



**Kamanga v Venus Inn & another (Employment and Labour Relations Cause 371 of 2017) [2024] KEELRC 404 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 404 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 371 OF 2017  
MA ONYANGO, J  
FEBRUARY 29, 2024**

**BETWEEN**

**JACKLINE JARENGA KAMANGA ..... CLAIMANT**

**AND**

**VENUS INN ..... 1<sup>ST</sup> RESPONDENT**

**MAHINDI COMFY HOTEL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this Court are two applications. The 1<sup>st</sup> Respondent filed the application dated 29<sup>th</sup> May 2023 seeking the following orders;
  - i. Spent
  - ii. That there be a temporary order of stay of execution or further execution of the decree herein pending the hearing and determination of this application inter-parties.
  - iii. That this Honourable court varies the judgment and directs that payment of the decretal sums be shared equally between the Respondents.
  - iv. That the 1<sup>st</sup> Respondent be allowed to liquidate the amount apportioned to him in equal monthly installments of Kshs 10,000.
  - v. That this Honourable Court be pleased to make any further orders as justice may demand.
  - vi. Costs of this application be provided for
2. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavit of Albert Chege Ndungu, the 1<sup>st</sup> Respondent's General Manager. In brief the grounds are that the 1<sup>st</sup> Respondent having been aggrieved by the judgment of this honourable court filed a notice of appeal; that though the 1<sup>st</sup> Respondent's appeal has high chances of succeeding, it is



unable to deposit the decretal sum as ordered and has consequently filed this application to be allowed to pay by way of instalments; that the Claimant has instructed Igare Auctioneers to execute and have proclaimed the 1<sup>st</sup> Respondent's which is at risk of being attached or sold; that judgment having been entered against both Respondents, it is only fair and just that payment of the decretal sum be shared equally; that the Claimant should not have chosen to only execute against the 1<sup>st</sup> Respondent; that the 1<sup>st</sup> Respondent lacks funds in its bank account to enable it make the deposit; that the 1<sup>st</sup> Respondent is not capable of paying the whole decretal amount due to financial constrains brought about by poor sales; and lastly, that the 1<sup>st</sup> Respondent's application is made in good faith.

3. The affidavit of Albert Chege Ndungu sworn on 29<sup>th</sup> May 2023 reiterates the contents of the grounds on the face of the application.
4. The application is opposed. The Claimant filed a Replying Affidavit sworn on 9<sup>th</sup> June 2023 in which she deposes that the present application has been made in bad faith with the ulterior motive of frustrating her from enjoying the fruits of her judgment.
5. The Claimant states that it is now more than one year since judgment was delivered and the 1<sup>st</sup> Respondent has not made any effort to settle the decretal sum.
6. It is the Claimant's case that the decree of the Court is against the judgment debtors jointly and severally and the issue of apportioning the decretal sum among the judgment debtors is a new cause of action which ought to be litigated independently and separately among the Respondents once the decree of the court has been satisfied.
7. The Claimant contends that the judgment debtors have not demonstrated any new issue, fact or evidence to warrant review of the judgment of the court.
8. According to the Claimant, the 1<sup>st</sup> Respondent's proposal to liquidate decretal sum of Kshs 171,750 together with costs of Kshs 213,075 in monthly instalments of Kshs 10,000 is unreasonable and unacceptable since it will take the Applicant almost 4 years. That the judgment debtors are both established businesses currently in operation with sufficient assets as demonstrated by the proclamation notices attached to the application dated 22<sup>nd</sup> April 2023.
9. The Claimant deposes that the application has been filed after unreasonable delay and no explanation has been offered for the delay.
10. In a rejoinder, the 1<sup>st</sup> Respondent's General Manager filed a further affidavit sworn on 15<sup>th</sup> June 2023 in which he states that the present application could not have been filed without ascertaining costs which were taxed on 27<sup>th</sup> January 2023.
11. The 1<sup>st</sup> Respondent avers that it is only fair and just that the Respondents share the burden equally which warrants a review of the judgment. That bearing in mind the harsh economic times, the 1<sup>st</sup> Respondent can only afford to liquidate the decretal amount in instalments of Kshs 10,000 which is reasonable.
12. The second application is the 2<sup>nd</sup> Respondent's Notice of Motion dated 12<sup>th</sup> June 2023 seeking the following orders;
  - i. Spent
  - ii. Spent
  - iii. That there be a stay of execution of the Judgment and decree of the court pending the inter parties hearing of this application



- iv. That the 2<sup>nd</sup> Respondent be struck out of the suit
  - v. That the Ex-parte Judgment herein and all consequential orders emanating therefrom be set aside in respect of the 2<sup>nd</sup> Respondent.
  - vi. That in the alternative to the above orders, the 2<sup>nd</sup> Respondent be granted leave to file its defence
  - vii. That costs of this application be provided for;
13. The 2<sup>nd</sup> Respondent in its grounds in support of the application avers that the Claimant has obtained judgment against the 2<sup>nd</sup> Respondent but there was no proper service of the pleadings on the 2<sup>nd</sup> Respondent; that service of the pleadings upon the 2<sup>nd</sup> Respondent was defective; that the 2<sup>nd</sup> Respondent became aware of the decree and suit when it was served with the application for stay by the 1<sup>st</sup> Respondent; that execution will proceed to the detriment of the 2<sup>nd</sup> Respondent; that the Claimant has no locus to sue the 2<sup>nd</sup> Respondent under the law as she has no contract with it; that the Claimant was never an employee of the 2<sup>nd</sup> Respondent; that the 2<sup>nd</sup> Respondent was wrongly sued; that the judgment infringes on the 2<sup>nd</sup> Respondent's constitutional rights to a fair hearing; that the 2<sup>nd</sup> Respondent ought to be struck off the suit and lastly, that the 2<sup>nd</sup> Respondent has a good defence to the Claimant's claim.
  14. The application is supported by the affidavit of the Anastacia Mumbi, the Director of the 2<sup>nd</sup> Respondent sworn on 12<sup>th</sup> June 2023 in which she reiterates the grounds above.
  15. The Claimant filed a Replying Affidavit sworn on 18<sup>th</sup> July 2023 in opposition to that application. The Claimant maintains that her advocate filed an application dated 22<sup>nd</sup> October 2019 seeking enjoinder of the 2<sup>nd</sup> Respondent having been adversely mentioned by the 1<sup>st</sup> Respondent in its statement of Response which application was allowed by the court.
  16. The Claimant states that Summons to enter appearance and Memorandum of Claim were served upon the 2<sup>nd</sup> Respondent as evidenced by the affidavits of service filed in court but the 2<sup>nd</sup> Respondent chose not to enter appearance or file a defence. That mention and hearing notices were served upon the 2<sup>nd</sup> Respondent as evidenced by the affidavits of service filed in court.
  17. It is the Claimant's contention that the 2<sup>nd</sup> Respondent was aware of these proceedings since 2019 but decided to ignore the same.
  18. According to the Claimant, the instant application has been filed more than one year after the court rendered its judgment and no justifiable reason has been given for the delay.
  19. Lastly, the Claimant contends that the 2<sup>nd</sup> Respondent has no defence and has not shown or demonstrated that it has a good and arguable defence which raises triable issues.
  20. The court was urged to dismiss the application dated 12<sup>th</sup> June 2023 with costs.
  21. On 11<sup>th</sup> July 2023, the court directed the parties to dispose of both applications by way of written submissions.
  22. The Claimant's submissions on the application dated 29<sup>th</sup> May 2023 and the application dated 12<sup>th</sup> June 2023 were filed on 10<sup>th</sup> July 2023 and 2<sup>nd</sup> October 2023 respectively. The 1<sup>st</sup> Respondent filed its submissions on the application dated 29<sup>th</sup> May 2023 on 8<sup>th</sup> August 2023. It appears the 1<sup>st</sup> Respondent did not file submissions to the 2<sup>nd</sup> Respondent's application dated 12<sup>th</sup> June 2023. I have perused the record and did not find any submissions for the 2<sup>nd</sup> Respondent.



23. I have considered both applications, the 1 affidavits as well as the submissions on record.
24. I will deal with the application dated 12<sup>th</sup> June 2023 first.
25. The 2<sup>nd</sup> Respondent's in its application dated 12<sup>th</sup> June 2023 seeks that to be struck out from the suit and also that the ex-parte judgment and all consequential orders emanating therefrom be set aside, and, in the alternative, the 2<sup>nd</sup> Respondent be granted leave to file its defence.
26. The 2<sup>nd</sup> Respondent was enjoined to these proceedings pursuant to the Claimant's application dated 22<sup>nd</sup> October 2019. The prayers sought in that application were:
- i. That this application be certified as urgent and the same be dispensed with in the 1<sup>st</sup> instance
  - ii. That the Respondent's memorandum of response dated 18<sup>th</sup> October 2019 and filed on the same date be struck out from the court record
  - iii. That in the alternative the Claimant be granted leave to amend her statement of claim to include and or enjoin Mahindi Comfy Hotel as the 2<sup>nd</sup> Respondent
  - iv. That the draft amended statement of claim annexed to this application be deemed duly filed and serve
  - v. Costs be in the course
27. On 5<sup>th</sup> November 2019, the court rendered its ruling and held as follows;
- “The application dated 22<sup>nd</sup> October 2019 is fully compromised by consent of the parties to the extent that the claimant will be allowed to amend the claim.
- And that the draft amended statement of claim attached to the application be deemed duly filed subject to payment of requisite court fees. The Respondent to file and serve an amended response if any within 14 days from today's date. Parties to thereafter set the suit down for hearing at the Registry or apply for any additional pretrial directions.”
28. In the application filed by the 2<sup>nd</sup> Respondent it seeks two main orders; that the Ex-parte Judgment and all consequential orders emanating therefrom be set aside in respect of the 2<sup>nd</sup> Respondent, and in the alternative, the 2<sup>nd</sup> Respondent be granted leave to file its defence.
29. Striking out of parties is provided for in Order 2 Rule 15 of the *Civil Procedure Rules* as follows:
- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
    - (a) it discloses no reasonable cause of action or defence in law; or
    - (b) it is scandalous, frivolous or vexatious; or
    - (c) it may prejudice, embarrass or delay the fair trial of the action; or
    - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
  - (2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.



30. Striking out is only possible before the suit is concluded, that is, before judgment. The Court becomes *functus officio* and cannot reopen the suit to strike out a party after judgment. It is therefore too late for the 2<sup>nd</sup> Respondent to be struck off the suit. This prayer is accordingly dismissed.
31. On the alternative prayer to set aside judgment, the 2<sup>nd</sup> Respondent has stated that it was not served with pleadings, that it was not aware about the suit and that it has a good defence. The draft of that defence is not attached to the application to enable the court confirm if the applicant indeed has a good defence or any defence at all.
32. While considering an application for setting aside an *ex-parte* judgment in *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR, Odunga J (as he then was) expressed himself as follows:
- “That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt and that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah v Mbogo & Another* [1967] EA 116.”
33. This is the import of Order 10 rule 11 which provides:
- Order 10, rule 11.] Setting aside judgment.
11. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.
34. In the instant case the 2<sup>nd</sup> Respondent did not attach a draft defence in its application even though it claims that it has a good defence to the Claim herein.
35. Annastacia Mumbi who swore the affidavit in support of the 2<sup>nd</sup> Respondent’s application states at paragraph 7 of the affidavit that the 2<sup>nd</sup> Respondent learned about this suit when it was served by the 1<sup>st</sup> Respondent. She further deposes that she is aware that the Claimant used to work for the 1<sup>st</sup> Respondent who carries on business in the premises currently occupied by the 2<sup>nd</sup> Respondent.
36. In both the original Memorandum of Response/Defence and in the Amended Memorandum of Response/Defence, the 1<sup>st</sup> Respondent pleaded as follows:
5. The 1<sup>st</sup> respondent further avers that though Venus Inn and Mahindi Hotel are distinct establishment they were owned by the late Jackson Mahindi Gitonga (Deceased).
  6. The process of succession is ongoing and the claimant has failed to bring into this claim the administrator (s) of the said estate otherwise there is no legal entity known as Venus Inn capable of suing or being sued.
  7. The 1<sup>st</sup> respondent denies that the claimant’s services were terminated unlawfully on 7<sup>th</sup> July 2017 and or without giving her a valid reason as she alleges and put her to strict proof thereof.
37. It is these averments in the Memorandum of Response/Defence that caused the Claimant to amend the Statement of Claim to join the 2<sup>nd</sup> Respondent.
38. It is apparent from the foregoing that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have common directors and are therefore not strangers. If this position is correct it means that the 2<sup>nd</sup> Respondent through its directors



who are also directors of the 1<sup>st</sup> Respondent was aware of these proceedings from the time the 1<sup>st</sup> Respondent was served with summons to enter appearance.

39. The affidavits of service of the 2<sup>nd</sup> Respondent show that it was properly served with all pleadings and notices by the Claimant.
40. I accordingly find no merit in the application of the 2<sup>nd</sup> Respondent and dismiss it with costs to the Claimant/Decree Holder.

### **Application dated 29<sup>th</sup> may 2023**

41. The second application filed by the 1<sup>st</sup> Respondent, seeks temporary stay of execution, review of the court's judgment to have the payment of the decretal sum shared equally between the Respondents and lastly, for the court to allow the 1<sup>st</sup> Respondent to liquidate the amount apportioned to it in equal monthly installments of Kshs 10,000.
42. In her response to the said application, the Claimant avers that the 1<sup>st</sup> Respondent is a well-established business currently in operation with sufficient assets but is hell bent on denying her the enjoyment of the fruits of her judgment.
43. In the case of *Hildegard Ndalut v Lelkina Dairies Ltd & Anor.* [2005] eKLR, the Court observed as follows:

“Both parties have referred to the case of *Keshavji Jethabhai & Bothers Limited v Saleh Abdulla [1959] EA 260*, which is a case from a High Court of Tanganyika. That case followed the principles laid down in the Indian case of *Sawatram Ramprasad v Imperial Bank of India [1933] AIR Nag. 33* – that a defendant should be required to show his bona fides by arranging fair payment of the proportion of the debt – in persuading the court to allow payment by way of instalments. This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of instalments. A judgment creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment creditor might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount”.

44. As mentioned, judgment was delivered in this suit on the 9<sup>th</sup> May 2022. As at the time the instant application was filed, a period of over one year had lapsed. From the record, there is no indication that the 1<sup>st</sup> Respondent has made any efforts to pay the decretal sum since the court delivered its judgment.
45. Further, the 1<sup>st</sup> Respondent has not demonstrated that it has taken any action to file its appeal against the judgment and decree of this court beyond filing the Notice of Appeal and applying for certified copies of proceedings by letter dated 19<sup>th</sup> May 2022, almost a year to the date of filing the instant application on 25<sup>th</sup> April 2023.
46. Order 42, rule 6 of the [Civil Procedure Rules](#) which provides for stay in case of appeal sets out the conditions to be fulfilled by an applicant who seeks stay of execution pending judgment. The rule provides:

6.

- (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.

47. Rule 6(2) is couched in mandatory terms, that no order for stay of execution shall be made unless an applicant provides security for the due performance of the decree.
48. The 1<sup>st</sup> Respondent's prayer to pay by installments cannot be granted in an application for stay pending appeal as security under order 42 rule (6) cannot be deemed to be such if it is to be paid in installments over a period of more than 4 years as proposed by the 1<sup>st</sup> Respondent. The rules provide for the security to be deposited as a condition for the stay. Such security in my understanding cannot therefore be deferred.
49. In this case the 1<sup>st</sup> Respondent filed an application dated 22<sup>nd</sup> April 2023 for stay of execution pending appeal and I granted stay of execution conditional upon the deposit of the decretal sum in a joint interest earning account in the names of counsel for the parties. The 1<sup>st</sup> Respondent opted to withdraw the said application and file the instant application in which it is not clear whether or not it is still pursuing the appeal or has abandoned the appeal and intends to settle the decretal sum. The prayers do not refer to stay pending appeal while the grounds imply that it is still pursuing the appeal.
50. It would appear that the 1<sup>st</sup> Respondent only filed the application dated 22<sup>nd</sup> April 2023 to stall the execution process that had been commenced against it. Once that objective was achieved by the ex-parte interim orders, the Applicant proceeded to withdraw the said application and filed the instant application dated 29<sup>th</sup> May 2023 in which it did not seek interim stay orders, orders as set out above.
51. This is therefore in my view, one of the cases contemplated by the court in *Shah v Mbogo* when the court stated that the discretion of the court is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
52. I consequently find that the application by the 1<sup>st</sup> Respondent dated 22<sup>nd</sup> April 2023 has no merit and dismiss the same with costs to the Claimant/ decree holder.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON**

**THIS 29TH DAY OF FEBRUARY 2024**

**MAUREEN ONYANGO**

**JUDGE**

