



REPUBLIC OF KENYA



**Ogentoto v Mega Pack (K) Ltd (Cause 101 of 2017)  
[2024] KEELRC 310 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 310 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 101 OF 2017  
DN NDERITU, J  
FEBRUARY 22, 2024**

**BETWEEN**

**DOUGLAS OGENTOTO ..... CLAIMANT**

**AND**

**MEGA PACK (K) LTD ..... RESPONDENT**

**RULING**

**I. Introduction**

1. In a judgment delivered on 22<sup>nd</sup> September, 2022 this court found in favour of the claimant and made the following orders –
  - (a) A declaration be and is hereby issued that the dismissal of the Claimant by the Respondent was unfair, wrongful, and unlawful.
  - (b) The Claimant is awarded the following
    - (i) One (1) month’s salary in lieu of notice - - Kshs.14,250/=
    - (ii) Compensation for unlawful dismissal in the remainder of the fixed term contract - Kshs.14,250.00Total - Kshs.28,500.00
  - (c) Costs to the Claimant.
2. In a notice of motion dated 1<sup>st</sup> September, 2023 (the application) filed through Sheth & Wathigo Advocates the respondent is seeking the following –
  1. Spent
  2. Spent



3. That this Honourable Court be pleased to stay execution of the judgment delivered on 22.09.2022 and/or ruling delivered on 15.08.2023 herein pending hearing and determination of this Application inter-partes.
  4. That this Honourable Court be pleased to order stay of further execution of the Applicants' attached property and any form of advertisement, and/or sale of the Applicants' proclaimed property pending the outcome of the reference with respect to the challenged taxation of party and party costs.
  5. That costs of this Application be in the cause.
3. The application is expressed to be brought under sections 1A, 1B, and 3A of the Civil Procedure Act, Order 21 Rule 12(2), Order 22 Rule 22, Order 42 Rule 6(1), (2), and (3), Order 51 Rule 1 of the Civil Procedure Rules, Article 159(2)(a) & (d) of the Constitution of Kenya, and all other enabling provisions of the law.
  4. The application is based on the grounds on the face of it and supported with the affidavit of Kisilah Daniel Gor, Advocate, sworn on even date with several annexures thereto.
  5. The application is opposed and the claimant through Munene Chege & Co Advocates filed a replying affidavit sworn by himself on 19<sup>th</sup> September, 2023.
  6. With the leave of the court, the respondent filed a supplementary affidavit sworn by the same deponent mentioned above on 18<sup>th</sup> October, 2023.
  7. Interim orders for stay of execution pending the hearing and determination of the said application were issued on 21<sup>st</sup> September, 2023. On the same date, it was, by consent, agreed that the application be canvassed by way of written submissions. Miss Oteyo for the respondent/applicant filed her submissions on 19<sup>th</sup> September, 2023, while Miss Achieng' for the claimant filed on 1<sup>st</sup> November, 2023. Miss Oteyo filed supplementary submissions on 20<sup>th</sup> November, 2023, with the leave of court.

## II. Analysis & Determination

### A. Affidavits

8. Essentially, the applicant is seeking for stay of execution for costs awarded to the claimant in the sum of Kshs.335,730/= by the taxing master (M. Kyalo DR) in a ruling delivered on 15<sup>th</sup> August, 2023.
9. In the supporting affidavit it is deposed that the trial court delivered a judgment on 22<sup>nd</sup> September, 2023 wherein the claimant was awarded a total of Kshs.28,500/= plus costs and interest, besides the declaratory order as set out above.
10. The respondent was aggrieved with the taxation of costs at Kshs.335,730/= and decided to file a reference which is pending hearing and determination.
11. It is deposed that the respondent settled the decretal sum of Kshs.28,500/= in October, 2022 and so the execution by the claimant is only in regard to the taxed costs against which the respondent has appealed by way of a reference to a judge as provided for in the applicable law, rule 11(1) of the Advocates Remuneration Order.
12. It is deposed that at the time of filing the application auctioneers had proclaimed various vehicles belonging to the respondent as listed in the proclamation forms attached.



13. It is deposed that if the execution is allowed to proceed the reference shall be rendered nugatory. Further, it is deposed that the respondent is ready and willing to provide security and comply with such reasonable terms and or conditions that may be imposed by the court in due performance and settlement of the costs in case the reference ultimately fails. It is further deposed that the costs incurred by the auctioneer for the work already done in execution may be agreed or assessed in the usual way for settlement.
14. It is stated that the taxed costs are exorbitant and way beyond what the claimant had asked for and that the taxing master granted the said huge amount without any basis in fact or law.
15. It is stated that if stay is not granted the respondent shall suffer irreparably and that the application has been filed without inordinate or unreasonable delay.
16. In the replying affidavit, the respondent deposes that the application is devoid of merits and the court is urged to dismiss the same with costs.
17. It is deposed that the taxing master allegedly exercised her discretion properly and arrived at the right decision in assessing the costs as she did.
18. It is alleged that there has been inordinate delay in filing the application and that if the same is allowed the claimant will be prejudiced and denied the fruits of the judgment and the taxation.
19. The court is urged that if the application is allowed and execution stayed that the entire sum of the taxed costs be deposited as security.
20. In the supplementary affidavit it is deposed that the claimant has not demonstrated his ability to refund the monies if it is paid to him and the reference ultimately succeeds.
21. It is emphasized that the stay of execution is in regard to the taxed costs not the awarded sum in the judgment which the respondent settled way back in October, 2022. It is emphatically stated that there was no delay in filing the application.

**(B) Submissions by Counsel**

22. On the one hand, counsel for the respondent has asked the court to consider the merits of the application based on various aspects including - the law applicable, whether there has been inordinate delay, whether the filed reference is arguable and likely to succeed, substantial loss, security offered, prejudice to respondent if stay not granted, among other factors.
23. It is submitted that the applicable law is as cited and expressed in the application. It is submitted that the stay sought is in regard to the orders in the ruling of the taxing master delivered and issued on 15<sup>th</sup> August, 2023. It is stated that the reference was filed on 30<sup>th</sup> August, 2023, and the application for stay filed on 1<sup>st</sup> September, 2023, and as such there was no delay on the part of the respondent, let alone inordinate delay.
24. It is emphasized that the stay sought is not in regard to the judgment delivered by this court on 22<sup>nd</sup> September, 2022. It is stated that the decretal sum of Kshs.28,500/= was settled way back in October, 2022.
25. It is submitted that the filed reference is arguable with high probability of success and that if the stay is denied the reference shall be rendered nugatory or merely academic. It is stated that while the claimant sought a sum of Kshs.204,770/=, unexplained “gross” sum of Kshs.369,680/= was also sought, and



the taxing master wrongfully and unlawfully awarded a sum of Kshs.335,730/= without any factual or legal basis or foundation.

26. Further, it is submitted that the claimant instructed auctioneers to proclaim several of its vehicles and that if the execution is not stayed the respondent shall suffer paralysis and substantial loss as the attachment shall bring its operations to a halt. It is submitted that the claimant has not demonstrated his ability to refund the monies if the reference ultimately succeeds.
27. It is submitted that the respondent is ready and willing to offer and deposit security in due performance and settlement of fair and just costs in case the reference fails. It is also ready to comply with such other or further orders as the court may order or direct.
28. It is submitted that with security offered, no prejudice or loss may be occasioned to the claimant that may not be compensated by way of costs. In any event, it is submitted that reasonable charges for the auctioneer may be agreed or assessed in the usual manner.
29. On the other hand, and this is well captured in the supplementary submissions by counsel for the respondent, counsel for the claimant completely misapprehended and misunderstood the matter before the court. The matter (application) before the court is for stay of execution of the ruling and order on costs as taxed by the taxing master. It is not the reference that is the subject matter at this stage.
30. For the foregoing reason, the court takes the view and holds that the submissions by counsel for the claimant are not relevant to the application at hand and the same are of no use in that regard.

### III. Determination

31. There is only one issue for determination in this application – Should the respondent be granted the stay of execution sought and on what terms?
32. The primary and overriding objective and duty of this court is to do justice in accordance with Article 159 of the *Constitution*, Sections 1A and 1B of the *Civil Procedure Act*, and Section 3 of the *Employment and Labour Relations Court Act*, amongst many other provisions of the law.
33. Bearing the contents of the above paragraph in mind, the applicable law in this application is Order 42 Rule 6(2) of the *Civil Procedure Rules*. This law provides that for this court to grant the orders sought for stay of execution it must satisfy itself that – substantial loss may result to the applicant if the stay is not granted; the application has been brought without undue delay; and, such security as the court may order for due performance of the decree has been given by the applicant.
34. However, Order 42 Rule 6(6) of the *Civil Procedure Rules* invokes the discretion of this court in an application for stay of execution in the following terms – “Notwithstanding anything contained in sub-rule (1) of this rule the High Court (ELRC) shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”
35. In my considered view and opinion, the above provision allows this court to grant stay of execution in the interest of justice in line with the constitutional and statutory provisions cited above. This means that beyond the provisions in Order 42 Rule 6(2) of the *Civil Procedure Rules*, this court has discretionary powers when considering an application for stay of execution beyond the three conditions stated therein. This explains why courts have considered factors such as - whether the appeal (reference in this matter) raises triable issues; whether the appeal shall be rendered nugatory if stay is denied; whether the decree-holder has the ability to repay the money in case the appeal (reference)



ultimately succeeds; and, the wider interests of justice, depending on the facts and the circumstances of each application.

36. It's no brainer that the application herein was filed without undue delay. The ruling on taxation was delivered on 15<sup>th</sup> August, 2023, and the application for stay was promptly filed on 1<sup>st</sup> September, 2023, barely 14 days apart. In all fairness, that cannot be termed as inordinate or unreasonable delay.
37. The contested taxed sum of Kshs.335,730/= is not a small amount of money by all means. The claimant has not demonstrated his means of repaying the money in the event that the reference ultimately succeeds. This means that if the reference ultimately succeeds and the respondent cannot recover the money, the reference shall be merely academic and rendered nugatory.
38. The respondent is ready and willing to provide security and or comply with such terms on stay as the court may order. It has also conceded to settlement of reasonable auctioneer's charges for the work so far done in execution.
39. The court has studied the grounds upon which the reference is founded and without prejudging the outcome thereof, my view is that the reference is arguable.
40. In the entire circumstances of this application, considering the evidence availed, and the submissions made from both sides, it is in the interest of justice that an order for stay of execution be issued pending the hearing and determination of the reference on the terms stated hereunder.

#### **IV. Costs**

41. The respondent shall pay auctioneer's costs for work done and the same may be agreed upon or assessed in the usual manner.
42. The costs of this application shall abide with the costs in the reference.

#### **V. Orders**

43. For all the foregoing reasons, the notice of motion dated 1<sup>st</sup> September, 2023 by the respondent is allowed on the following terms -
  - a. Stay of execution be and is hereby granted pending the hearing and determination of the reference on the following terms and conditions.
  - b. The respondent shall deposit a sum of Kshs.100,000/= in court as security within 30 days of this ruling.
  - c. In default of (b) above the stay of execution shall automatically lapse.
  - d. The respondent shall pay reasonable auctioneer's charges for work done; the same may be agreed or assessed/taxed in the usual manner.
  - e. Costs of the application shall be in the reference.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024.**

.....

**DAVID NDERITU**

**JUDGE**

