



**Kisongochi v Fortcom Holdings Ltd (Employment and Labour Relations Cause 2337 of 2017) [2023] KEELRC 2069 (KLR) (9 August 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2069 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2337 OF 2017**

**AN MWAURE, J  
AUGUST 9, 2023**

**BETWEEN**

**PHOEBE NASAMBU KISONGOCHI ..... CLAIMANT**

**AND**

**FORTCOM HOLDINGS LTD ..... RESPONDENT**

**RULING**

1. The applicant vide a notice of motion dated 15<sup>th</sup> March 2023 is seeking the following prayers.
  1. That application be certified urgent and heard on a priority basis.
  2. That this honourable court be pleased to dispense with service in the first instance and the application be heard ex parte.
  3. That pending hearing inter partes the honourable court be pleased to issue stay of execution of the judgment delivered on 16<sup>th</sup> June 2022 and all consequential orders thereto.
  4. That pending hearing interpartes, the honourable court be pleased to set aside ruling on taxation delivered on 7<sup>th</sup> February, 2023 and a certificate of taxation issued on 13<sup>th</sup> February, 2023 and all consequential orders thereto.
  5. That this honourable court be pleased to grant leave to Ruth Rotich & Company advocates to come on record post judgment of the judgment debtor/applicant.
  6. That pending hearing inter partes this honourable court be pleased to grant stay of execution of the purported decree issued on 15<sup>th</sup> February, 2023 and



any other consequential orders arising thereof including proclamation notice dated 10<sup>th</sup> March 2023.

7. That pending the hearing inter partes this honourable court be pleased to order by way of an injunction restraining the respondent and their agents, auctioneers or any other persons acting on their behalf from towing, carrying away goods belonging to the applicant.
  8. That this honourable court be pleased to lift the warrants of attachment of movable property in execution of decree of money issued on 15<sup>th</sup> February, 2023.
  9. That this honourable court be pleased to give further orders and directions as it may deem fit and just.
2. The applicant states that the judgment was entered on 16<sup>th</sup> June 2022 and decree was extracted on 15<sup>th</sup> February 2023 amounting to kshs 359,655/40 warrants of attachment were issued and Beta Base Auctioneers were given instructions to execute.
  3. The applicant states they had instructed M/s Paul Anderson & Company advocates on their behalf until judgment was entered and they claim the said advocates never gave them updates and were never informed of courts proceedings.
  4. They say they should not suffer for the mistakes of their advocates and that on 20<sup>th</sup> July 2022 the said advocates applied to cease acting for them.
  5. They claim they are bound to suffer a lot if this application is not granted and they also aver they brought this application without undue delay and so they pray for the application to be granted.
  6. The application is supported by the affidavit of Simon Ngugi Muigai who is the applicant. The same dated 15<sup>th</sup> March 2023 retaliates what is already in the notice of motion application. The applicant pleads with the court to grant its orders.

### **Claimant/Respondent's Response**

7. The claimant opposed the application by the respondent/judgment debtor and his response is dated 11<sup>th</sup> April 2023. The claimant says that throughout the pendency of this suit the respondent was represented by M/s Paul Anderson & Co Advocates and they represented them till the time of taxation when they applied to cease acting. The email forwarding the same is of 21<sup>st</sup> July 2022.
8. He says that even after the advocates ceased acting the respondents did not prosecute their application. They were served on 19<sup>th</sup> September 2022 with notice to cease acting. The respondents did not attend court on the said 19<sup>th</sup> September 2022 and so he said Anderson & Co advocates were allowed to cease acting.
9. The claimant states that they served the respondent's with the notice of their advocates to cease acting and consequent notices including the bill of costs, taxation, notice and ruling but respondents continued to ignore the case.
10. He says that upon delivery of ruling of bill of costs and when claimant commenced attachment the respondents woke up and brought this application.
11. The claimant says the respondent is being untruthful to say he only learnt of the judgment when it sent a representative to check another matter.



12. They have now instructed another law firm since the claimant instructed Beta Base Auctioneers and they claim they did not receive updates from their advocates.
13. The claimant states the respondent has been indolent and intentionally ignore the court process and so prays the respondent's application be dismissed with costs.

### **Submissions**

14. The court has considered the submissions by the applicant dated 12<sup>th</sup> April 2023 as well as the claimant's submissions dated 12<sup>th</sup> April 2022.

### **Determination**

15. The main issue for this court to determine is whether the applicant has demonstrated a credible case for grant of stay of execution. The respondent claims he did not receive updates from his past advocate Messrs Paul Anderson & Co advocates.
16. The case was filed on 22<sup>nd</sup> November 2017. Case was set for hearing on 21<sup>st</sup> March 2022. The respondents did not appear for hearing and neither did they participate in the hearing. The court is quite disappointed that both the respondent and his advocates then behaved in a very casual manner towards these proceedings. The court wonders why the respondent did not follow his advocate for all that while to find out the progress of the same. The respondent was indolent.
17. His advocates as well were equally unprofessional in the manner they handed or failed to handle the suit. They never appeared in court nor did they file any submissions. The court is now learning that after judgment was entered they applied to cease acting for the respondent.
18. The respondents were served with various notices of bill of costs, taxation notice and ruling by the claimants as per affidavit of service one stating service was done on 20<sup>th</sup> September 2022 and another was served on 15<sup>th</sup> October 2022 and the process server is one Owour O. Reen. On the one dated 15<sup>th</sup> October 2022 the process server avers he served copies of taxation. The respondents never denied service by the claimant of these notices.
19. The applicant filed the application on 23<sup>rd</sup> March 2023 and they claim they only came to know about the proclamation on 10<sup>th</sup> March 2023.
20. The court concedes the applicant had a duty like every client to follow up in order to know the status of his case. It was held in the case *Alice Mumbi Nyanga v Danson Chege Nyanga & Another Civil case No 394 of 2001* that

“A civil case once filed is owned by a litigant and not an advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to them is made.
21. The court is also aware of the fact that grant of stay of execution is a matter of judicial discretion to be exercised in the interest of justice. This was held in the case of *British American Insurance Co. Ltd v Julius Mamali Kanaali* (2018) eKLR. The same was also buttressed in the Civil Appeal case of *Global Tours & Travels Ltd WC NO 43 of 200 UR*. The court held:

“... Such discretion is unlimited save that by virtue of its character as of judicial discretion it should be exercised rationally and not capriciously or whimsically. The sole question is



whether it is in interest of justice to order stay of proceedings and on what terms should it be granted.

22. The court has found no reason why the respondent never followed the status of his case from 2017 until the case was heard undefended. Worse of when he was served with notice of his advocate to cease acting by the claimant's advocates on 28<sup>th</sup> July 2022 for a hearing of that application on 19<sup>th</sup> September 2022 they apparently did not turn up for the hearing.
23. Court records demonstrate they were served with several notices as earlier noted including taxation notice dated 13<sup>th</sup> October 2022 and bill of costs.
24. They could have mitigated their indolence had they made an application at that point considering judgment had been delivered on 16<sup>th</sup> June 2022. There is unexplainable delay which makes the court unsympathetic towards the respondent.
25. The respondent has not demonstrated if they wish to appeal the judgment delivered by his honourable court and so has not demonstrated chances of success of the appeal should the court be persuaded to grant the stay of execution.
26. The case of Court of Appeal of *Vishram Raiji Halai v Thornton & Turpin* Civil Application No 15 of 1991 (1990) eKLR 365 outlined the requirements for grant of stay of execution pending appeal. It held:

“that whereas the Court of Appeal power to grant a stay pending appeal is unfettered, the high court's jurisdiction to do so under order 41 rule 6(as it then was) of Civil Procedure Rules is fettered by three conditions namely establishment of a sufficient cause satisfaction of substantial loss and furnishing of security.”

27. So first the intended appeal must be arguable. In this case the applicant has to demonstrate that it has an appeal with arguable issues and so that ground is not proved and no record of appeal is furnished to the court.
28. The second aspect is to consider if application before court was filed without undue delay. The court has already pronounced itself on the issue of delay. The respondent was definitely indolent in filing the application.
29. Substantial loss must also be established by the applicant. Substantial loss is not just to claim execution has commenced since execution is a lawful process. As held in the case of *Ena Investments Ltd v Benard Ochau & others* cause 214 of 2015 substantial loss must be demonstrated by applicant by “establishing other factors which show that execution will create state of affairs that will irreparably affect or engage the very essential core of applicant as the successful party in the appeal.”
30. This has also not been proved by the respondent and as already observed the respondent has not brought any evidence of his appeal. He cannot therefore argue if it has arguable grounds or not.
31. The Court also notes that the application for stay of execution is usually more seriously considered by the courts where the application offer to put security of costs. The court observed in the case of [\*Gian Franco Manenthi & Another v Africa Merchant Assurance Company Ltd\*](#) 2009 eKLR court held that:

“The applicant must show and meet conditions of payment of security for due performance of the decree under the condition a party who seeks right of appeal from money decree from the lower court for an order of stay must satisfy this condition on security. In this regard the security for due performance of decree under order 42 rule 6(i) of civil procedure rules. It is



trite that the winner of litigation should not be deemed opportunity to execute the decree in order to enjoy the fruit of is judgment in case the appeal fails.”

32. Considering the pleadings and the submissions for and against this application for stay of execution the court is convinced the respondent did not satisfy the tenets of granting the stay of execution as demonstrated by this honourable court. The application by the respondent dated 15<sup>th</sup> March 2023 therefore fails and is hence dismissed in total.

33. Further the respondent is ordered to pay the costs of the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9<sup>TH</sup> DAY OF AUGUST, 2023.**

**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**

