



Likhutsa v Prime Steel Mills Limited (Employment and Labour Relations Cause 2050 of 2018) [2024] KEELRC 709 (KLR) (18 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 709 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2050 OF 2018
BOM MANANI, J
MARCH 18, 2024**

BETWEEN

MICHAEL MBUYA LIKHUTSA CLAIMANT

AND

PRIME STEEL MILLS LIMITED RESPONDENT

RULING

Background

1. By the court's decision that was rendered on 22nd June 2023, judgment was entered in the cause in favour of the Claimant. Dissatisfied with the decision, the Respondent/Applicant applied to the Court of Appeal for stay of execution pending the lodging of an appeal against it.
2. From the record, it is apparent that the parties recorded a consent before the Court of Appeal in which the Respondent's/Applicant's request for stay of execution of the court's decree was granted subject to the Respondent/Applicant furnishing the Claimant with a bank guarantee for the judgment sum within 14 days of the order. The aforesaid conditional order for stay of execution was entered on 20th November 2023.
3. If the information on record is anything to go by, the Respondent/Applicant was to have furnished the Claimant with the bank guarantee by 4th December 2023. Apparently, this did not happen.
4. Following the failure to comply with the condition for stay of execution as set out in the Court of Appeal order, the Claimant took out execution proceedings. This process triggered the filing of the instant application dated 26th February 2024.
5. Through the application, the Respondent's/Applicant's Advocates ask that they be granted permission to come on record. By the same application, the Respondent/Applicant beseeches this court to grant it stay of execution of the impugned judgment pending appeal to the Court of Appeal.



6. The Respondent's/Applicant's lawyers aver that they filed an application for stay of execution of the impugned judgment before the Court of Appeal vide Court of Appeal Civil Application No. E 367 of 2023 on the basis of which an order for stay of execution was granted subject to the Respondent/Applicant providing the Claimant with a bank guarantee for the amount in the decree within 14 days from the date of the order. However, the Court of Appeal order was only availed to the Respondent/Applicant on 19th January 2024, long after the 14 days had lapsed.
7. The Respondent's/Applicant's lawyers aver that although their client applied for the bank guarantee immediately after getting the Court of Appeal order, issuance of the guarantee was delayed by the bank. As such, their client was still awaiting endorsement of the guarantee at the time of filing the instant application.
8. In a subsequent affidavit dated 28th February 2024, the Respondent/Applicant avers that it subsequently obtained the bank guarantee from Diamond Trust Bank. A copy of the guarantee has been attached.
9. The Respondent/Applicant avers that its appeal raises triable issues. Therefore, the court should grant the orders sought to ensure that it (the appeal) is not rendered nugatory.
10. The application is opposed. The Claimant avers that the parties having moved to the Court of Appeal with an application for stay of execution, this court cannot entertain a similar application. It is functus officio. As such, the instant application is an abuse of the court process.
11. The Claimant avers that the Respondent/Applicant is in breach of the conditions upon which the Court of Appeal issued the order for stay of execution. As such, it cannot move this court to redress the breaches.

Analysis

12. The record shows that the Respondent/Applicant filed an application for stay of execution of this court's decree through Court of Appeal Civil Application No. E 367 of 2023. The record further shows that on the basis of a consent between the parties, the Court of Appeal issued an order for stay of execution of this court's decree on 20th November 2023 subject to the Respondent/Applicant furnishing the Claimant with a bank guarantee within 14 days of the order.
13. The Respondent/Applicant admits that the requirement for issuance of a bank guarantee was not met within the timelines that had been set by the Court of Appeal. It (the Respondent/Applicant) attributes the failure to comply with the requirement on the failure by the Court of Appeal to furnish it with a copy of the order in good time.
14. My understanding of the law is that once this court rendered its decision, the Respondent/Applicant was at liberty to apply to it for stay of execution of the decision in the first instance. Alternately, the Respondent/Applicant was free to approach the Court of Appeal directly with the application for stay of execution as it indeed did.
15. Once the Respondent/Applicant elected to move the Court of Appeal and once the Court of Appeal pronounced itself on the matter, the option of moving this court for similar orders was effectively lost. In effect, this court became functus officio in respect of such application.
16. If the Respondent/Applicant was unable to comply with the conditions that were set by the Court of Appeal for whatever reasons, the proper way to address the matter was to move that court to enlarge the time within which to issue the bank guarantee. There is no room in law to move the trial court for fresh orders of stay of execution.



17. What the Respondent/Applicant has attempted to do by filing the instant application is to invite this court to review the orders by the Court of Appeal. This is as unacceptable as it is strange.
18. As such, there is no doubt in my mind that the procedure that the Respondent/Applicant has adopted to address the challenges that it currently faces constitutes an abuse of the judicial process. It is so declared.

Determination

19. For the reasons alluded to above, I arrive at the conclusion that the instant application is an abuse of the court process.
20. The application is devoid of merit.
21. Accordingly, it is dismissed with costs to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 18TH DAY OF MARCH, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent/Applicant

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

