



REPUBLIC OF KENYA



**KENYA LAW**  
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**East African Portland Cement Company Limited v Kenya Chemical & Allied Workers Union & 3 others (Civil Application E233 of 2023) [2023] KECA 1429 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1429 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E233 OF 2023  
MSA MAKHANDIA, K M'NOTI & M NGUGI, JJA  
NOVEMBER 24, 2023**

**BETWEEN**

**EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED ..... APPLICANT**

**AND**

**KENYA CHEMICAL & ALLIED WORKERS UNION ..... 1<sup>ST</sup> RESPONDENT**

**JULIET CHEPCHUMBA TUWOT & 227 OTHERS ..... 2<sup>ND</sup> RESPONDENT**

**MORRIS MUTETI KAWINZI ..... 3<sup>RD</sup> RESPONDENT**

**JOSEPH KARITHI MITHIKA & 219 OTHERS ..... 4<sup>TH</sup> RESPONDENT**

*(Application for stay of execution and stay of further proceedings pending the hearing and determination of an appeal from the ruling and order of the Employment & Labour Relations Court at Nairobi (Mwaure, J.) dated 16th May 2023 in ELRCC No. 2119 of 2014)*

**RULING**

1. In an application under rule 5(2) (b) of the Court of Appeal Rules for stay of execution and stay of further proceedings pending appeal from the ruling and order of the Employment and Labour Relations Court (ELRC) at Nairobi (Mwaure, J.) dated 16th May 2023, the applicant, the East African Portland Cement Co. Ltd contends that its intended appeal is arguable and risks being rendered nugatory if the Court does not grant the prayers sought.
2. By the impugned ruling, the trial court allowed the respondents to execute against the applicant a decree in their favour for Kshs 1,311,585,364.80. Arising from the said ruling, the applicant's bank accounts were garnisheed and 24 titles to its properties placed under prohibition, though the applicant avers that the garnisheed sums have not yet been released to the respondents or the orders of prohibition registered against the titles.



3. The applicant further contends that the arguable points in the appeal which it has already filed include the fact that the ELRC determined the issue of execution of the decree which was not before it; denied the applicant the right to be heard; took into account irrelevant matters; and determined the application before it on the basis of sympathy rather than law and facts. It adds that the pending appeal stands to be rendered nugatory because the respondents, who are its former employees, have no known assets or means to repay the decretal amount should the appeal succeed after payment.
4. The respondents oppose the application on the grounds that the decree in question is not in dispute; that the applicant truly and justly owes them the decretal amount; that the applicant's appeal to this Court against the decree was dismissed for lack of merit; that previously this Court and the ELRC granted the applicant conditional stay of execution but the applicant refused or failed to comply with the conditions; that the applicant subsequently entered into a consent order with the respondents on payment of the decretal sum which consent order provided for automatic execution of the decree upon default by the applicant; that the applicant defaulted on the consent order and that in the circumstances, the ELRC cannot be faulted for allowing execution to proceed.
5. In addition to the affidavit and annexures in support of the application, the applicant filed two supplementary affidavits sworn by Florence Mitey on 19<sup>th</sup> July 2023 and 21<sup>st</sup> August 2023, which dwell largely on the background and history of the litigation. For their part, the respondents opposed the application through replying affidavits sworn by Dakota Wario on 24<sup>th</sup> August 2023, Peter Ouko Onyango on 25<sup>th</sup> August 2023, and Juliet Chepchumba Tuwot on 28<sup>th</sup> August 2023, which lay the factual basis for their objection to the application as we have set out above.
6. Further, the parties filed submissions, which we have carefully considered, dated 21<sup>st</sup> August 2023 for the applicant; 24<sup>th</sup> August 2023 for the 1<sup>st</sup> respondent; 28<sup>th</sup> August 2023 for the 2<sup>nd</sup> respondent; and 24<sup>th</sup> August for the 3<sup>rd</sup> respondent. The 1<sup>st</sup> respondent also filed a notice of preliminary objection founded on the contention that the Court lacks jurisdiction to entertain the application for stay of execution, having previously determined a similar application.
7. Starting with the preliminary objection, we find that the same is completely bereft of merit because the current application is founded on the notice of appeal against the ruling dated 16<sup>th</sup> May 2023, whilst the earlier application was founded on a totally different notice of appeal against the decree issued by the ELRC on 2<sup>nd</sup> August 2018. In the circumstances, the question of res judicata or lack of jurisdiction of the Court does not arise, and the preliminary objection is accordingly dismissed.
8. Turning to the merits of the application, it is common ground between all the parties that the decree in question arose from a judgment dated 16<sup>th</sup> July 2015. The applicant's Appeal No. 14 of 2016 to this Court against the said judgment was dismissed on 6<sup>th</sup> October 2017, thus making the decretal amount due and payable by the applicant.
9. When the respondent's attempted to execute the decree, on 14<sup>th</sup> September 2018, the applicant sought and obtained a conditional order of stay of execution in this Court. The substantive conditions for stay of execution were that:
  - a) the applicant to deposit in court or provide a bank guarantee of Kshs 350,000,000.00 within 30 days, failing which the orders of stay was to lapse;
  - b) the applicant to file the intended appeal within 60 days, failing which the order of stay would lapse; and
  - c) The order of stay of execution to lapse within 12 months unless extended by the Court;



The applicant did not comply with any of the above conditions.

10. On 13<sup>th</sup> January 2020, the applicant entered into a consent order with the respondents for settlement of the decretal sum. The key parts of the consent order required the applicant to pay to the respondents Kshs. 90 million on or before 31<sup>st</sup> January 2020. Thereafter the parties were to meet on 5<sup>th</sup> February 2020 and agree on modalities for payment of the balance of the decretal amount, which was to be settled from the sale of two properties belonging to the applicant. If the said properties were not sold, the applicant undertook to make reasonable endeavours to secure funds to pay the balance of the decretal sum.
11. By clause 9 of the consent order, the parties agreed that should the applicant be in default, the respondents were at liberty to execute for the balance of the decretal sum. It is common ground that as regards the consent order, the applicant complied only with the payment of Kshs. 90 million.
12. The principles that guide this Court in an application for stay of execution and stay of proceedings are well known and are exhaustively discussed in [Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others \[2013\]](#) eKLR.
13. Applying those principles in the application at hand, we are not satisfied that the applicant has presented a bona fide arguable appeal for the simple reason that the decree in question has already been upheld by this Court when it dismissed the applicant's appeal and that further the parties voluntarily agreed in their consent order dated 13<sup>th</sup> January 2020 that in the event of the applicant's non-compliance with the consent order, execution was to issue. That consent order has neither been challenged nor set aside. Equally, the applicant does not claim to have satisfied the balance of the decretal amount. We agree with the respondents that the true purpose of this application is, therefore, to delay the matter and postpone the day of reckoning.
14. But even if the applicant had presented an arguable appeal, we would not, in the circumstances of this application, have granted the equitable remedy of stay of execution. It is trite that to entitle a party to an equitable remedy, the party must demonstrate that it is truly worthy of such a remedy. (See [Elijah Kimani Kimuyu & 2 Others v. Francis Mburu Kamau \[2021\]](#) eKLR, [Benson Mugo Mukunya v. Samuel Mwangani Thuku & 10 Others \[2021\]](#) eKLR, and [Titus Gicharu Mwangi v. Mary Nyambura Murima & Another \[2014\]](#) eKLR.
15. The applicant has previously obtained orders from this Court on terms, which it has not bothered to fulfil. It has also voluntarily entered into a consent order with the respondents, which again, it has not fulfilled. For those reasons, we are satisfied that the conduct of the applicant disentitles it to an equitable remedy.
16. Ultimately, we find no merit in the applicant's Notice of Motion dated 31<sup>st</sup> May 2022 and the same is hereby dismissed with costs to the respondents. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**



**MUMBI NGUGI**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

