



**Muia v Mzoori Limited (Cause 2250 of 2015)
[2023] KEELRC 1020 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1020 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2250 OF 2015
NJ ABUODHA, J
APRIL 28, 2023**

BETWEEN

VIVIAN MUIA CLAIMANT

AND

MZOORI LIMITED RESPONDENT

RULING

1. The applicant herein by a motion dated February 7, 2023 moved the court for orders among others that pending the hearing and determination of the applicant's intended appeal, the court grant a stay of execution of the ruling of Hon Lady Justice Mbaru delivered on January 26, 2023 and the decree issued therefrom.
2. The application was brought on the grounds among others that:
 - i. That on the January 26, 2023, the Honorable Lady Justice Monica Mbaru gave a ruling against the applicant herein in.
 - ii. That Alvin Mogaka, be held personally liable to satisfy the decretal sums herein.
 - iii. As a result of the delivery of the said ruling, the claimant/respondent herein has initiated measures to recover the decretal sum against the applicant including committal to civil jail of Mr Alvin Mogaka.
 - iv. The applicant being aggrieved by the determination of the honourable court and the consequential orders thereto, is appealing against the ruling in its entirety and has filed a notice of appeal dated February 3, 2023.
 - v. The applicant's appeal raises triable issues with high chances to success and failure to stay the execution proceedings herein, the appeal stands to be rendered nugatory.



- vi. The applicant and its employee, Mr Alvin Mogaka, stand to suffer irreparable harm, including loss of personal liberty, and prejudice if the stay of execution is not granted.
 - vii. The respondent is an individual and her ability to refund the decretal amount is unknown and his assets are unknown.
 - viii. The claimant/respondent will not be prejudiced if the application for stay is granted.
3. The application was further supported by the affidavit of one Alvin Mogaka Mwencha who stated in the main that:
- i. I am a male adult of sound mind, and as the chief executive officer of the respondent/applicant, well conversant and familiar with the facts giving rise to this suit and the affidavit herein.
 - ii. I have access to all the information and records relating to the matter in question herein and the respondent/applicant's authority to swear this affidavit on its behalf.
 - iii. This honorable court entered judgment against the respondent/applicant on the April 15, 2020.
 - iv. Via a notice of motion elated August 25, 2021, the claimant/respondent made an application to this honorable court seeking the following orders:
 - a. Summons do issue compelling one Alvin Mogaka Onkundi Mwencha aka Alvin Mogaka, the known chief executive officer and shareholder of the judgment debtor company to attend court on such date as may be ordered or allocated, to be orally examined as to the judgment debtor's means and assets.
 - b. The said Alvin Mogaka be ordered to produce judgment debtor's books, papers, documents and/or documentary evidence showing the affairs of the company.
 - v. The court made a ruling on the June 6, 2022 and an order ensued therefrom that I should attend court to be orally examined on oath as to the respondent/applicant's means and assets and that I should further produce the respondent/applicant's books, papers, documents and/or documentary evidence showing the affairs of the respondent/applicant.
 - vi. I furnished this court via my sworn affidavit of February 3, 2022 with the following documentary evidence showing the affairs of the respondent prior to this court issuing the order as to the production of the said documents on June 6, 2022:
 - a. A letter to city county dated February 9, 2016.
 - b. The respondent/applicant's pin certificate indicating its dormancy.
 - c. Respondent/applicant's last audited financial statements audited; and
 - d. A letter from Wamutu and Associates dated May 26, 2015
 - vii. In obedience to the court order, I attended court on December 1, 2022 to be orally examined as to the means of the respondent and the documents I had furnished to this honorable court.
 - viii. The court ruled on the January 26, 2023 that 1 should be held personally liable to satisfy the decretal sums herein.



- ix. Being dissatisfied with the ruling of the court delivered on January 26, 2023, the respondent/applicants have instructed the firm of Steve Justice Advocates LLP to appeal against the whole of the ruling.
 - x. Steve Justice Advocates LLP lodged a notice of appeal before this court on the February 3, 2023 to commence the appeal process.
 - xi. I am advised by our Advocates on record and whose advise I verily believe to be true that the applicant's intended appeal raises several arguable points and has high chances of success.
 - xii. As a result of the delivery of the said ruling, the claimant/respondent herein has initiated measures to recover the decretal sum against me including committal to civil jail.
4. The claimant/respondent filed a replying affidavit in which she depend among others that:
- i. I am a female adult of sound mind and the claimant/decreed-holder/respondent herein, familiar with the facts of this case and I am therefore competent to swear this affidavit.
 - ii. I am advised by my advocate which advise I verily believe to be correct that the application lacks merit for the reason that the appeal itself stands low chances of success for the reason that Alvin Mogaka failed to fully give disclosure on the assets of the judgement debtor despite being ordered and given an opportunity to do so by the court. Therefore the appeal is frivolous. For example, he did not even avail a bank statement for Mzoori Limited. The judgment-debtor and alvin mogaka cannot therefore suffer substantial loss when the appeal itself lacks merit. To the contrary, I will continue to suffer due to denial of the fruits of the judgment if this application is allowed because it relates to an appeal with low chances of success and thus nothing more than a delaying tactic.
 - iii. Neither Alvin Mogaka nor the judgement debtor has offered any security pursuant to order 42 rule 6 of the [Civil Procedure Rules 2010](#).
 - iv. I am advised by my advocate which advise I verily believe to be correct that the appeal also stands remote chances of success because leave of this court was required before filing of the appeal pursuant to order 43 rule 1 of the [Civil Procedure Rules](#) and section 75 of the [Civil Procedure Act](#), but none was sought meaning the appeal a non-starter. Thus no stay pending the appeal should be granted where the appeal itself is a complete non-starter.
5. The judgment herein was delivered on April 15, 2020. The respondent/applicant never appealed against the judgment. The decree holder attempted to execute the judgment of the court but was unable to because no known assets of the company/judgment debtor could be traced for the purpose of execution. This prompted the decree holder herein to seek the order for the court for cross examination of the judgment debtor's director herein on the status of the respondent company to meet the decree.
6. The court (Hon Mbaru J) lifted the corporate veil after hearing the cross examination of the respondent's/applicant's director Mr Alvin Mogaka. The learned judge in her ruling delivered on January 26, 2023 held Mr Alvin Mogaka personally liable to satisfy the decretal sum ordered against the judgment debtor.
7. In her ruling the learned judge lamented that in while in her ruling of June 6, 2022 the respondent/applicant was required through its directors to produce books of accounts, there was no certification of insolvency nor was there production of books of accounts. The court observed that no efforts whatsoever were taken by the respondent/applicant's founding directors to satisfy the directions of the court.



8. This court has power to stay its own decisions pending appeal to the Court of Appeal. It is an acknowledgment that the court as a trial court may be wrong in its decision or order but sight must not be lost that in granting such an order the court needs to be persuaded that it is merited. The conduct of the applicant also counts in certain circumstances.
9. The court has perused the ruling of the court intended to be appealed from coupled with the fact that the initial judgment of this court was delivered way back in April, 2020 and the respondent/applicant never appealed against it. The court further notes that insolvency is a matter to law which must be exhibited by a court order or a certificate of insolvency in cases of voluntary liquidation. No such evidence was put forward before the learned judge as observed in her ruling herein.
10. The court in the circumstances is disinclined to grant the orders sought noting that being a court of coordinate jurisdiction, to stay the decision of a fellow judge especially where such judge is of the opinion that there is lack of sincerity on the part of the applicant might amount to sitting on appeal over the discretion of such judge and that would be unconstitutional.
11. From the foregoing the court declines to grant the orders sought in the instant application and advises the parties to seek the same before the Court of Appeal.
12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF APRIL 2023

ABUODHA JORUM NELSON

JUDGE

In the presence of:-

Macharia for Burugu for the Claimant

Biko Nyaga for Justice Nyaga for the Respondent

