



Mbuthia t/a Musera Auctioneers v Kenya Chemical & Allied Workers Union; East African Portland Cement PLC (Respondent) (Employment and Labour Relations Cause 2119 of 2014) [2024] KEELRC 13539 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13539 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2119 OF 2014
MN NDUMA, J
DECEMBER 19, 2024**

BETWEEN

ROSEMARY W MBUTHIA T/A MUSERA AUCTIONEERS APPLICANT

AND

KENYA CHEMICAL & ALLIED WORKERS UNION CLAIMANT

AND

EAST AFRICAN PORTLAND CEMENT PLC RESPONDENT

RULING

1. The Respondent/Applicant filed a notice of motion application dated 5/9/2024 seeking the following orders:
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the intended appeal against the Ruling and Order/s of the honourable court, the Hon. D. O. Mbeja, D.R., issued on 4/09/2024, and which orders were to the effect, inter alia, that the 1st Respondent herein (Rosemary W. Mbuthia T/A Mbusera Auctioneers) is to have police assistance in the execution of the Decree of this honourable court issued on 6/07/2015 as read together with the order of 13/01/2020 (or any other decree or order for that matter) by way of attachment and sale of its assets (moveable or otherwise) and especially pursuant to those warrants of attachment and sale dated 15/03/2024 (or their extensions thereof), this honourable court be pleased to issue a stay of execution of said Ruling and Order/s.
 4. This honourable court be pleased to grant such further orders that are fair and just.



5. Costs of this application be provided for.
2. The application is premised on grounds 1 to 22 set out on the face of the notice of motion and buttressed in the supporting affidavit of Roseline Ominde, Acting Head of Legal at the applicant's company.
3. The nub of the grounds in support of the application is that the 1st Respondent, Rosemary Mbutia T/ A Messrs Mbusera Auctioneers an agent of the Claimant union herein, the Kenya Chemical & Allied Workers Union have illegally sought to execute against the applicant company. That the Auctioneers have proclaimed goods of the company and served the applicant company with the warrant of attachments and sale. That the statutory 7 days redemption notice has long expired.
4. That by an order of Hon. D. O. Mbeja Deputy Registrar, issued on 4/9/2024 the 1st Respondent was granted police assistance to effect the said execution.
5. That the imminent execution is illegal for the reasons, inter alia that the 1st Respondent has failed to comply with mandatory provisions of section 21 of the Government Proceedings Act Cap 40 Laws of Kenya which lays out the procedure for executing decreed orders as against instrumentalities or agencies of Government including state corporation as was set out by the Court of Appeal in the case of Five Star Agencies Limited versus National Land Commission & others [2024] KECA 439 KLR.
6. That the High Court in several decisions has held that the applicant company is a state corporation which decisions include:
 - i. Mark Ole Karbolo & 4 others versus Acting Minister Ministry of Industrialization and Another [2012] eKLR.
 - ii. Charles Kombe Charo versus East African Portland Cement Company Limited [2022] eKLR.
 - iii. Republic versus Inspector General Corporations & Another Ex-parte Titus K. Barmazai [2013] eKLR.
7. That the impugned order by Hon. Mbeja Deputy Registrar is riddled with errors in holding that the issue of police assistance had not been considered and determined by Hon. Lady Justice Anna Ngibuini Mwaure in a ruling of 12/7/2024.
8. Furthermore, the grievant had been granted similar orders by the Chief Magistrates Court at Kajiado in Kajiado Misc. case No. E045 OF 2024 – Ken Muigai Karago T/A First Choice Auctioneers versus East Africa Portland Cement Limited which orders had subsequently been stayed by the said Kajiado Court on 8/8/2024.
9. Others errors cited included that Hon. Mbeja ignored section 6 and 7 of the Civil Procedure Rules Cap 21 Laws of Kenya and by stating that the applicant had not filed a response to the said police assistance applicant and that no appeal had been filed against the ruling by Mwaure J.
10. That the Hon. Mbeja also failed to find that the warrants of attachment had long expired and could not be executed without extension.
11. That the applicant company has since appealed against the orders by Hon. Mbeja issued on 4/9/2024.
12. That if the application is not granted, the applicant stands to suffer irreparable harm upon the illegal sale of its assets. That the applicant company has since paid Kshs. 110,069,075.69 to the grievants and also entered into arrangement, with nearly one hundred (100) grievants, to settle the portion of the Decretal amount in kind by way of allocating them parcels of land.



13. That these genuine efforts by the applicant company to settle the matter shall be defeated by the illegal sale.
14. That the Respondents have also illegally and contrary to court decree inflated the decretal sum awarded in the sum of Kshs. 1,401,585,364.80 to a whopping and unimaginable figure of Kshs. 2,638,804,729.90.
15. That the Respondents seek to unjustly enrich themselves and sell the applicant company tools of trade contrary to section 44 of KPR.
16. That the attempted execution has been done in bad faith and it be set aside as prayed.
17. The Claimant Decree holder filed a notice of preliminary objection dated 16/9/2024 to the application dated 5/9/2024 which may be summarised as follows:
 - “ a. The Respondent judgment/debtor and the Claimant’s decree holder entered into a consent dated 13/1/2020 for the full payment of the 1.4 billion and in the said consent the parties agreed
18. That in default of the 1st Respondent not complying with clause 7 and 8 the claimant/applicant be at liberty to execute the balance.”
19. That the matters raised in the application are res judicata, as both the court and the Court of Appeal have addressed similar applications in E233 of 2023; East African Portland Cement Limited versus Kenya Chemical and Allied Workers Union and Civil Application No. 230 of 2018, East African Portland Cement Limited versus Kenya Chemical and Allied Workers Union.
20. That the matter is res judicata and the court is functus officio therefore. That section 21 of the [Government Proceedings Act](#) is not applicable to this matter.
21. That the applicant is in contempt of court by physically obstructing the lawful execution of this honourable court’s decree through its agents.
22. That this court has already held that it is functus officio in the matter of execution of the court’s decree issued herein because the court has previously issued orders of stay of execution with conditions which have not been complied with. That the Court of Appeal in an application for stay of execution arising from the decree herein in Civil Application Number 237 of 2018 EAPCC Ltd versus KCAWU issued a conditional stay of execution herein. The respondent/judgment debtor did not meet any of the conditions set out there in which included depositing in court in a joint account of Kshs. 350,000,000.00 with a suitable bank guarantee of a similar amount within 60 days from the date of the ruling on 14/9/2018.
23. That the execution must therefore proceed accordingly.
24. That before then, the court par O. N. Makau J. had similarly issued a stay of execution to the Respondent on condition that it deposits the entire decretal sum which then stood at Kshs. 1.4 billion. The said condition was also not adhered to culminating in the consent dated 13/9/2020.
25. The details of the determination of this matter by the court and the Court of Appeal are captured in paragraphs (C) and (D) of the submissions by the claimant/objector as follows:
26. The Respondent/judgment debtor filed a similar application in the Court of Appeal in in Court of Appeal Civil Application Number 233 of 2023; East African Portland Cement Company Limited



versus Kenya Chemical and Allied Workers Union which was dismissed with costs on 24th November, 2023. The Court of Appeal at page 5-7 stated: -

- “ 10. On 13th January 2020, the applicant entered into a consent order with the respondents for settlement of the decretal sum. The key parts of the consent order required the applicant to pay the respondents Kshs. 90 million on or before 31st January 2020. Thereafter the parties were to meet on 5th February 2020 and agree on modalities for payment of the balance of the decretal amount, which was to be settled from the sale of the two properties belonging to the applicant. If the said properties were not sold, the applicant undertook to make reasonable endeavours to secure funds to pay the balance of the decretal sum.
 11. By clause 9 of the consent, the parties agreed that should the applicant be in default, the respondents were at liberty to execute for the balance of the decretal sum. It is common ground that as regards the consent order, the applicant complied only with the payment of Kshs. 90 million.
 12. The principles that guide this court in an application for stay of execution and stay of proceedings are well known and are exhaustively discussed in Stanley Kang’ethe Kinyanjui versus Toney Ketter & 5 Others [2013] eKLR.
 13. Applying those principles in the application at hand, we are not satisfied that the applicant has presented a bona fide arguable appeal for the simple reason that the decree in question has already been upheld by this court when it dismissed the applicant’s appeal and that further the parties voluntarily agreed in their consent order dated 13 January 2020 that in the event of the applicant’s non-compliance with the consent order, execution was to issue. That consent order has neither been challenged nor set aside. Equally, the applicant does not claim to have satisfied the balance of the decretal amount. We agree with the respondents that the true purpose of this application is, therefore, to delay the matter and postpones the day of reckoning.”
27. At paragraph 15, Court of Appeal further stated that “The applicant has previously obtained orders from this court on terms, which it has not bothered to fulfil. It has also voluntarily entered into a consent order with the respondents, which again, it has not fulfilled. For those reasons, we are satisfied that the conduct of the applicant disentitled it to an equitable remedy.”
 28. This honourable court (Mwaure J.) as recently as on 12th July, 2024 dealt at length with the issue of functus officio and held as follows on page 4 of the ruling delivered on 12th July 2024 at paragraph 20. “As submitted by all the parties herein, the court is functus officio as illustrated in its ruling of 7/07/2023 in which the issue of execution was substantially determined that the applicant’s assets be attached to satisfy the decree. In particular, the court stated that judgment debt could be realized from whichever source and therefore not only from the sale of land in issue.”
 29. The honourable court (Mwaure J) in her previous ruling dated 7th July, 2023 at paragraph 23 stated: - “The court has endeavoured to handle all the applications filed since May 16, 2023 and firmly holds the execution proceedings should now proceed accordingly. At the same time all costs of all these applications should be in the cause.”



30. The foregoing will clearly demonstrate beyond any peradventure that this court has no jurisdiction to entertain another application for stay of execution. The honourable court has no jurisdiction to sit on appeal over its previous decisions. The order and ruling of Mwaure J. was made by a court of competent jurisdiction and dealt conclusively on the issue of stay of execution and allowed the execution to proceed by dismissing the Respondent's application which had sought of execution and injunction "from executing the decree of this honourable court issued on 6/07/2015 as read together with the order of 13/01/2020." The Court of Appeal differently constituted was quite clear that execution must proceed in the two rulings aforesaid that no stay of execution will be granted unless payment of the decretal sum is paid. The court should therefore as stated elsewhere must down its tools by striking out the Respondent/judgment debtor's application with costs.
31. The submissions by the claimant/Judgment debtor are buttressed by further comprehensive submissions by the 2nd respondent, Juliet Chepchumba Tuwot & 228 others supported also by Joseph Kariithi Mithika and 219 others and the 3rd respondent and Morris Muteti Kawinzi the 4th respondent.
32. They state that the matter of stay of execution was comprehensively concluded by this court and the Court of Appeal as set out in this ruling already and that the matter is res judicata and the court is functus officio except for the process of execution. That the multiple applications filed in this matter in an attempt to stay execution are misconceived and abuse of court process.
33. That the respondent/applicant refrain from introducing non-parties in this matter as judgment debtor by introducing 23 non-grievant in the list of judgment creditors. That these new persons are at liberty to pursue their own claims since they were not part of the original grievant in this matter.

DETERMINATION

34. This court has carefully considered the application dated 5/9/2023 as set out in the notice of motion, supporting affidavit by the judgment debtor/applicant vis-à-vis the notice of preliminary objection dated 17/9/2024 together with the submissions by the objectors and applicants and by all the claimants/respondents in this matter.
35. The court finds without equivocation that the matter of stay of execution with regard to this suit has been fully heard and determined by this court and the Court of Appeal in Civil Application E233 of 2023 East African Portland Cement Ltd Vs Chemical & Allied Workers Union and Civil Application No. 236 of 2018; East African Portland Cement Limited versus Kenya Chemical and Allied Workers Union.
36. The issues raised herein by the judgment debtor/applicant are res judicata and the court is functus officio. The court finds no justifiable reason to fault the orders by D. O. Mbeja, Deputy Registrar issued on 4/09/2024, to provide "police assistance" in executing lawful orders of this court and the Court of Appeal including consent order by the judgment debtor and the judgment creditors dated 13/1/2020 which remains in force having not been set aside by any court.
37. The court however notes that there ought not to be introduced new grievants after judgment in this matter who were not part of the initial proceedings for the purpose of execution of judgment in this matter without leave of the trial court and/or by consent of the parties. The judgement and decree of the court must be satisfied in terms of the consent dated 13/1/2020. Any arrangements agreed upon for payment in kind in satisfaction of the decretal amount to individual grievants must be sanctioned by the judgment debtor and the decree holder in terms of the consent. Execution process must be in terms of the law applicable without violating the rights of the judgment debtor and the judgment creditors. If found appropriate, the judgment debtor and decree holder including all grievants in the



initial proceedings to hold meetings to enable, faster and just resolution of impediments that may arise in the pending execution process which in the court's understanding is underway in various agreed modes.

38. Each party to bear their own costs of the suit

DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Nyambena for Claimant/Degree Holders

Mr. Mirii for 3rd Respondent

Mary for Juliet and 28 others

Mr. Muchiri for Respondent

Mr. Lesaignor for Enoch Abina & 30 others/Degree Holders

Mr. Lawson Ondieki for Garnishee - City Bank

Mr. Munene for Morris Muteti Kawinzi 4th Respondent

Court Assistant; Kemboi

