



**Muthaiga Travel Limited v Dawoodia (Employment and Labour Relations Cause 1014 of 2016) [2025] KEELRC 1037 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1037 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1014 OF 2016**

**JW KELI, J  
MARCH 28, 2025**

**BETWEEN**

**MUTHAIGA TRAVEL LIMITED ..... APPLICANT**

**AND**

**FEMINA DAWOODIA ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a Notice of Motion Application dated 19<sup>th</sup> December, 2024 under Order 22 Rule 25 of the Civil Procedure Rules, 2010 seeking inter alia the following substantive orders from this Court:-  
  
“ There be stay of execution of the decree herein pending the hearing and determination of the Applicant’s suit by way of a counter- claim against the Decree holder in Milimani HCCC No. 386 of 2017 Fermina Dawoodia vs Muthaiga Travel Limited & 3others.”  
  
In the alternative, there be stay of execution of the Decree herein pending the hearing and determination of the appellant’s intended appeal against the decree  
  
The costs of the application be provided for.”
2. The Respondent’s Application was filed alongside a Supporting Affidavit sworn by Ms. Mir Bid Shah the Executive Director of the Respondent on 19<sup>th</sup> December, 2024.
3. The Claimant through its Counsel filed a Replying Affidavit dated 20<sup>th</sup> December, 2024 in response to the said Application.
4. In a rejoinder, the Respondent filed a Supplementary Affidavit dated 15<sup>th</sup> January, 2025 to the said Application.



5. Subsequently, the parties filed their respective submissions; the Claimant/Respondent filed its Skeleton Submissions dated 16<sup>th</sup> January 2025 and the Respondent/Applicant filed its written submissions dated 17<sup>th</sup> January 2025.
6. The Parties' Counsel, Mr. Oyatsi for the Applicant and Mr. Washika for the Respondent, highlighted their Submissions orally before the Court on the 20<sup>th</sup> January, 2025.

### **The Applicant's case**

7. The Applicant/Judgment Debtor, in its pleadings, asserted that the Applicant had filed a substantial counterclaim against the decree holder seeking to recover the sum of Kshs. 78,957,063.00.
8. The Applicant averred that the court in the Judgment dated 26<sup>th</sup> September, 2024, declined to hear and determine the said counterclaim on the ground that it had no jurisdiction to determine the same as the counterclaim raised an issue under the *Companies Act* which was in the province of the commercial division of the High Court. Subsequently, the Applicant filed a Commercial case in the Commercial division of the High Court case No. Milimani HCCC No. 386 of 2017 Fermina Dawoodia vs Muthaiga Travel Limited & 3others (hereinafter referred to as "Commercial Suit") which is pending determination.
9. In the aforementioned commercial suit, the Applicant claimed that the suit aims to recover the sum of Kshs. 78,957,063.00 from the Respondent based on the Respondent's breach or repudiation of the covenants of the Applicant's Memorandum of Association and Articles of Association. That the Commercial suit is partly heard and is at an advanced stage of Hearing. The Applicant asserts that the current status of the case is that the Plaintiff's case is closed, and the Defence Hearing will be fixed at the Mention of the case on 5<sup>th</sup> February 2025. The Applicant anticipates that they may have a Judgment within this year.
10. The Applicant further contended that if the Applicant's commercial suit is successful and the decree holder is found liable for the breaches pleaded therein, then the decretal sum that the Applicant will be awarded will be set off from the decretal sum awarded in this present suit.
11. Further, the Applicant contended that the Applicant/Company has been in existence for a period of 31 years with a reputable business in which the Respondent is a shareholder. That it is in the interest of the Respondent and other members that the operation of the Company is not affected to generate income to pay her dividends. That the Company is solvent and there is no risk.
12. In a nut shell, the Applicant urged the Court to order a stay of execution pending determination of the Commercial suit.

### **The Respondent's position**

13. In response, the Respondent/Claimant/ Decree Holder asserted that the Applicant had been granted 45 days stay of execution pending Appeal by the Court, which has since expired as a result of the inaction of the Applicant towards settlement of the Judgment debt. The Respondent contended that the Court dismissed the Applicant's counterclaim in the suit in its favour and if the Applicant is dissatisfied with the dismissal, it ought to appeal the same.
14. Further, the Respondent averred that asking the Court to further stay execution proceedings on a dismissed counter claim is an attempt at re-litigating matters already determined with finality by this Court. It was further claimed by the Respondent, that the Applicant has not demonstrated how



payment of the Decree in this present suit, prejudices its ability to execute whatever judgment it may receive in the Commercial Division of the High Court.

15. The Respondent asserted that the present suit was commenced in the year 2016 with reference to her dismissal in 2013, she had waited 9 long years for her terminal dues and money owed to her and it is only fair and just that she gets her benefits immediately as she is in dire need of the funds to settle long standing debts and obligations including hospital bills in excess of Kshs. 7,000,000/=.
16. In her submissions, the Respondent/Claimant contends that the Applicant has failed to demonstrate the substantial loss, irreparable damages or financial difficulty that it would suffer if the orders sought are not granted. The Respondent cited that the Case of KTK Advocates vs Baringo County Government [2018] eKLR which made reference to the case of Hidegard Ndelut vs Letkina Dairies Ltd & another [2005] eKLR which held that “a judgment creditor is entitled to payment of the decretal amount which he should receive promptly to reap the fruits of the judgment”.
17. Further, the Respondent contended that Judgment was entered against the Applicant on the 26<sup>th</sup> September, 2024 and the Court Decree issued on 21<sup>st</sup> November, 2024. That despite the Decree being served upon the Applicant for settlement, the Applicant failed to act bonafides and failed to settle the same.
18. The Respondent submitted that in granting the orders requested in the Application, the Court would be required to interrogate the proceedings before the High Court and make a determination on the chances of success of that suit usurping the powers of the High Court going beyond its jurisdiction.
19. On the issue of whether the payment of the Decree would interfere with the business of the Applicant Company, the Respondent contended that that interference has not been demonstrated by the Applicant. Further, that after the delivery of the Judgment, the Applicant was granted 45 days stay, by the Court during which the Applicant failed to move the court and the orders lapsed. The Respondent averred that it moved the Court after 83 days as the Stay orders had lapsed.
20. It was the Respondent’s case that the Application was only meant to delay settlement of the Decree and that it is necessary for the Decree Holder to enjoy the fruits of her Judgment. In summation, the Respondent urges the Court to dismiss the instant Application with costs.

## **Decision**

### **Issue for determination**

21. The issue for determination by the Court is: Whether the Applicant is entitled to the orders sought?
21. The Application dated 19<sup>th</sup> December, 2024 sought for a Stay of Execution of the Decree pending determination of the High Court Commercial Suit under Order 22 Rule 25 of the CPR between the parties. It was hinged on Order 22 Rule 25 of the Civil Procedure Rules which provides thus:

“Stay of execution pending suit between decree-holder and judgment- debtor: Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.” According to the Blacks Law Dictionary, discretion is defined as “a liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable, and wholesome, as determined upon the peculiar circumstances of the case,



and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law.”

22. It is a well settled law that discretion must be exercised judiciously and in accordance with sound legal principles as established in the case of *Principal Kaewa Harambee Secondary School & another v Kitonyi* (Miscellaneous Civil Application E070 of 2022) [2022] KEHC 9937 (KLR) which held thus:

“Being an exercise of judicial discretion, like any other judicial discretion, it must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. Such discretion must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. ” It is trite law that the grant of an equitable remedy such as a stay, is not an automatic right but is purely based on a lawful, just and sufficient cause established by the Applicant. See *Reliable Electrical Engineers Ltd v. Mantrac Kenya Ltd* [2006] eKLR.

23. There are no clear established guidelines for the grant of the said Order under the law, that being the case, the Court has to determine the issue on a case by case basis depending on the special circumstances of the case and in exceptional instances. See *Ngathiko & 6 others v Mwarire & 2 others* (Environment & Land Case 34 of 2016) [2022] KEELC 15023 (KLR) (15 November 2022), *Kiogora v Imetha Water & Sanitation Co Ltd & another* (Miscellaneous Application E009 of 2022) [2023] KEELRC 2864 (KLR) (10 November 2023) (Ruling).

24. The High Court in India in the case of *Sikandar Mohammad Ali Dalal & Anr vs. Babu Hanumanth Mindolkar & Ors.* (18.01.2023 – HC of Karnataka, Dharwad Bench) when adjudicating on a similar Application held as follows:

“The power to stay execution of the decree under Order 21 Rule 29 of CPC is discretionary. The discretion should be exercised judicially and not mechanically as a matter of course. On mere satisfaction of the pre- condition stipulated in Order 21 Rule 29 of CPC, the execution proceeding is not to be stayed. The power under this rule has to be exercised only in exceptional cases where the interest of justice requires it. The fundamental consideration should be that the decree holder is not to be deprived of the fruits of the decree except for good reasons. The decree must be allowed to be executed and unless an extraordinary case is made out, no stay should be granted. As held by the Supreme Court in *KRISHNA SINGH v. MATHURA AHIR*, the jurisdiction to stay execution of the decree under Order 21 Rule 29 of CPC has to be exercised with very great care and only in special cases.”

25. The Court has the delicate duty of balancing the rights of the two litigants and in doing this, the Court must be satisfied whether there is a just cause for depriving the respondent her right of enjoying the fruits of her judgment. Warsame, J (as he then was) held as follows in *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR :“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. ...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt



to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

26. In determining the foregoing issue, it is not lost to the Court that execution is a lawful process and it is not a ground for granting stay of execution. Further, the Order of Stay pending suit is not granted simply because there is a suit pending in another Court against the holder of the Court in the name of the person against whom the Decree was passed as a matter of course but the Applicant must show exceptional circumstances why the Court should rule in his favour. In the Ugandan case of *I.T. Office Uganda Limited v Tropical Bank Limited* (Miscellaneous Application 617 of 2024) [2024] UGCommC 227 (4 June 2024), the High Court when considering a similar application, took the following conditions into account:-

“(i) the nature of the claim in the other pending suit; (ii) the extent of identity between the defendant and the other party; (iii) the relationship (if any) between the claim giving rise to the judgment and the claim in the other pending suit; (iv) the strength of the claim in the other pending suit; (v) the size of the claim in the other pending suit; (vi) the likely delay before the claim in the other pending suit will be determined; (vii) the prejudice to the judgment creditor if a stay is granted; and (viii) the risk of prejudice to the party making the cross-claim if a stay is refused.”

27. In this instance case, I classified the conditions to guide the Court into three namely: Firstly, what is the nature and status of the pending suit, Secondly, what potential prejudice will be meted on either parties and lastly, the issue of security of costs. On the first condition on the nature and status of the pending suit requires the Court to look at the nature of the Claim in the other pending suit, the identity or the relationship of the parties in the other suit, the strength or triability of the claim in the pending suit, the size of the claim and progress or the projected conclusion of the pending suit. It was averred that the Applicant filed a Counterclaim in this suit against the Claimant/Respondent which was struck out in the already concluded Judgment dated 26<sup>th</sup> September, 2024 on the ground that this Court had no jurisdiction to determine the same as the counterclaim raised an issue under the *Companies Act* which was in the province of the commercial division of the High Court. It was not disputed that the Applicant has filed a Commercial case in the Commercial division of the High Court case No. Milimani HCCC No. 386 of 2017 *Fermina Dawoodia vs Muthaiga Travel Limited & 3 others* (hereinafter referred to as “Commercial Suit”) seeking to recover the sum of Kshs. 78,957,063.00 from the Respondent based on the Respondent's breach or repudiation of the covenants of the Applicant's Memorandum of Association and Articles of Association which suit is pending determination. The Applicant contended that the pending suit is at the advanced stage of hearing and is likely to be concluded within the year. From the facts, It is my opinion that with the current status of case backlog of the said Court, the likelihood of disposal of the commercial suit taking more than a year is more likely than not. In the event of the decision being appealed, final conclusion of the matter may take even much longer than anticipated which may further delay the Respondent/Decree-holder's Justice who has waited since the year 2016 for justice. Most important the said suit is not before this court hence the court has no control over its fate.

28. On the size of the Claim, the Applicant avers that its claim against the Decree- holder in the Commercial suit is in the tune of Kshs. 78,957,063.00 and on the other hand, the Decree dated 21<sup>st</sup> November, 2024 in the present suit is in the aggregate amount of Kshs. 4,110,027.45 exclusive of interest and costs. The Judgment-Debtor/Applicant claims that if the Applicant's commercial suit is



successful, and the decree holder is found liable for the breaches pleaded therein, then the decretal sum that the Applicant will be awarded will be set off from the decretal sum awarded in this present suit. On this issue, it matters not on the size of the claim as what is of key importance is that the Applicant must show any foreseeable difficulties in enforcing judgment if it succeeds in the pending suit as was held in the aforementioned Ugandan case (*I.T. Office Uganda Limited v Tropical Bank Limited* (Miscellaneous Application 617 of 2024) [2024] UGCommC 227 (4 June 2024)). I find that the Applicant has not demonstrated any enforceability difficulties that are likely to occur if the Stay is not granted which is a key factor in an application such as this.

29. On the triability or lack thereof of the pending Commercial suit, the Court reserves its comment on the issue as it would likely be interfering with the jurisdiction of the High Court which is yet to conclusively hear the case. Be that as it may, even if the Applicant's suit is triable, that would not in itself justify a grant of stay in the absence of other considerations.
30. The second paramount consideration the Court ought to weigh, is the likely prejudice or substantial loss that would result if no stay is granted. It is indeed my finding that in an application of this nature, the issue of prejudice forms the backbone of the application as underscored in the case of *Kinyanjui v Njoki* (Civil Appeal E298 of 2023) [2024] KEHC 344 (KLR) (25 January 2024) (Ruling). The court in the exercise of its discretion has to weigh the competing rights of the parties and rule on a balance of convenience. The court has to consider whether or not by staying execution of the decree, would cause great injustice to the Applicant or the Decree Holder. In the case of *Samvir Trustee Limited vs Guardian Bank Limited*, where the court observed that: "For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss..." On a perusal of the pleadings before the Court, I find that the Applicant has not demonstrated with specificity how execution of the decree will result in irreparable harm or substantial loss to it. General assertions of potential disruption to its operations are insufficient and unsubstantiated. Further, I do concur with the Respondent that the Applicant has not demonstrated how payment of the Decree in this present suit, prejudices its ability to execute whatever judgment it may receive in the Commercial Division of the High Court. From the facts of the case, the Applicant has also failed to demonstrate that it may be unable to recover the money from the Decree Holder or that the Decree-holder would fail to reimburse the decretal sum and pay damages to it if the other pending commercial suit were successful.
31. On the other hand, the Decree-holder/Respondent averred that the present suit was commenced in the year 2016 with reference to her dismissal in 2013, she had waited for 9 long years for her terminal dues and money owed to her and it is only fair and just that she gets her benefits immediately as she is in dire need of the funds to settle long standing debts and obligations including hospital bills in excess of Kshs. 7,000,000/=.
32. I do find that the balance of convenience tilts in favour of the Decree- holder who has a vested right to enjoy the fruits of her judgment. Delaying execution undermines this right and can cause prejudice especially in the absence of any exceptional circumstances. Therefore, if the stay is granted, it would delay justice for the Decree Holder who may not still not able to enjoy fully the fruits of the decree after protracted litigation and has to wait for a further indeterminate period for the conclusion of the proceedings in the pending commercial case and this would amount to grave injustice. The Indian case of *Sikandar Mohammad Ali Dalal & Anr vs. Babu Hanumanth Mindolkar & Ors.* (18.01.2023 – HC



of Karnataka, Dharwad Bench) cited the case of Shreenath & Anr. vs. Rajesh & Ors.<sup>4</sup>, India where the Supreme Court observed that:

the seeker of justice, many a times, has to take long circuitous routes, both on account of hierarchy of Courts and the procedural law. Such persons are and can be dragged till the last ladder of the said hierarchy for receiving justice but even here he only breaths fear of receiving the fruits of that justice for which he has been aspiring to receive. To reach this stage is in itself an achievement and satisfaction as he, by then has passed through a long arduous journey of the procedural law with many hurdles replica of mountain terrain with ridges and furrows. When he is ready to take the bite of that fruit, he has to pass through the same terrain of the procedural law in the execution proceedings the morose is writ large on his face. What looked inevitable to him to receive it at his hands distance is deluded back into the horizon.”. The foregoing case exemplifies the challenges litigants may face in legal proceedings, where, after enduring lengthy litigation and obtaining a favorable judgment, the enforcement of that judgment can be further delayed by applications for stay of execution therefore, the Court should be reluctant to award stay unless it is based on exceptional circumstances. Therefore, it is my considered view that the Applicant has not adequately demonstrated to the satisfaction of the Court that they would suffer substantial loss or prejudice in the event the application for stay is not granted.

33. The third consideration, the Court must take into account is the issue of security of costs. The purpose of security was explained in the case of Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates, Nishit Raikundalia & Sapphire Trading & Marketing Ltd [2014] KEHC 2430 (KLR) where the court stated:-“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.” Evidently, the issue of security is discretionary and it is upon the court to determine the same. In this case, the applicant has not offered any form of security for the performance of the decree.
34. From the foregoing reasons, the Court declines to grant the orders of Stay of execution proceedings pending conclusion of the High Court Commercial suit. The court holds that it is in the greater interest of justice and on a balance of convenience titling to the Respondent that the application should and is hereby be dismissed with costs to the Respondent.
35. The court in consequently confirms the Garnishee Nisi Order of 18<sup>th</sup> December 2024 as Garnishee Order Absolute for the payment by the Garnishee to the Decree Holder of the sum of Kshs. 11,680,480.04 from the amount held by the Judgment debtor at the Account Nos. 1108784240 and 1108477429 at Kenya Commercial Bank Limited, Village Market Branch. Costs to Garnishee of Kshs. 20,000 deductible from any of the said Bank accounts.
36. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH, 2025.**

**J.W. KELI,  
JUDGE.**



In the presence of:

Court Assistant: Otieno

Appellant : - Otieno h/b Oyatsi

Respondent: Washika

Garnishee – Ms. Wangari h/b Ms. Waititu

