



University of Nairobi v Kisiangani & another (Employment and Labour Relations Appeal 184 of 2023) [2024] KEELRC 189 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 189 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL 184 OF 2023**

K OCHARO, J

FEBRUARY 9, 2024

BETWEEN

UNIVERSITY OF NAIROBI APPELLANT

AND

EMMANUEL KISIANGANI 1ST RESPONDENT

MORAN AUCTIONEERS 2ND RESPONDENT

RULING

Background

1. The Appellant/Applicant filed a Notice of Motion application dated 31st October 2023 expressed to be under the provisions of Order 22 Rule 22 and Order 51[1], of the *Civil Procedure Rules 2010*, and Sections 1A, 1B, and 3A of the *Civil Procedure Act*, seeking the following orders: -
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to set aside the proclamation attachment and sale of the Applicant's property as outlined in the 2nd Respondent's proclamation dated 27th October 2023 until the hearing and determination of this appeal.
 - d. That this Honourable Court be pleased to enlarge time and grant the Applicant leave to file its appeal out of time.
 - e. That in the alternative, this Honourable Court do make such other orders as it may deem just and expedient pending the hearing and determination of this Application.
 - f. Spent.



- g. That the costs of this application be in the cause.
2. The application is supported by an affidavit of Fredrick Collins Omondi, the Applicant's Director, Legal and Corporate Board services, sworn on the 31st of October 2023.
3. The 1st Respondent opposed the Notice of Motion Application, through a Replying Affidavit sworn on 6th November 2023.
4. Following the directions of this Court issued on 8th November 2023 that the application be canvassed by way of written submissions, the Appellant/Applicant filed submissions dated 22nd November 2023 together with a List of Authorities dated the same day. On his part, the 1st Respondent filed submissions and a list of authorities both dated 9th December 2023.

Appellant/Applicant's Case

5. The Applicant states that following the judgment delivered on 6th March 2023, and the decree emanating therefrom. in Nairobi Commercial Court Case CMEL No. 1423 of 2019, the 1st Respondent has commenced the execution proceedings against the Applicant. The 1st Respondent has taken out warrants of attachment and had the Applicant's motor vehicle registration numbers KBY XXXX, KBJ XXXX, KBW XXXX, office desks, office chairs, computers, photocopying machines, metal cabinets, printers and TV sets all totalling KShs. 3,545,000/-, proclaimed.
6. The Applicant contends that the proclaimed goods are its tools of trade and, therefore exempted from attachment.
7. That aggrieved by the decision, the Applicant's Advocate erroneously moved to the High Court and filed a memorandum of appeal dated 11th May 2023 and an application for stay of execution dated 18th April 2023. Subsequently, the Court issued a conditional stay of execution pending appeal, directing inter alia that the Applicant deposits KShs. 200,000 as security.
8. On the 19th of September, 2023, it dawned on the Court that the appeal was filed in the wrong forum, prompting it to order the transfer of the same to this court, the Employment and Labour Relations Court, for hearing and determination of the same. The order of stay of execution that had been issued was extended for a period of 30 days.
9. The matter was eventually transferred to this court, but for a long time, no action could be taken on it as there were challenges in mapping the matter to their portal, until the 25th of October, 2023. It is only after that, that the Respondent managed to get a mention date.
10. The value of the goods proclaimed far exceeds the decretal sum which amounts to Kshs. 1,024,735/- as particularised in the proclamation notice dated 27th October 2023. Further, in the absence of the orders sought, there is imminent danger of its property being attached and auctioned off at any time by Public Auction at a gross undervalue, causing its business to suffer irreparable damages.
11. The Applicant contends that the application herein has been filed timeously.

The Respondent's Response

12. The 1st Respondent argues that the applicant's application does not raise any point of law on the case or the Judgment of the learned Magistrate for consideration by this Court. He insists that the Judgment was well reasoned.



13. He states that a proclamation is an inventory of assets and a precautionary measure meant to identify the Judgment Debtor's movable assets and to prevent them from disposing of those assets to frustrate the execution process. That proclamation does not necessarily equate to selling all the assets.
14. The 1st Respondent further contends that the commencement of the execution process does not automatically translate to a substantial loss on the Judgment debtor. This is upon the reason that execution of a decree is a legal process.
15. The 1st Respondent avers that the proclamation of the Applicant's property was procedural and lawful, the same coming after the High Court orders of stay of execution had been vacated for want of jurisdiction. In any event, the Applicant has admitted that they are willing to settle the decretal amount by stating that they are capable of settling the decretal amount.
16. It is asserted that the Applicant has not met the conditions for the grant of a stay of execution. They have no arguable appeal. Further, they have not demonstrated that they will suffer substantial loss if the orders sought are not granted.
17. That however, should this Court find it reasonable to allow the application, it should do so only on condition that the Applicant pays the 1st Respondent half of the decretal amount and deposits the other half in a joint interest-earning account in the joint names of the Advocates for the parties as security.
18. The 1st Respondent argues that a grant of the orders of stay sought will prejudice him immensely. His pursuit has been for payment for the service he rendered to the Applicant for eleven semesters. Pursuit which has taken a long time to fully come to fruition.

Analysis and determination

19. I have considered the Notice of Motion dated 31st October 2023, the Grounds thereof, the Supporting Affidavit sworn on 31st October 2023, the 1st Respondent's Replying Affidavit sworn on 6th November 2023, the respective submissions filed by each party and authorities relied on. The following issues emerge for determination: -
 - a. Whether this Court should enlarge the time for the Applicant to file an appeal out of time.
 - b. Whether the Appellant/Applicant should be granted Orders of stay of execution of the decree of the trial Court.

a) Whether this Court should enlarge the time for the Applicant to file an appeal out of time.

20. Through a memorandum of appeal dated 19th April 2023, but filed on 18th April 2023, the Applicant assailed the Judgment of the Learned trial Magistrate, Rawlings Liluma delivered on the 6th March 2023 in CMEL No. 1423. It is common cause that the memorandum of appeal was filed in the High Court, as Civil Appeal No. E 308 of 2023. Through an order given in the said appeal on the 19th of September 2023, Lady Justice Mulwa directed;
 - i. That this Appeal was filed in the High Court instead of the Employment and Labour Relations Court.
 - ii. That the Appeal be and is hereby transferred to the Employment and Labour Relations Court for further dealing.
 - iii. That the interlocutory stay orders are hereby vacated.



- iv. That an order of status quo is granted as the matter goes for processing before the Employment and Labour Relations Court.
 - v. That the status quo to last for 30 days only.
21. This Court notes that contemporaneously with the memorandum of appeal, the Applicant had filed a Notice of Motion Application dated 18th April 2023, wherein they sought;
- “ 1. Pending the hearing of this application inter partes and determination thereof, this Honourable Court be pleased to grant an Order of stay of execution of the Orders of the lower Court in Milimani CMEL No. 1423 of 2019, delivered on 6th March 2023.
 2. That pending the subsequent hearing and determination of the appeal, this Honourable Court be pleased to grant an Order of Stay of Execution of the Orders of the Lower Court in Milimani CMEL No. 1423 of 2019 delivered on 6th March 2023.
 3. That the costs of and incidental to this application in the intended appeal.”
22. No doubt, the appeal herein was initiated in the High Court. The Learned Judge of the High Court transferred the appeal to this Court for further processing, [in my view, hearing and determination]. She didn't give an order that in any manner rendered the being of the appeal against the decree of the trial court, and the application for stay of execution dated 18th April 2023, extinct. The appeal and the application are alive. The Applicant has not argued that the appeal was filed out of time, or that it ceased to exist for one reason or the other, to justify the application for enlargement of time. I find considerable difficulty in fathoming what informed the application for an extension of time.
23. As a result, I find the application for enlargement of time misplaced and unmerited. It is hereby declined.

b)Whether the Appellant/Applicant should be granted Orders of stay of execution of the decree of the trial court.

24. I have carefully considered the application before me, and it has not escaped my sight that there is no single prayer for a stay of execution pending appeal. All the prayers therein that relate to the stay of execution only speak to stay pending the hearing and determination of the application. Counsels for the parties have submitted on matters application for stay pending appeal, with no hesitation I hold that the submissions are not relevant to the application before me, in the circumstances.
25. Having stated as I have that the earlier application dated 18th April 2023 for a stay of execution pending appeal is still pending, I consider the filing of the instant application an abuse of the Court process.
26. In the upshot, I decline the prayers sought in relation to stay of execution.
27. By reason of the foregoing premises, the Applicant's application dated 31st October 2023, is dismissed with costs.

READ, DELIVERED AND SIGNED THIS 9TH DAY OF FEBRUARY, 2024.

OCHARO, KEBIRA.

JUDGE

In the presence of:



Ms. Selah for the Applicant

Mr. Muhoro for the 1st Respondent

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE

