



**Kitale v Statpack Industries Ltd (Miscellaneous Case E155 of 2022)
[2023] KEELRC 671 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 671 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E155 OF 2022**

**JK GAKERI, J
MARCH 21, 2023**

BETWEEN

CHRISTINE KATUNGE KITALE CLAIMANT

AND

STATPACK INDUSTRIES LTD RESPONDENT

RULING

1. Before the court for determination is a notice of motion dated September 28, 2022 by the applicant/respondent seeking orders That:-
 1. Spent.
 2. Spent.
 3. The court grants leave to the applicant/respondent to reconstruct the file in ELRCC No. 879 of 2017 between the parties herein as the same is said to be lost and/or missing.
 4. The court subsequent to reconstruction of the file be pleased to give further orders in the matter herein.
 5. The applicant be at liberty to apply for further orders and/or directions as the court may deem just to grant.
 6. The costs of this application be provided for.
2. The notice of motion filed under certificate of urgency is expressed under section 16 of the *Employment and Labour Relations Court Act*, Rules 33 and 38 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling provisions of law and is based on the grounds set forth on its face and the Supporting Affidavit of Joseph Kinyanjui sworn on 28th September, 2022.
3. The affiant deposes that he is the Administration and Finance Manager of the applicant.



4. He states that in November 2020, Hon. Justice Wasilwa directed that the matter herein be listed for hearing within 90 days and the applicant's counsel attempts to secure a hearing date within 90 days were unsuccessful as the Registry indicated that the file was not available and letters to the Registry were unresponded to.
5. That during a visit by the Applicant's counsel at the Registry for a mention date, counsel was notified that the file was missing or unavailable.
6. The affiant further states that even as at the date of filing the instant application, the Applicant has been unable to access the file for perusal yet the decree leading to the warrants of execution were issued on the basis of the file.
7. That the Respondent had appointed auctioneers who had visited the Applicant's premises for proclamation in satisfaction of the decree.
8. That the Applicant is prejudiced by its inability to take action in the matter due to the missing file and the same has occasioned injustice to the Applicant and stood to suffer immensely if execution proceeded as it would ground its operations.
9. The affiant states that the Applicant was willing to depositing a reasonable sum in court should the court be inclined as the file was being reconstructed and if stay of execution is granted.
10. That the Application ought to be granted in the interests of equity, fairness and justice.

Respondent's response

11. In its Replying Affidavit by Davies Mulani sworn on October 6, 2022, the affiant states that the application herein is misconceived and an abuse of the court process as the orders sought have already been overtaken by events.
12. That the Respondent sued the Respondent via a Memorandum of Claim filed on May 11, 2017 Cause No. 879 of 2017 and despite service on the Applicant, it failed and/or neglected to file a response and the suit proceeded to hearing and judgement delivered on 21st May, 2020.
13. That the Respondent served Notice of Entry of Judgement dated June 17, 2020 upon the Applicant who in response filed the Application dated June 23, 2020 and July 19, 2020 and the former was allowed on 28th July, 2020 and the subsequent one on 11th November, 2020.
14. The affiant states that while the applicant paid throw away costs of Kshs.50,000/= as directed by the court, it failed to set the matter down for hearing within 90 days and the Respondent filed its Bill of Costs dated 11th March 2021 and the same was taxed with the Applicant's participation and the draft decree was served upon the Applicant on June 25, 2021 and the court issued the same on 10th December, 2021 and the Respondent commenced execution by applying for warrants to no avail.
15. That the Respondent filed an application dated June 27, 2022 ELRCC MISC No. E127 of 2022 seeking reconstruction of the file and the order was granted on August 24, 2022.
16. Consequently, the instant application has been overtaken by events and the court is functus officio as the order for reconstruction was issued which explains the execution process.
17. That the Applicant was misleading the court as the letters produced were written in 2022 long after the 90 days given by the court and the Taxing Master delivered a ruling on June 25, 2021.



18. That the Applicant was dishonest as its counsel was fully aware of the proceedings, participated in the taxation proceedings after he failed to have the matter listed for hearing and there was a judgment for record.
19. That the Applicant is estopped by the principle of laches as Judgement was entered on May 21, 2020 and has neither been varied nor set aside and the instant application lacked merit and had been overtaken by events as the file in Cause No. 879 of 2017 had already been reconstructed pursuant to orders made on 24th August, 2022.
20. The affiant prays that the temporary orders issued on September 30, 2022 be discharged.
21. That the application is aimed at depriving the Respondent the fruits of her judgement and should be dismissed with costs.
22. In its further Affidavit by Joseph Kinyanjui dated December 5, 2022, the affiant deposes that the Applicant's counsel had as early as February 2021 intimated to the Respondent's counsel that he was experiencing challenges with securing a hearing date and the Respondent was aware of the challenges.
23. That the Applicant protested to the Deputy Registrar that the taxation of costs was premature as attempts to have the matter listed for hearing were on-going.
24. The affiant states that it was curious that the Respondent filed her application to tax costs yet the Applicant could not take steps in furtherance of its case.
25. That it was common knowledge that the file in Cause No. 879 of 2017 was missing and the Respondent applied for its construction without notifying the Applicant's counsel.
26. That it was only fair that a stay of execution be granted.

Applicant's submissions

27. On December 7, 2022 during the hearing of the Application herein, Mr. Jude Onyango holding brief for Mr. Wachira informed the court that Mr. Wachira had been unwell and had not filed a further reply and promised to do so by close of business. Counsel proposed that the Application be disposed of by way of written submissions.
28. Counsel for the Respondent Mr. Onyancha wondered what Reply being referred to was as the Applicant had already filed a Further Affidavit dated 5th December, 2022 and the file had been reconstructed and the application had abated.
29. The court directed that the Application be disposed of by way of written submissions of 2 pages within 14 days a piece with a mention on February 1, 2023 to confirm compliance on which date the Applicant's counsel was absent and only the Respondent's counsel had filed and served submissions. Ruling was reserved for March 21, 2023.
30. By March 8, 2023 when the court retired to prepare this ruling, the Applicant's counsel had not filed submissions.

Respondent's submissions

31. The Respondent's counsel addressed two issues, namely; functus officio and stay of execution.
32. As regards the principle of functus officio, counsel urged that the court was factus officio as the Applicant did not participate in the proceedings in Cause No. 879 of 2017 and judgment was entered



- for the Respondent on May 21, 2020 and the judgment was subsequently set aside pursuant to the Applicant's application but subject to two (2) conditions.
33. That thereafter, taxation of costs took place and a decree was issued by the court on December 10, 2021 but execution was not possible as the file could not be found or had been misplaced leading to the Application dated June 27, 2022 for reconstruction of the file and the order was granted on August 24, 2022 and the Deputy Registrar confirmed the pleadings as submitted by the Respondent and issued warrants of attachment for execution.
 34. Counsel submitted that as matters stood, the court was functus officio as the order for reconstruction has already been made and acted upon and had neither been varied nor set aside.
 35. Counsel maintained that the court was functus officio as the instant application did not raise any new issue as the order of reconstruction was issued by Rika J. and was a final order.
 36. Reliance was made on the decisions in *ICEA Lion General Insurance Company Limited V Julius Nyaga Chomba* (2020) as well as *Jersey Evening Post Ltd V Al Thani* (2002) JRL 542 at 550 to reinforce the submission.
 37. On whether the court can issue stay orders as sought, counsel submitted that the Applicant wanted the court to perform an oversight role over proceedings in the original claim which was unpermissible and there were no orders stopping the execution process in the original claim and the *Civil Procedure Rules*, 2010 were applicable in execution of orders and decrees.
 38. Counsel submitted that order 22 rule 22 (1) prohibited the court from issuing stay orders of execution without the Applicant first applying in the original claim and the Applicant did not do so.
 39. Reliance was made on the decision in *Eynice Grace Njambi Kamu & another V Kenya National Highways Authority & 30 others* (2022) eKLR cited with approval in *John Muthee Ngunjiri & 4 others V Attorney General & 3 others; Kenya Power & Lighting Co. Ltd & another (Interested parties)* (2021) eKLR to urge that stay orders as sought by the Applicant could not issue.
 40. The court was urged to dismiss the application with costs.

Determination

41. The issue for determination is whether the orders sought by the Applicant herein are merited.
42. As regards the stay of execution of the decree, the Applicant sought a stay specifically pending the hearing of this application and when the matter came up ex parte on September 30, 2022, the court granted the stay of execution pending the hearing and determination of the application.
43. Instructively, the Applicant did not seek a stay of execution pending any other action such as appeal or review or indeed any other action it intended to take or had taken.
44. The stay was sought specifically during the pendency of the application exclusively and the court having granted the same on September 30, 2022 till the date of this ruling, the Applicant's wish was indeed fulfilled in its entirety and there is not further order for the court to make on that front.
45. In the interest of justice, however, the court will analyse the Applicant's case in light of the relevant law to determine whether further orders could have been issued if the Applicant so desired.
46. As correctly submitted by counsel for the Respondent, rule 32 (2) of the *Employment and Labour Relations Court Rules*, 2016 provides that Rules on execution of an order or decree shall be enforceable in accordance with *Civil Procedure Rules*, 2010.



47. Order 42 rule 6 (2) of the *Civil Procedure Rules*, 2010 as explained in legions of decisions is to the effect that the court must be satisfied that;
- i. Substantial loss may result to the Applicant if the order is not granted.
 - ii. The application has been made without unreasonable delay and such security as the court orders for the due performance of the decree or order has been given by the applicant.
48. Rule 6(2) is couched in mandatory terms and operationalizes rules 6(1) of the *Civil Procedure Rules*, 2010.
49. As evident and as applied by courts in innumerable decisions, order 42 rule 6 of the *Civil Procedure Rules* relates to stay of execution pending appeal.
50. It is trite that the law on the exercise of the courts discretion under order 42 rule 6(2) of the *Civil Procedure Rules*, 2010 is well settled.
51. In *Andrew Okoko V John Waweru Ngatia & another* (2018) eKLR, the court held as follows;
- “The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. The yardstick is for the court to balance and weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to the fruits of his judgement.”
52. Similar sentiments were expressed in *Charles Irungu V Elizabeth Kalunda Wakano* (2021) eKLR.
53. The court is guided accordingly.
54. As regards substantial loss, the applicant states that it stands to suffer immensely should execution proceed. It has not particularised the immense suffering that could arise and has neither indicated what it intends to do if the stay of execution is granted.
55. Relatedly, although the applicant further states that the Respondent had attached its tools of trade, the annexure styled JK2 was not attached.
56. Finally, the Applicant states that its equipment and machinery had been pledged as collateral to creditors through various debentures.
57. As regards the timing of the application, it is common ground that the trial court rendered its judgement in the Respondent’s favour on May 21, 2020 and the Applicant was notified of the entry of judgement via a notice dated June 11, 2020.
58. Strangely, the Applicant/Respondent neither entered appearance nor file a response.
59. The judgement was however set aside pursuant to the applicant’s application dated July 29, 2020.
60. It is also common ground that the applicant was unable to fulfil one of the conditions prescribed by the court within 90 days and as a consequence the judgement dated May 21, 2020 was thereby reinstated in mid-February 2021.



61. The Applicant provided copies of letters dated December 8, 2020 and February 8, 2020 seeking a hearing date. It is unclear whether the applicant attached a copy of the court's ruling to urge the urgency of the matter.
62. Evidently, no action was taken between 11th November to 8th December, 2020 and until 8th February, 2021. Only two letters were sent to the Deputy Registrar within the 90 days and not a single email was filed yet it was the more effective mode of communication at the time.
63. The other letters were dispatched after the 90 days had lapsed.
64. Puzzlingly, the applicant's counsel continued writing letters even as late as 7th June, 2021 instead of lodging an application for a review of the court's directions or file an appeal as it pursued a hearing date.
65. In the meantime, the Respondent filed his party and party Bill of Costs dated 11th March, 2021 and a ruling delivered on 25th June, 2021.
66. The Applicant's counsel participated in the Taxation of the Bill of Costs but contended that he protested it was premature.
67. Records also reveal that the Respondent forwarded the Draft Decree to the Respondent's counsel on 25th June, 2021 and the Decree was issued on 10th December, 2021.
68. Similarly, the Respondent's counsel applied for warrants in February 2022 by which time the file had been misplaced a fact both counsels are in agreement with from as early as March 2021.
69. It is however unclear as to how the Respondent's counsel filed and prosecuted the Bill of Costs during the unavailability of the file.
70. Intriguingly, it is the Respondent's counsel who sought the reconstruction of the file by an application dated 27th June, 2022 and the order was given on 24th August, 2022 and the file was reconstructed.
71. The applicant counsel's application for reconstruction is the instant application.
72. On 13th October, 2022, when the application came up for hearing, counsel for the Respondent informed the court that Rika J. had already ordered reconstruction of file in Cause No. 879 of 2017 and the instant application had been overtaken by events.
73. As regards security, the Applicant states that it was willing and open to depositing a reasonable sum in court should the court be so inclined as the file was being reconstructed if the stay of execution was granted. Apart from the fact that the Applicant has not sought a stay of execution beyond the determination of the instant application, the court is not persuaded that the Applicant has made a sustainable case for a grant of stay of execution.
74. The foregoing chronology of events and actions taken by the parties reveal that the Applicant's counsel could have applied for reconstruction of the file and stay of execution of order or decree from as early as December 2021 when the Respondent's counsel obtained the decree bearing in mind that the Respondent's counsel had had the party and party Bill of Costs taxed on 25th June, 2021.
75. In the upshot, it is the finding of the court that the Applicant's application for stay of execution was not timeous. Put in the alternative, there was unexplained delay since the file had been missing since March 2021 and the Applicant's counsel did not make the application for reconstruction of the file or stay of execution which was impending.



76. Finally, as regards reconstruction of the file, the Respondent submitted that the issue had been overtaken by events and the file had been reconstructed in accordance with the directions of Rika J. on 24th August, 2022.
77. It is common ground that the reconstruction order related to ELRCC No. 879 of 2017 and the applicant herein is seeking the reconstruction of the same file. According to the Respondent’s counsel, the court is functus officio.
78. As regards the doctrine of functus officio in *Telkom Kenya Limited V John Ochanda* (2014) eKLR, the Court of Appeal held as follows;
- “Functus officio an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in *Re St. Nazarre Co* (1979) 12 ch 1288. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate jurisdiction. The rule applied only after the formal judgement had been drawn up, issued and entered and was subject to two exceptions . . .”
- “What it does bar is a merit based decision to re-engagement with the case once final judgment has been entered and a decree thereon issued.”
79. The Supreme Court of Kenya expressed similar sentiments *Raila Odinga & 2 others V IEBC and 3 others* (2013) eKLR, citing from Daniel Malan Pretorius in “The origins of Functus Officio Doctrine with special Reference to its application on Administrative Law” as follows;
- “The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers, may as a general rule, exercise those powers only once in relation to same matter . . . The principle is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the matter.”
80. Similar sentiments were also expressed in *Jersey Evenings Post V Al-Thani* (Supra) cited by the Respondent’s counsel.
81. Applying the foregoing principle to the facts of the instant suit, the court is satisfied that it is functus officio as regards the reconstruction of the file for ELRCC No. 879 of 2017.
82. Finally, as regards the making of further orders after reconstruction of the file, the Applicant made no specific request having been aware that the court had already directed that the file be reconstructed. It was its application and was at liberty to catalogue the orders or directions it deemed necessary in prosecuting its case after reconstruction of the file and justify entitlement to the orders and/or directions. In the absence of specificity the court’s hands are tied.
83. In the upshot, the court is satisfied that the Notice of Motion dated September 28, 2022 is unmerited and is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF MARCH 2023

DR. JACOB GAKERI

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 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 *Civil 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.

DR. JACOB GAKERI

JUDGE

