



**Musuni & 3 others v Dambusters East Africa Limited (Cause
2400 of 2012) [2024] KEELRC 60 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 60 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2400 OF 2012
MA ONYANGO, J
JANUARY 25, 2024**

BETWEEN

**JACKSON MUGOLIO MUSUNI 1ST CLAIMANT
SCHOLASTIC WANAGRE 2ND CLAIMANT
JUDITH NTHOKI NDUVA 3RD CLAIMANT
EVANS MORARA NYANTIKA 4TH CLAIMANT**

AND

DAMBUSTERS EAST AFRICA LIMITED RESPONDENT

RULING

1. Judgement in this case was delivered on 21st June, 2019. The Court awarded each of this claimant's various amounts as follows:
Judith Nthoki Nduva Ksh. 225,000.00
Evans Moraa Nyantike Ksh.333,968.25
Jackson Mugulio Musunji Ksh. 258,750.00
Scholastic Wangare Ksh.224,250.00
Total Ksh. Ksh.1,041,968.25
2. Vide an application dated 29th July, 2019 the Respondent sought orders of stay of execution of Judgment on grounds that it intended to file an appeal.
3. On 16th December 2019 the court granted the Respondent conditional stay of execution subject to the Respondent depositing the decretal sum in a joint interest bearing account in the names of counsel for the Claimant and counsel for the Respondent within 30 days.



4. Vide an application dated 9th September, 2020, the Respondent again filed an application seeking orders that the Claimants be restrained from attaching, possessing, distraining, cartaling off or in any other manner whatsoever levying execution against the Respondent's business premises, goods or property.
5. The application was opposed by the Claimant's who in a replying affidavit of Evans Morara the 4th Claimant, termed the same an abuse of court process as the Respondent had never complied with the court orders of 16th December, 2019 granting it stay of execution conditional upon deposit of decretal sum in a joint interest earning account.
6. The Claimant's further pointed out that no appeal had been filed by the Respondent against the Judgment.
7. The Claimants further noted that they filed their bill of costs which was taxed and a ruling delivered on 30th April 2020 and that the Respondent actively participated in the taxation proceedings.
8. The Claimants stated that it is after the taxation that they commenced the execution process that prompted the Respondent to file its application dated 9th September, 2020.
9. In a ruling delivered on 5th November, 2021 the court dismissed the application on 2 grounds.: First that the application had no merit and secondly, that the same had been filed by an advocate who was not properly on record.
10. The Court noted that the Respondent was at the time of Judgment represented by ELkington & Associates while the application was filed by Kithinji Marete and Company Advocates without seeking leave to come on record after Judgment in accordance with order 9 Rule 9 of the [Civil Procedure Rules](#).
11. Vide another application dated 16th November 2021 the Respondent, through the firm of Kithinji Marete & Company Advocates, sought the following orders: -
 1. That for reasons stated in the Certificate of Urgency filed herewith, this Application be certified as urgent and service thereof be dispensed with in the first instance.
 2. That leave be granted to the firm of M/s Kithinji Marete & Company Advocates to come on record on behalf of the Applicant herein.
 3. That pending the inter partes hearing and determination of this Application, an injunction do issue directed at the Respondents jointly and severally whether by themselves, their agents and/or employees:
 - a. Restraining them from attaching, possessing, distraining, carting off, or in any manner whatsoever levying execution against the Applicant's business premises, goods or property.
 - b. Staying the Execution of the Judgment and orders of 21st June, 2019 and all subsequent orders of this court.
 4. That an injunction do issue directed at the Respondents;
 - a. Restraining them from attaching, possessing, distraining, carting off or in any manner whatsoever levying execution against the Applicants' business premises, goods or property.
 - b. Staying the Execution of the Judgment and orders of 21st June, 2019 and all subsequent orders of this court.



5. That the Honourable Court be pleased to extend time accorded to the Applicant to comply with its Order to deposit the decretal sum of Ksh. 1,041,968.25 in an interest earning account maintained by the Advocates of the Parties herein pending the hearing and determination of its Appeal from the Judgment of this Court.
6. That this Honourable Court be pleased to issue any other order it may deem just in the circumstances of the matter.
12. Vide a replying affidavit of Evans Nyantika sworn on 18th November 2021 the Claimant's opposed the application terming it an abuse of Court process, vexatious and intended to obstruct justice to the Claimants.
13. On 6th December, 2021 when the application came up for inter parties hearing the court noted that the consent by ELkington & Associates to allow Kithinji Marete & Company Advocates to come on record was not filed with the application and directed that the same be filed through a supplementary affidavit.
14. On 4th May, 2022 when the Application came up for hearing counsel for the Respondent informed the Court that the Respondent had deposited the decretal sum in an interest earning account as earlier directed by the Court. On that day Mr. Muriithi was holding brief for Kithinji Marete for the Respondent / Applicant.
15. Mr. Okemwa for the Claimants confirmed the deposit of the decretal sum but noted that costs had not been deposited into the interest earning account. That the Respondent had also not settled the auctioneer's fees.
16. The court directed that the Respondent deposits costs into the interest earning account and settles the auctioneer's fees and that parties came back to court on 6th June, 2022 for directions on the issue of the appeal. The court stated that stay will automatically lapse should the respondent fail to comply.
17. On 26th July, 2022 when the parties next appeared in court Mr. Okemwa informed the court that the Respondent had not deposited costs or paid the auctioneer.
18. Mr. Muriithi who was holding brief for Mr. Marete informed the court that Mr. Marete and Mr. Okemwa had agreed that the Respondent would deposit the decretal sum in the interest earning account. The Court thereafter made the following orders.
 - a. Applicant has not complied. Stay therefore automatically lapsed. Claimant is free to execute
 - b. Deposited sum to be released to Claimant and Claimant free to execute for costs and auctioneer's fees.
19. It is these orders that are the subject of the applications dated 19th and 30th August 2022.
20. In the application dated 19th August 2022, the Respondent seeks the following orders
 1. The Application be certified urgent and service of the same be dispensed with in the first instance.
 2. Pending the inter-partes hearing and determination of this Application this Court be pleased to issue an Order to Stay the Orders of Hon. Lady Justice Maureen Onyango made herein on 2nd August 2022 to inter alia release the deposited decretal amount to the Respondent and granting liberty to the Respondent right to execute for costs and auctioneering fees.



3. This Honourable Court be pleased to Review and Set aside the Order of Hon. Lady Justice Maureen Onyango made herein on 2nd August 2022 to inter alia release the deposited decretal amount to the Respondent and granting liberty to the Respondent right to execute for costs and auctioneering fees.
 4. This Court be pleased to issue any other Order it deems mete and just in the circumstances.
 5. The Costs of this Application be awarded to Dambdusters East Africa Limited
21. The grounds in support of the application which I reproduce verbatim, are as follows-
- a. On 26th July 2022, the Honorable Judge made Orders dated 2nd August 2022 and served upon Applicant on 8th August 2022 releasing the deposited decretal amount to the Respondent and granting the Respondent liberty to execute for costs and auctioneering fees.
 - b. The Orders were granted ex-parte, in the absence of the Applicant's Counsel hence not having an opportunity to reply to the Oral Application made by the Respondent's Counsel.
 - c. The Applicant got notice of orders upon service thereof on the 8th August 2022 which prompted perusal of the Court file and established of what had transpired prior to the granting of the Orders.
 - d. On the said 26th August 2022 when the subject Orders were made, the Applicant Counsel had logged off the virtual Court session soon after the learned judge penned off.
 - e. As the record will reflect, Counsel for the Respondent soon thereafter in the same Court session prompted the Court and made an Oral Application Which Application was allowed exparte in the absence of Counsel for the Applicant.
 - f. The Applicant Counsel was not granted an opportunity to respond to the Application which in its very nature entailed releasing the decretal amount deposited by consent in a joint interest account in the name of both counsels and granting the Respondent right to execute for costs and auctioneering fees.
 - g. The learned judge made an error apparent on the face of on the record by not taking notice that Counsel for the Applicant had logged off the Court session.
 - h. The absence of counsel hence not having an opportunity to be heard raises sufficient reason which the Applicant implores this court to exercise its jurisdiction.
 - i. It is only right that this Court exercises its power and discretion to review and set aside the order of 2nd August 2022 which will allow the Applicant to prosecute its pending Applications before the Court.
 - j. The said Applications and the intended Appeal by the Applicant will become an academic exercise to the detriment of the Applicant if the Orders are not granted.
 - k. The Applicant is apprehensive that the respondent is in the process of having the decretal amount released and proceed to execute for costs which actions will lead irreparable loss and disrepute upon the establishment.
22. In the affidavit in support of application, Mr. Peter Kimani, a manager of the Respondent, reiterates the grounds on the face of the application.
23. In the second application dated 30th August 2022 the Claimants seek orders as follows: -



- a. That this application is heard concurrently with the Respondent's application dated 19th August, 2022.
 - b. That the Bank Manager Consolidated Bank Limited, Koinange Branch, Nairobi, be and is hereby ordered to forthwith release Ksh. 1,041,96.25 and all accrued interest under the joint names of Okemwa and Company Advocates and Githinji Marate Advocates under FDR certificate serial number 046499 dated 5th May, 2022 to the claimants through its advocates Okemwa and Company Advocates.
 - c. That costs be provided for.
24. The grounds in support of the application which I also reproduce verbatim are that
- a. The Honorable Court gave clear orders and directions on 4th May 2022 for the Respondent to deposit full decretal amount and costs and pay Auctioneers fees within 14 days' failure of which the claimants were at liberty to execute which orders were not obeyed to date.
 - b. The Respondent did not heed the Court order even after a reminder through the complainants advocates on 23rd May 2022
 - c. On the 5th of August 2022 in presence of both parties' advocates the Court was informed of the disobedience or its orders and the development as stated in grounds 1 and 2 above and issued orders the funds be released to the Claimants.
 - d. Upon service of the court order, the Respondent through counsel wrote to the Bank Manager Consolidated Bank Koinanage Branch and threatened them not to release the funds.
 - e. There is a need for a specific court order to issue specifying the release of the Joint funds and also action by the Bank Manager for compliance.
 - f. That court orders must be obeyed, and the Respondent who has disobeys court orders and obstructs justice deserves no further orders from court.
 - g. This is a matter in court for 12 years there is no justification to sustain the same even for a single day it is in the interest of justice that litigation comes to an end.
25. The affidavit of Evans Morara in support of the Application reiterates the grounds on the face of the application.
26. On the 17th October, 2022 Evans Morara, for the Claimants swore a further affidavit in which he states that:
- a. That the Respondent filed an application 1168 of 2022 at the Court of Appeal, being an Appeal of this Court order subject of Review on the 17th August 2022 further deposing on false allegation and scandalizing this Honorable Court that it was condemned unheard and that our advocates appeared in an online court after parties had logged out and given the orders which fact they know is not true.
 - b. That no interim orders were issued by the Court of Appeal and that is when the Respondent resorted to file this present Application dated 19th August 2022 before this court. This is an abuse of court process.
 - c. The application was never served and it is until 14th October 2022, that our Advocates received a notification from the Registrar Court of Appeal.



27. Both parties filed and exchanged submissions. In view of the fact that a determination of the Respondent's application will automatically resolve the Claimant's application, I will start with the same which is also the earlier one.
28. The application by the Respondent seeks review and setting aside of this court's orders issued on 2nd August 2022 on grounds that the orders were granted ex parte and the Applicant's counsel did not have an opportunity to respond to the oral application.
29. It is important to set the record straight as it would have a bearing on the application. On 4th May, 2022, the court made the following orders:
- a. The applicant to deposit costs and settle auctioneer's fees within 14 days from today failing which stay will automatically lapse.
30. On 26th July, 2022, when the matter next came up in court, Mr. Muriithi was present holding brief for Mr. Marete the for Respondent while Mr. Okemwa appeared for the Claimants.
31. The proceeding in court on that day are reproduced below:-
26/7/2022.
Coram Before Hon Lady Justice M. Onyango
Court Assistant Daniel
Muriithi holding Brief for Marete for Applicants
Okemwa for Claimants
- Okemwa: Last time we were before the Court the Respondent was ordered to pay costs and auctioneer's fees failing which stay would be vacated. We followed up with a letter and upto now there has been no compliance. We pray that the court makes orders as it had proposed. This is a very old matter which the Respondent keeps protracting 3 years after Judgment. There is no appeal on this matter.
- Muriithi: The issue of costs was long before Hon. Kagunji Mr. Okemwa and Marete agreed they would deposit the money in the joint interest earning account
- Court:
- a. Applicant has not complied. Stay therefore automatically lapsed. Claimant is free to execute
 - b. Deposited sum to be released to Claimant and Claimant free to execute for costs and auctioneer's fees.
32. The averments of the Respondent that there were orders issued by the court on 26th July, 2022 in the absence of the Respondent is therefore not correct as there were no ex-parte proceedings on that day or any orders issued in the absence of the Respondent. orders were made by the Court after Mr. Muriithi responded to the prayers by the Claimant's counsel.
33. In any event, the orders pronounced by the court had already taken effect as the orders made on 4th May, 2022 were self-acting and the court's pronouncements on 26th July, 2022 were therefore only re-emphasizing what had already taken place.
34. Even had the foregoing not been the case, the Applicant would still not be entitled to the orders sought.
35. A party who comes to the court must do so with clear hands and must make a disclosure of all relevant facts to the court. The Respondent has not denied the averments in the further affidavit of Evans



Morara to the effect that on 17th August 2022 the Respondent filed an application in the Court of Appeal in the court of Appeal in respect of the same subject matter of the instant application in the and that the Respondent only came to this court after failing to obtain the orders in the Court of Appeal. This is a clear abuse of court process that would render a party ineligible for the equitable orders of this court.

36. The Respondent has not denied that it filed application number E368 of 2022 in the court of appeal dated 17th August, 2022.
37. This court further notes that even though the Respondent filed a Notice of Appeal in this court dated 3rd July, 2019 and applied for proceedings by letter dated 2nd July, 2019, no follow up has been made on the same to date. The Court notes that the Applicant always goes to sleep and only wakes up with a flurry of activities whenever the Claimants threaten to execute the judgment delivered by this court on 21st June, 2019.
38. The comments at paragraph 29 of the Respondent's submissions has also not escaped the attention of the court. Paragraph 29 of the submissions reads.

One other important thing, however not subject to this Applications but which is imperative to bring to the attention of the Court is that Dambusters intends to bring an Application requesting for proof of life of the aforesaid Claimants as it is apprehensive that they may be deceased.

39. The same does not auger well with the Claimants who filed the instant suit in 2012 and have been waiting to reap from the fruits of their judgment since the judgment was delivered on 21st June 2019.
40. From the foregoing, I find no merit in the application dated 19th August 2022.
41. I therefore confirm the orders made on 26th July 2022 and direct that the bank releases the moneys deposited into the joint account held in the names of Advocates of the parties to this suit be released to Okemwa & Company Advocates for the Claimants/deed holders.
42. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF JANUARY 2024

MAUREEN ONYANGO

JUDGE

