



REPUBLIC OF KENYA



**Mwangi v Family Bank Limited (Employment and Labour Relations Cause 331 of 2014) [2024] KEELRC 13509 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13509 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 331 OF 2014  
AN MWAURE, J  
DECEMBER 19, 2024**

**BETWEEN**

**FLORA NJOKI MWANGI ..... CLAIMANT**

**AND**

**FAMILY BANK LIMITED ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a Notice of Motion dated 29<sup>th</sup> July 2024 under Certificate of Urgency seeking the following orders that:
  1. Spent
  2. Pending the inter-parties hearing hereof this Honourable Court be pleased to grant stay of execution of the judgment dated 21<sup>st</sup> September 2023.
  3. Pending the hearing and determination of this application this Honourable Court be pleased to grant stay of execution of the judgment dated 21<sup>st</sup> September 2023
  4. The Honourable Court be pleased to issue appropriate directions as to whether the sum of Kshs.1,500,000.00 payable to the Claimant as a condition for stay pending appeal in terms of the court's ruling dated 4<sup>th</sup> July 2024 is subject to statutory deduction.
  5. Upon issuance of appropriate directions as per prayer 4 above, this Honourable court be pleased to extend time for compliance with the said directions and compliance with the court's ruling dated 4<sup>th</sup> July 2024.
2. The application is supported by the affidavit of Paul Murimi Kiongo, Advocate.



### **Respondent/Applicant's case**

3. The Advocate avers that in a ruling delivered on 4<sup>th</sup> July 2024, the court allowed the Respondent/Applicant's application for a stay of execution pending appeal, requiring them to pay the Claimant/Respondent Kshs.1,500,000.00 within 30 days and deposit Kshs.1,375,000.00 in a joint account.
4. The Advocate avers that on 23<sup>rd</sup> July 2024, the Respondent/Applicant complied with the court orders of 4<sup>th</sup> July 2024 by issuing and forwarding the 2 Bankers' cheques of Kshs.687,500.00 both totaling Kshs.1,375,000.00 depositing in a joint interest earning account and another 2 Bankers' cheques of Kshs.525,000.00 both totaling Kshs. 1,050,000.00 forwarded to the Claimant/Respondent's advocates.
5. The Advocate avers that the Respondent/Applicant forwarded the cheques to the Claimant/Respondent's advocates on 25<sup>th</sup> July 2024 and deducted Kshs.450,000.00 from the Kshs.1,500,000.00 payment as statutory deductions under section 49(2) of the *Employment Act*.
6. The Advocate avers that the Respondent/Applicant is seeking directions from this Honourable court on the issue of the statutory deduction from Kshs.1,500,000.00 which was a condition of stay to avoid allegations of non-compliance with the orders of 4<sup>th</sup> July 2024.
7. The Advocate avers that despite reaching out to the Claimant/Respondent's advocates who have not responded, the Respondent/Applicant fears the Claimant/Respondent may execute.
8. The Advocate avers that the Respondent/Applicant is prepared to comply with the court's ruling but seeks clarification on the said issue and requests an extension for compliance with both the court's directions and the 4<sup>th</sup> July 2024 ruling, as it is impractical to provide the directions within 30 days.

### **Claimant/Respondent's replying affidavit**

9. In opposition, the Claimant/Respondent filed a replying affidavit of Mwangi K.M FCI Arb. Advocate dated 15<sup>th</sup> October 2024.
10. The Advocate avers the application dated 29<sup>th</sup> July 2024 is an abuse of the court process which has been used as a delaying tactic to prevent the Claimant/Respondent from enjoying the fruits of her judgment.
11. The Advocate avers that the issue of stay of execution is res judicata which was raised in the application dated 2<sup>nd</sup> November 2023 and was conclusively determined by this Honourable Court in its ruling on 4<sup>th</sup> July 2024.
12. The Advocate avers that the Respondent/Applicant has already paid the sum of Kshs.1,500,000.00 as directed in the ruling dated 4<sup>th</sup> July 2024 leaving nothing for the court to determine or clarify.
13. The Advocate avers that the court becomes functus officio once it delivers a ruling, meaning it can only review its rulings in cases of apparent errors or new evidence that could not have been presented earlier.
14. The Advocate avers that misinterpretation of the law is a ground for appeal, not review, and the Respondent/Applicant has already lodged a Notice of Appeal against the judgment delivered on 21<sup>st</sup> September 2023.
15. The Advocate avers that the decree is for a money decree which is quantifiable and the Respondent/Applicant will not suffer irreparable loss or damage.



16. The Advocate avers that if the Court of Appeal determines that the amount is subject to statutory deduction, then it will be easily recovered from the amount deposited in the interest-earning account.
17. The Advocate avers that the Claimant/Respondent urges this Honourable Court to dismiss the application with costs.

**Claimant/Respondent's submissions.**

18. The Claimant/Respondent submitted that this Honourable Court (Justice David Nderitu) on 1<sup>st</sup> August 2024 ordered that Kshs.1,500,000/= to be deposited without any deductions as per the ruling of 4<sup>th</sup> July, 2024 which the Respondent/Applicant was to comply with.
19. The Claimant/Respondent submitted that the court clarified on 1<sup>st</sup> August 2024 that the payment should be made in full, without any deductions made.
20. The Claimant/Respondent submitted that the order issued by the court cannot be changed through this current application but through an appeal. The Claimant/Respondent also submitted if the court was to re-open this issue, it would be appealing against its decision and this court does not have jurisdiction to hear an appeal over its own decisions and to overturn its decisions.
21. The Claimant/Respondent submitted that the Respondent/Applicant already paid Kshs.1,500,000/= and the application herein was seeking to have statutory deductions of the amount before payment. However, since the payment has been made, this Honourable cannot determine it.
22. The Claimant/Respondent cited on Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides for review as follows: -
  - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling-
    - (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
    - (b) on account of some mistake or error apparent on the face of the record;
    - (c) if the judgment or ruling requires clarification; or
    - (d) for any other sufficient reason.
23. The Claimant/Respondent submitted that the order contained no error or mistake that needed clarification, so there was no need for review.
24. The Claimant/Respondent submitted that Section 49(2) of the *Employment Act* is a statutory provision that does not require court clarification and if the court failed to address statutory deductions, it is an error that only the Court of Appeal can rectify. The Applicant has filed a Notice of Appeal and is seeking a stay of execution pending the appeal.
25. The Claimant/Respondent submitted that the order of stay of execution is res judicata as this Honourable Court (Justice David Nderitu) already issued those orders on 4<sup>th</sup> July 2024 and the Respondent/Applicant was issued a conditional stay of execution. In *John Florence Maritime Services Limited & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR the Court of Appeal stated that the principle of res judicata aims to end litigation and protect



parties from repetitive suits over the same matter. It ensures efficient use of court resources, promotes judgment stability, and maintains confidence in the judicial system by avoiding inconsistent decisions and fostering predictability.

26. The Claimant/Respondent urges this Honourable Court to dismiss the application with costs.

27. The Respondent/Applicant did not file their submissions.

### **Determination**

28. The court considered the application, replying affidavit as well as the submissions, and precedents. The court is to determine if this application is merited.

29. In *Mbukua V Water Services Trust Fund* [2023] KEELRC 900 (KLR) the Respondent filed two applications: one to clarify whether the Kshs.2,129,000 paid during the proceedings can be deducted from the Judgment sum of Kshs.5,280,000 and if it is subject to statutory deductions; and the second to seek a stay of execution of the Judgment and to set aside the warrants of execution and proclamation dated 2<sup>nd</sup> March 2023. The court held that the sum of Kshs.2,129,000 was not deductible from the Judgment sum.

30. In this instant case, the court awarded Kshs.2,875,500 in the judgment delivered on 21<sup>st</sup> September 2023. The Respondent/Applicant filed an application for stay of execution pending appeal which was granted on 4<sup>th</sup> July 2024.

31. The court directed that the Respondent/Applicant pay Kshs.1,500,000 to the Claimant/Respondent and Kshs. 1,375,500 to be deposited in the joint interest earning account. From the ruling, it is clear that the sum of Kshs.1,500,000 was to be paid and it was not to be subjected to statutory deduction.

32. In view of the foregoing, Kshs.1,500,000 was not to be subjected to statutory deduction and in any event the same was already settled in full. The court made an order further on 1<sup>st</sup> August 2024 and clarified the Kshs.1,500,000/= should be paid to the Claimant without any deductions at this juncture. That then is settled.

33. On the issue of whether stay of execution was res judicata, Section 7 of the [Civil Procedure Act](#) provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

34. In *John Florence Maritime Services Limited & Conken Cargo Forwarders Limited V Cabinet Secretary for Transport and Infrastructure, Attorney General, Kenya Maritime Authority & Office De Gestion Du Freight Maritime (OGEFREM)* [2015] KECA 472 (KLR) the Court of Appeal addressing the issue of res judicata said as follows:

“The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion



is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

35. In *Kiogora v Imetha Water & Sanitation Co Ltd & another* [2023] KEELRC 2864 (KLR) the court held that the application is res judicata on the issue of stay of execution and also payment by instalments.
36. In this instant case, the court already issued stay of execution orders on 4<sup>th</sup> July 2024 and it did not make logic to grant another stay of execution and since there is an appeal in the court of appeal the same should be pursued.
37. In view of the foregoing, the prayer for stay of execution in this application is found to be res judicata and the applicant should pursue the appeal if still persuaded so to do.
38. The court finds the application is therefore unmerited and directs that the Respondent/Applicant to pay Kshs.450,000/= which is part of the stay of execution orders within 14 days from the date of this ruling in order to comply with the stay orders issued on 4<sup>th</sup> July 2024.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAKURU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**

