



**Molonket v East African Portland Cement Co Ltd (Cause
198 of 2019) [2024] KEELRC 421 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 421 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 198 OF 2019
NZIOKI WA MAKAU, J
FEBRUARY 27, 2024**

BETWEEN

LUCY RIMANTO MOLONKET CLAIMANT

AND

THE EAST AFRICAN PORTLAND CEMENT CO LTD RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 19th December 2023 seeking to be heard for orders that this Honourable Court be pleased to vary the Order issued on 1st December 2023 to allow the Applicant deposit the decretal sum in a joint interest-earning account in equal monthly instalments of Kshs. 2 Million until the full amount is deposited. Further, that the Court be pleased to make any other orders as it deems fit in the circumstances and that the costs of this Application be provided for.
2. The Application was made on the grounds set out therein and supported by the sworn Affidavit of Ms. Roselyne Ominde. Ms. Ominde averred that by a Ruling delivered on 23rd November 2023 and the subsequent Order of 1st December 2023, this Court granted the Applicant stay of execution of the Judgment issued on 21st September 2023 on condition that the sum of Kshs. 15,165,782.00 is deposited in an interest-earning account in the joint names of the Advocates. She asserted that the Applicant has been experiencing cash flow/financial challenges over the years and is thus unable to deposit the entire decretal amount in lump sum. That in the last financial year alone, the Respondent/Applicant reported a loss of Kshs. 1.3 Billion. Ms. Ominde confirmed that having reviewed the Applicant's financial performance, it is ready to make the deposits in equal monthly instalments of Kshs. 2 Million starting December 2023 until the full amount is deposited. That no prejudice will be occasioned to the Claimant in the event this Application is allowed and that it is in the interest of justice that the orders sought are granted.



3. In response, the Claimant/Respondent swore a Replying Affidavit on 22nd January 2024 averring that she was not agreeable on the account proposed by the Applicant's Advocate on record because there was no prior consultation and agreement on the same. That given the Applicant's default in payment in a similar matter in which parties agreed on payment in instalments but the Applicant failed to honour the Agreement (see annexure LRM-1). She thus urged the Court to dismiss the Application as the same is in bad faith and is an abuse of the court process.

Respondent/Applicant's Submissions

4. The Applicant submitted that section 12(3)(vii) of the Employment and *Labour Relations Act*, 2011 grants this Honourable Court the discretionary power to issue any appropriate relief such as the order sought in the Application herein. That since the order sought is similar to an order for settlement of a decretal sum in instalments, analogous principles should consequently be applicable in this instance. That in this context, the Court in the case of *Freight Forwarders Ltd v Elsek & Elsek (K) Ltd* [2012] eKLR stated that for the court to allow the grant of an order to pay a decretal sum in instalments, the applicant must show "sufficient cause", which in the said case the Court noted was that: the applicant was unable to pay in lump sum; it could pay by reasonable monthly instalments; and the application had been made in utmost good faith. (Emphasis by Applicant)
5. It was the Applicant's submission that it had demonstrated by way of its Audited Accounts for the year ending June 2023 (annexure RO-2), that it has been experiencing cash flow/financial challenges and has accumulated significant losses over the years. That it was evident the financial constraints were making it unavoidably challenging for the Applicant to deposit the entire decretal sum in lump sum. That it had secondly informed the Court that it is able to pay reasonable monthly instalments and lastly, that the present Application had been made with sincerity and utmost good faith despite the Respondent not being agreeable to its proposal on instalment deposits. The Applicant urged this Court to exercise its discretion as under section 3A of the *Civil Procedure Act* and uphold substantive justice in exercise of judicial authority as buttressed by the provisions of Article 159(2) of *the Constitution* of Kenya.
6. The Applicant asserted that if the present Application is not allowed as prayed, the conditional stay shall lapse for failure to deposit the decretal sum and the Claimant/Respondent shall move to execute against it, thus occasioning substantial loss that cannot be compensated by an award for damages. Moreover, that the Applicant's Appeal shall also be rendered nugatory. The Applicant urged the Court to be guided by the holding in the case of *CFC Stanbic Bank Limited v John Kung'u Kiarie & Dyer & another* [2016] eKLR wherein the Court of Appeal stated that courts are required to exercise their discretion in a manner which ensures that an appeal, if successful, would not be rendered nugatory. According to the Applicant, the Claimant/Respondent will not suffer any prejudice if the orders sought are granted as the Applicant intends to deposit the decretal sum by way of instalments until the full amount is met before the intended Appeal is determined.

Claimant/Respondent's Submissions

7. The Claimant/Respondent submitted that the Applicant had not laid out any and/or reasonable basis for seeking the Order sought in the Application to warrant the Court to allow the same. That the Applicant had also not offered any security deposit up until now, an action that clearly indicates that the Application was made in bad faith and intended to circumvent the Court Orders. It was the Claimant's submission that the decretal sum cannot be deposited in any account without the consent of both parties and that the Court should be guided by ELRC Cause No. 484 of 2012 – *Karanga M'nchebere & Stephen Kamau v East African Portland Cement*. In this respect, the Claimant urged



the Court to decline the Respondent's Application to vary/set aside the Order issued on 1st December 2023 for being an abuse of the court process.

8. The Respondent has indicated vide its motion that it has a difficulty in making the decretal sum deposits in lump sum. It was urged that the Court permit the deposit vide the sum proposed till the decretal sum is fully deposited. Having had a look at the financial statements which demonstrate the nett cash flow position, it would be in the interest of justice to consider the motion in that light. Deposit of the sum is in certain circumstances capable of deposit by way of periodic instalments. In the case before me, an offer was made to deposit the sum of Kshs. 2 million a month from December 2023. The statements demonstrate that the Respondent earned Kshs. 425,757,000/- in investing activities and in 2023 was to earn Kshs. 1,992,209,000/-. This demonstrates the Respondent is not badly off as it suggests in the motion. The net increase in cash and cash equivalents in the period under consideration is Kshs. 40,592,000/- which is well above the sum it was intended to secure by way of deposit in an interest earning account. The full sum of Kshs. 15,165,782/- must be secured in the interest earning account within the next 7 days. Should the Respondent fail to make deposit as ordered herein, the stay granted to automatically lapse. The Respondent to meet the costs for this motion.

- 8 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

