcharged his counsel on record's account and deducted a sum of Kshs. 2,500 for the bouncing cheque.

14. The Claimant/Respondent avers that issuance of of a bouncing cheque is an offence under the Penal Code and the Respondent/Applicant should not benefit from its illegality.

15. The Claimant/Respondent avers that the issuance of bouncing cheques by the Respondent/Applicant is a clear indication that it will not be able to honour its financial obligation to the Claimant and as such, the execution should be allowed to proceed.

16. It is the Claimant/Respondent's case that lodging a notice of appeal does not necessarily stay execution. Additionally, no formal appeal has been lodged at the Court of Appeal.

17. He avers that the Respondent/Applicant has not demonstrated an arguable appeal with chances of success to warrant the issuance of stay orders.

18. The Claimant/Respondent avers that the ruined reputation suffered by his Counsel and the breach of his legitimate expectation to be paid as a result of the Respondent/Applicant's actions of issuing a bounced cheque cannot be adequately be compensated by way of damages.

19. The Claimant/Respondent urged court to lift the temporary stay order issued on 17th June 2025 and allow him to recover the decretal sum in the interest of justice. He further prayed that to be ordered to reimburse the surged amount of Kshs. 5,000 by the bank and pay the auctioneer fees of Kshs. 100,000.

Respondent/Applicant's Submissions

20. The Applicant submitted on two issues: was the execution process undertaken in accordance with the law; should the court grant a stay of execution of the orders issued on 4th April 2025.

21. On the first issue, the Applicant submitted that to enforce the judgment, the Claimant/Respondent was required to comply with Rule 72(1) of the Employment and Labour Relations Court Rules, 2024 to present a draft decree for the Respondent's review and agreement, as it provides:

> "Any party to a suit may prepare a draft decree and submit it for approval by the other party to the suit, who shall approve it with or without amendment, or reject it, within seven days of service and if the draft is approved by the party, it shall be submitted to the Registrar who, if satisfied that it is drawn in accordance with the judgment, shall sign and seal the decree accordingly."

22. The Applicant submitted that the Claimant's auctioneers were also obligated under Paragraph 11 (a) (i) and (ii) of the Auctioneers Rules, 1997 to capture the accurate decretal amount and correctly identify the Respondent in the warrants of attachment.

23. The Applicant submitted that the Claimant neither presented a draft decree for approval nor served a final decree. As a consequence, the auctioneers ambushed it with erroneously drafted warrants of attachment to pay the amount of Kshs. 1,896,444.52 without subjecting that sum to statutory deductions.

24. It is the Applicant's submission that if the Court does not set aside the execution process, the payment of this amount would permit an erroneously drafted warrant of attachment naming another party and it would also be, if honored by the Respondent/Applicant, contrary to Section 49(2) of the *Employment Act*, which provides that:

> "Any payments made by the employer under this section shall be subject to statutory deductions."

25. Additionally, it would be inconsistent with Paragraph 60 of the judgment, which directed that the awarded amount of Kshs 1,877,825 be subjected to statutory deductions as follows: "Total payable therefore = Kshs 3,727,825/~ Less Kshs 1,850,000/ already paid. Balance due = Kshs 1,877,825/- Less statutory deductions."

26. It is the Applicant's submission that given the serious errors, procedural irregularities and the significant prejudice it is likely to suffer, the entire execution process is flawed and illegal.

27. The Applicant submitted that if the Claimant/Respondent had presented a draft decree for approval as required, the correct name of the Applicant would have been inserted, and the amount would have been corrected. The involvement of auctioneers and the resulting expense would have been avoided. Considering these lapses, the Claimant should be held solely liable to pay the auctioneer's fees.

28. On the second issue, the Applicant submitted indetermining whether one is entitled to an order of stay of execution, this court is guided by Order 42, Rule 6(1) and (2) of the Civil Procedure Rules, 2010, which provides that:

> " 1. 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 order set aside.
>
> 2. No order for stay of execution shall be made under subrule (1) unless—
>
> a. the court is satisfied that substantial loss may result to the 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."

29. The Applicant submitted that it stands to suffer substantial loss if the order for stay of execution is not granted and it pays the awarded amount.

30. The Applicant submitted that the Claimant/Respondent admitted that he received Kshs 2,000,000 from the Applicant as part of the settlement concluded. In his affidavits and pleadings, the Claimant admits to having significant financial difficulties arising from his daughter's treatment. He has not demonstrated, in his replying affidavit, that he is financially capable of refunding the awarded amount should the Respondent/Applicant's intended appeal succeed.

31. It is the Applicant's submission that the enforcement of the judgment will lead to further payments to the Claimant, who has already received a substantial portion and create a material change in the circumstances of the parties, negating the Respondent/Applicant's intended appeal which contests the award of additional sums.

32. The Applicant submitted that this Court has discretion to determine the appropriate security to guarantee the performance of the decree to ensure that both parties are protected pending the determination of the appeal. It thus urges this court to exercise its discretion and strike a fair balance between the Claimant's right to enjoy the fruits of judgment, which he has done substantially, and the Respondent/Applicant's right to a meaningful appeal contesting the award of further sums.

33. The Applicant submitted that in the judgment, the Claimant was awarded a sum of Kshs. 3,727,825, out of which theCourt confirmed that Kshs. 2,000,000 has already been paid to the Claimant. Given that a substantial portion of the decretal sum (almost 50%) has already been satisfied and the Claimant has already derived partial benefit from the judgment, the Respondent/Applicant prays that the court grants an unconditional stay of execution.

34. The Applicant submitted that the application has been brought without undue delay. Following the delivery of the Court's judgment on 4th April 2025, the Respondent promptly filed its Notice of Appeal on 17th April 2025, within the prescribed period under Rule 61(1) of the Court of Appeal Rules, 2022.

35. It is submitted that the Applicant has shown through its draft memorandum of appeal that it intends to raise arguable issues that warrant consideration by the appellate court involving the interpretation and effect of the settlement agreement between the parties, the scope of reliefs granted, the treatment of privilege, and the evidentiary weight accorded to material placed before the Court.

36. It further submitted that by its letter dated 14th April 2025, the Respondent has taken proactive steps to facilitate the appeal process by requesting the typed proceedings from the Deputy Registrar. Thus, it has satisfied the requirements for an order for stay of execution.

Claimant/Respondent's Submissions

37. The Claimant/Respondent submitted on three issue: whether the application seeking stay of execution is merited; who should bear the costs of the surged amount and auctioneers fees; and who should bear the costs of the application.

38. On the first issue, the Claimant/Respondent submitted that it trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should safisfy the court that: substantial loss may result to him/her unless the order is made; that the application has been made without unreasonable delay; and 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.

39. The Claimant/Respondent submitted that the Applicant has not demonstrated substantial loss it will suffer unless the orders are made and it only alleged that the intended appeal would be rendered nugatory. He cited James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR wherein substantial loss was clearly explained:

> " No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule & of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal."

40. The Claimant/Respondent submitted that the Applicant has not deponed in its application/ supporting affidavit that it will be able to pay security or abide by the orders of the court regarding security. Also, considering that the Respondent/Applicant issued the Claimant's counsel with bouncing cheques, it is clear that it will not be able to pay security. Reliance was placed in Gianfranco

Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] KEHC 7586 (KLR) it was held that:

> "The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 4(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls."

41. The Claimant/Respondent submitted that the Respondent/Applicant's application is not merited and has not satisfied the criteria set out under Order 42 Rule 6(1) of the Civil Procedure Rules. Thus, the application be dismissed with costs to himself.

42. On the final issue, the Claimant/Respondent submitted that the Respondent/Applicant should bear the costs of Kshs. 5,000 surged on the accounts of the auctioneer and the Claimant's as a result of issuance of bouncing cheques by the Respondent. This fact is not controverted by the Respondent/Applicant.

43. The Claimant/Respondent submitted that the Respondent/Applicant should bear the costs of the auctioneer for the reasons that a valid decree of the court was issued on 4th April 2025 and the Respondent/Applicant has not disputed that the said decree did not conform to the judgment of the court. He cited the case of Florence Cherugut v Cheptum Murei Annah [2022] KEELC 1459 (KLR) wherein it was held that failure to forward a decree to the other party for approval is not fatal to execution proceedings; as long as the decree is drawn in accordance with the judgment.

44. The Claimant/Respondent submitted that there was nothing illegal in the attachment process as the Respondent/Applicant does not dispute the existence of valid decree. Further, the Respondent/Applicant does not dispute that the amount in the decree and subsequently the warrants of attachment was not in line with the judgment of the court delivered on 4th April 2025.

45. The Claimant/Respondent submitted that considering that the warrants of attachment and proclamation was issued on 9th June 2025 and the Respondent/Applicant was issued with a 7 days' notice before the execution was done on 16th June 2025, the auctioneer is entitled to be paid her fees by the Respondent/Applicant. He cited the Court of Appeal in National Industrial Credit Bank Limited v S. K. Ndegwa Auctioneer [2005] KECA 22 (KLR):

> "It is clear from Rule 12 as read with Rule 14 of the Auctioneers Rules and the contents of the prescribed form, that is, Sale Form 2 that the proclamation of the movable goods is legally and effectively an attachment. From the moment the goods are proclaimed, the judgment-debtor is deprived of the legal possession and physical control of the goods and instead the goods are placed in the custody of the law and the court through the auctioneer. The judgment-debtor can only redeem them by the payment of the debt. If the judgment-debtor fails to pay the auctioneer moves to the second stage of conducting the sale of the attached goods. We are satisfied that the learned Judge correctly construed the word "proclamation" in the context in which it is used in the Auctioneers Rules and reached the correct decision that the auctioneer was entitled to fees for attachment prescribed in paragraph 4 of Part II of the Fourth Schedule."

46. I have examined all the averments and submissions of the parties herein. The applicant has sought stay pending appeal and has indicated that he is ready to adhere to all conditions of the stay.

47. From the record, the applicant filed their notice of appeal dated 17/4/25. There is no evidence that the appeal itself has been filed. The notice of appeal having been filed however, this is an apt reason to grant stay. I however note also the fact that the execution had partly proceeded and the claimant had incurred expenses including the cheque issued bouncing.

48. In the circumstances, I will grant stay but on condition that the applicant respondent pays the auctioneers costs of kshs 100,000/-, Kshs 5000 cost of bounced cheque and also deposit the entire decretal sum in a joint interest earning account held in joint names of counsels on record within 30 days. In default of this condition, execution may proceed. Costs abide outcome of appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF NOVEMBER 2025.

HELLEN WASILWA.

JUDGE