



**Abubakar v Modern Coast Builders & Contractors Ltd (Miscellaneous Application E015 of 2022) [2024] KEELRC 291 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 291 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E015 OF 2022**

**AK NZEI, J  
FEBRUARY 8, 2024**

**BETWEEN**

**FIRDAUS ATHMAN ABUBAKAR ..... APPLICANT**

**AND**

**MODERN COAST BUILDERS & CONTRACTORS LTD ..... RESPONDENT**

**RULING**

1. On 17<sup>th</sup> November 2022, this Court delivered a Ruling and rendered itself as follows:-

“ 13. I allow the Notice of Motion dated 17<sup>th</sup> March 2022 in the following terms:-

- a. The award of the Director of Occupational Safety and Health Services made on 11<sup>th</sup> November 2019 is hereby adopted by this Court and accordingly, judgment is hereby entered for the claimant against the Respondent for ksh. 9,349,244 being the amount of compensation assessed by the Director of Occupational Safety and Health Services.
- b. The Applicant is also awarded costs of these proceedings and interest on the decreed sum at Court rates.
- c. Interest shall be calculated from the date of this Ruling until payment in full.”

2. The foregoing orders were made by this Court pursuant to the Applicant/Respondent’s Notice of Motion dated 17/3/2022, and after dismissal by the Court of the Respondent/Applicant’s Notice of Motion application dated 30/5/2022 seeking revocation of the aforesaid award of compensation made by the Director of Occupational Safety and Health Services. The Respondent/Applicant



(Modern Coast Builders and Contractors Limited) did not appeal against this Court's orders dated 17<sup>th</sup> November 2022.

3. On 29/11/2022, the Respondent/Applicant filed a Notice of Motion dated 22/11/2022 seeking the following orders:-
  - a. that the Court be pleased to review and/or vary its judgment rendered on 17/11/2022 by setting aside the said judgment and referring the matter back to the Director of Occupational Safety and Health Services for fresh consideration.
  - b. that in the alternative, the Court be pleased to set aside the judgment thereto and grant leave to the Applicant to file an appeal against the award of the Director of Occupational Safety and Health services dated 17/11/2019.
4. The forgoing application, which was opposed by the Applicant/Respondent herein, was considered by this Court and was dismissed vide the Court's Ruling delivered on 11/5/2023.
5. On 1/9/2023, the Respondent/Applicant filed a Notice of Motion dated 31/8/2023 seeking the following orders:-
  - a. that the application be certified urgent and (be) heard ex-parte in the first instance.
  - b. that execution of the order made on 17<sup>th</sup> November 2022 enforcing the award by the Director of Occupational safety and Health Services dated 11<sup>th</sup> November 2019, and all consequential decrees, orders and proclamation, attachment and execution process be stayed, suspended and/or lifted pending the hearing and determination of this application.
  - c. that execution of the order made on 17<sup>th</sup> November 2022 enforcing the award by the Director of Occupational Safety and Health Services dated the 11<sup>th</sup> November 2019 and all consequential decrees, orders and proclamation, attachment and execution process be stayed, suspended and/or lifted pending the hearing and determination of the Applicant's intended appeal at the Court of Appeal.
  - d. that costs and incidentals of this application be provided for.
6. The application is based on the affidavits of Christine Mfutu sworn on 31/8/2023 and 6/10/2023 respectively. It is stated in the said affidavits:-
  - a. that on 29/8/2023, Ndutumi Auctioneers, acting on instructions of the Claimant/Respondent, proclaimed the Respondent/Applicant's Motor vehicles and other assets.
  - b. that the proclaimed motor vehicles and other assets are the Applicant's tools of trade, and that the same are exempted by law from attachment. That the Applicant primarily deals in transportation of people, goods and services within East African region and beyond; and that the attached motor vehicles and assets are necessary for performance of the Respondent/Applicant's trade.
  - c. that the Applicant has preferred an appeal to the Court of Appeal against the order dated 11<sup>th</sup> May 2023 disallowing the Applicant's application dated 22/11/2022 seeking orders reviewing the order dated 17<sup>th</sup> November 2022 allowing enforcement of the award of the Director of Occupational Safety and Health Services dated the 11<sup>th</sup> November 2019.
  - d. that the Applicant filed a Notice of Appeal on 15<sup>th</sup> May 2023, and has requested for typed proceedings to be availed for purposes of the preferred appeal to the Court of Appeal.



- e. that the preferred appeal is likely to succeed, and if the assets are sold, the appeal will be rendered nugatory.
7. The application is opposed by the Applicant/Respondent vide his replying affidavit sworn on 5/9/2023. It is deponed in the said replying affidavit:-
- a. that the application is brought in bad faith as the Applicant has failed to disclose that they sought review of the judgment, and that they are seeking to appeal (against) the ruling dismissing the application for review; without appealing against the judgment itself.
  - b. that the judgment has not been appealed against, and remains to be executed.
  - c. that the application is based on Section 44(1) of the Civil Procedure Act, which is intended to protect, not corporate entities, but artisans whose livelihoods depend on their workmanship.
  - d. that the proceedings herein are enforcement proceedings, other issues having been determined by the Director of Occupational Safety and Health Services under the Work Injury Benefits Act (WIBA).
8. The application (dated 31/8/2023) was placed before the duty Judge under a certificate of urgency on 4/9/2023. The Court certified the application as urgent, directed that the same be served and fixed it for directions on 18/9/2023. On 6/9/2023, however, the Respondent filed yet another application, dated 5/9/2023, seeking the following orders:-
- a. that the application be certified urgent, and be heard ex-parte in the first instance.
  - b. that execution of the warrants of attachment dated 18/8/2023 issued to Ndutumi Auctioneers and proclamation notice issued thereto and dated 29<sup>th</sup> August 2023 be stayed, suspended and/or lifted pending hearing and determination of the application.
  - c. that warrants of attachment dated 18<sup>th</sup> August 2023 issued to Ms. Ndutumi Auctioneers and the proclamation of sale issued thereto be quashed and/or re-called, and the same be declared illegal, unprocedural and irregular.
  - d. that execution of the order made on the 17<sup>th</sup> November 2022 enforcing the award by the Director of Occupational Safety and Health Services dated the 11<sup>th</sup> November 2019 and all consequential decree, proclamation, attachment and execution process be stayed, suspended and/or lifted pending the hearing and determination of the Applicant's intended appeal at the Court of Appeal.
  - e. that costs and incidentals be provided for.
9. The application is based on the supporting affidavit of Christine Mfutu sworn on 5/9/2023, and which is similar in detail, to the said deponent's affidavit sworn on 31/8/2023 in support of the application of even date, and which is substantially reproduced in paragraph 6 of this Ruling.
10. The application (dated 5/9/2023) was placed before the duty Judge on 6/9/2023 under a certificate of urgency. The Judge ordered that the application be listed for directions on 18/9/23 together with the application dated 31/8/2023. On 18/9/2023, the duty Judge granted an interim stay of execution in terms of prayer (b) in the Notice of Motion dated 5/9/2023 and directed that parties do appear before me on 25/9/2023 for directions (on the two applications); which they did. The Applicant/Respondent filed an affidavit in response to the Notice of Motion dated 5/9/2023 (sworn by himself on 30/9/2023), while the Respondent/Applicant filed a further affidavit sworn by Christine Mfutu on



6/10/2023, in response to the Applicant/Respondent's replying affidavit. Both parties subsequently filed written submissions on the said two applications pursuant to the Court's directions in that regard.

11. The two applications, dated 31/8/2023 and 5/9/2023 respectively, are before me for determination. The Notice of Motion dated 5/9/2023 is substantially similar to the Notice of Motion dated 31/8/2023, and its purpose, in my view, was achieved on 18/9/2023 when an interim order of stay of execution was granted by the Court. The application dated 5/9/2023 has thus been substantially subsumed into the Notice of Motion dated 31/8/2023. I will proceed to determine the application, nevertheless.
12. Prayer nos. (a) and (b) in the application dated 31/8/2023 and prayer nos. (a) and (b) in the application dated 5/9/2023 are spend, and the only issue for determination at this stage are whether execution of the decree passed on 17/11/2022 vide this Court's Ruling delivered on 17/11/2023 can be stayed pending hearing and determination of the Applicant's intended appeal, and whether the warrants of attachment issued in execution of the decree are irregular. The two applications are brought under Sections 1A, 1B, 3A and 44(1) of the [Civil Procedure Act](#) and Order 22 Rule 51 of the Civil procedure Rules.
13. Section 13 of the [Employment and Labour Relations Court Act](#) provides that this Court's judgments, awards, orders or decrees shall be enforceable in accordance with the rules made under the [Civil Procedure Act](#). The Civil Procedure Rules are the Rules made under the [Civil Procedure Act](#). Order 42 Rule 6 of the Civil Procedure Rules provides for stay of execution of decrees and orders pending appeal. Rule 6(1) provides as follows:-
  - “(1) No appeal or second appeal shall operate as a stay of execution of 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 if preferred may apply to the appellate Court to have such order set aside.”
14. My understanding of the foregoing sub-rule is that for a stay of execution of a decree or order pending appeal to issue, the decree or order whose execution is sought to be stayed must have been appealed against. In other words, there must be a pending valid appeal against such decree or order.
15. Order 42 Rule 6(4) provides that for purposes of the Rule (Rule 6), an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court, a notice of appeal has been given.
16. As stated elsewhere in this Ruling, this Court's Ruling delivered on 17/11/2022, vide which judgment was entered against the Respondent/Applicant herein, was never appealed against. The only Notice of Appeal that was filed by the Respondent/Applicant herein, and which Christine Mfutu deposes (on behalf of the Respodnent/Applicant) was filed on 15/5/2023, was NOT in respect of the Ruling delivered/decree passed on 17/11/2022. It was in respect of the Ruling delivered on 11/5/2023.



17. Indeed, the Notice of Appeal dated 15/5/2023 and shown to have been filed in this Court's Registry on 18/5/2023 states as follows:-

“NOTICE OF APPEAL

TAKE NOTICE that the Respondent being dissatisfied with the Ruling of the Hon. Lady Justice Agnes M.K. Nzei delivered on the Respondent's application dated 22/11/2022 at the Employment and Labour Relations Court at Mombasa on 11<sup>th</sup> May 2023, intends to appeal to the Court of Appeal against the said Ruling...”

18. This Court's decree, issued pursuant to the judgment entered on 17/11/2022, is what the Applicant/Respondent is executing. The Respondent/Applicant has NOT appealed against the said decree and/or Ruling of 17/11/2022 vide which the decree was passed, and as such there cannot be a stay of execution of the decree pending appeal.
19. The Notice of Appeal dated 15/5/2023 and filed by the Respondent/Applicant on 18/5/2023 is in respect of this Court's Ruling delivered on 11/5/2023, vide which this Court dismissed the Respondent/Applicant's application seeking review of this Court's Ruling/orders dated 17/11/2022. The prayer for stay of execution of this Court's decree issued pursuant to the Ruling/orders dated 17/11/2022 pending appeal must, therefore, fail.
20. On the Respondent/Applicant's assertion that the proclaimed motor vehicles are the Respondent's tools of trade and that the same are protected against attachments under Section 44(1) of the *Civil Procedure Act*, it is to be noted that nothing was placed before this Court to show what kind of business the Respondent/Applicant engages in, and that the proclaimed motor vehicles/assets are the Respondent/Applicant's tools of trade. It is not enough for a judgment debtor to allege, or to even depone, that he engages in a particular business or that proclaimed/attached goods are his or her tools of trade. A judgment debtor must exhibit documents, like trade licences or business permits, to demonstrate the nature of their trade and/or business, and therefore the relevance of the proclaimed or attached properties to their trade, business or profession. The Respondent/Applicant has not demonstrated that the proclaimed motor vehicles/assets are assets or tools of its trade.
21. The Applicant/Respondent submitted that Section 44(1) (ii) of the *Civil Procedure Act* does not extend to companies/corporate bodies such as the Respondent/Applicant herein, but protects artisans whose livelihoods depend on their workmanship.
22. The Respondent/Applicant cited the case of *Invesco Assurance Co. Ltd -vs Kinyanjui Njuguna & Co. Advocates & Another* [2022] eKLR where the Court, (Odunga, J, as he then was) stated:
- “ 39. As rightly deposed by the Applicant in its supporting affidavit, it is a limited liability company duly registered under the *Companies Act* 2015, Cap 486 (now repealed) and licenced to carry on insurance business in the Republic of Kenya under the *Insurance Act*, Cap 487 Laws of Kenya. The 1<sup>st</sup> Respondent contends that under those circumstances, the Applicant cannot rely on Section 44(1) (ii) in order to successfully argue that the properties proclaimed were exempt from execution.



40. The said issue was the subject of the decision rendered by Bosire, J (as he then was), in *Blackwood Hodge [kenya] Ltd -vs- Cleaning Sam and Chase [K] Ltd* [1986] KLR 749, that:-

“The debt having been pending for a very long time, the conduct of the Applicant in failing to make any payment in settlement of it had been such as would not persuade the Court to come to its aid... Section 44 of the *Civil Procedure Act* is intended to protect, not corporate entities, but artisans whose livelihood depends on their workmanship. The Section reads “tools and implements of a person for the performance by him of his trade or profession.” “Person” as used in the subsection does not include a corporate body.

This Section did not protect the Applicant...

There was a high probability that if the attached property was released, it may be attached in satisfaction of the Applicant’s other debts.”

41. The said decision was cited with approval in the case of *Master Fabricators Limited -vs- Patrick Omondi Ndonga* [2014] eKLR”

23. I fully agree, and associate myself with the aforesaid decisions as Section 44(1) (ii) of the *Civil Procedure Act* is unambiguously clear that it refers to natural persons; individuals engaging in trade or professions whose performance require the use of the tools and implements. It is those tools and implements that Section 44(1) (ii) of the *Civil procedure Act* protects. This protection is not available to corporate entities, and is therefore not available to the Respondent/Applicant herein.
24. Regarding the Respondent/Applicant’s assertion that the warrants of attachment issued herein were unprocedurally issued and are irregular, as costs of the proceedings herein are yet to be assessed/taxed, I have noted from the Court’s record that on 18/11/2022, a Party and Party bill of costs was filed by the Applicant/Respondent and was subsequently served on the Respondent/Applicant and that on 8/8/2023, the Applicant/Respondent filed a notice of withdrawal, withdrawing the said Party and Party bill of costs. The said notice of withdrawal is worded as follows:-
- “Notice of Withdrawal of the Bill of Costs dated 18<sup>th</sup> November 2022
- Take Notice that the Applicant herein withdraws the Bill of Costs dated 18<sup>th</sup> November 2022, and shall no longer pursue that were (sic) awarded in this matter.
- The Applicant shall only pursue the decretal amount plus interest.”
25. It is clear from the foregoing notice that vide the notice, the Applicant/Respondent abandoned and renounced his right to have the costs awarded to him taxed and paid to him. He elected to do so, and cannot be faulted or vilified for so doing. Indeed, the decree being executed is shown to have been issued after the said withdrawal, and is not shown to include any amount in costs.
26. Under the foregoing circumstances, Section 94 of the *Civil Procedure Act* cannot be called in aid by the Respondent/Applicant. I find no illegality or irregularity in the warrants of attachment issued in this matter on 18/8/2023.



27. In view of all the foregoing, and having considered written submissions filed on behalf of both parties herein, I find no merit in the applications dated 31/8/2023 and 5/9/2023 respectively, and the same are hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8<sup>TH</sup> FEBRUARY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

**THIS RULING HAS BEEN DELIVERED VIA MICROSOFT TEAMS ONLINE PLATFORM. A SIGNED COPY WILL BE AVAILED TO EACH PARTY UPON PAYMENT OF THE APPLICABLE**

Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Applicant

.....Respondent

