



**Kaleve & 2 others v East African Portland Cement Company PLC (Cause 248,  
247 & 249 of 2019 (Consolidated)) [2023] KEELRC 2150 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2150 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 248, 247 & 249 OF 2019 (CONSOLIDATED)  
MA ONYANGO, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**MUSA MOHAMED KALEVE ..... 1<sup>ST</sup> CLAIMANT**

**PETER NDUNGU MATHERI ..... 2<sup>ND</sup> CLAIMANT**

**CHARLES MAINA JESSE ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**EAST AFRICAN PORTLAND CEMENT COMPANY PLC ..... RESPONDENT**

**RULING**

1. Before this court are two applications. The claimants filed an application dated December 1, 2021 seeking the following orders;
  - i. Spent
  - ii. That the Honourable court be pleased to order that the amount of (shillings fourteen million, two hundred and twenty six thousand, three hundred and forty one cents thirty two) ksh 14,226,341.32/= deposited in court by the respondent be released to the firm of Nyabena Alfred & Co. Advocates who have been in conduct of this matter on behalf of the claimants/ applicants for onward transmission to the claimant's applicants
  - iii. That the respondent be ordered to pay the Auctioneers costs to be agreed or to be taxed by the Taxing Officer of the Honourable Court
  - iv. That the costs of the application be paid by the respondent / Judgment debtor
2. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavit of the 1<sup>st</sup> claimant. In brief the grounds are that the court on February 14, 2020 delivered judgment in favour of the claimants/ applicants herein for payment of ksh 14,226,341.32 plus



costs and interests from the date of filing of the suit; that the respondent through an application dated March 3, 2020 sought for stay of execution and the court on February 5, 2021 delivered a ruling on the said application and gave a conditional stay of execution, the condition being that the respondent deposits the entire decretal amount in a joint interest earning account held in the names of the counsels of the two parties within 21 days; that the respondent did not comply with these orders and the claimant proceeded with execution and while in progress, the claimants were served with an application dated May 28, 2021 where the respondent sought extension of the stay of the execution orders and made a proposal to deposit ksh 3,500,000 in a joint interest earning account immediately and the balance to be deposited in the joint account in eleven equal monthly instalments of ksh 975,122; that the court after hearing the parties reserved its ruling to September 30, 2021 and pending the said ruling ordered that:

- i. No execution shall proceed on condition that ksh 3,500,000 be deposited in court forthwith and not later than 18<sup>th</sup> June 2021
  - ii. The proposed monthly instalments of ksh 975,122 be deposited in court effective June 30, 2021 and thereafter every 20<sup>th</sup> day of the succeeding months
  - iii. In default of any of the instalments execution to proceed
3. It was averred that the respondent deposited ksh 3,500,000 and the 1<sup>st</sup> instalment as ordered by the court but blatantly defaulted in the monthly deposits for July and August 2021 which were deposited on September 7, 2021; that on September 30, 2021, the court in its ruling dismissed the respondent's application for review of the ruling on stay of execution and gave the respondent 30 days to either pay the decretal amount or go to the appellate court.
4. It is contended that the respondent has not sought or obtained stay orders from the Court of Appeal under rule 5(b) of the *court of Appeal* and that the stay of 30 days have lapsed; that it is important that the claimants proceed with execution which has been commenced for the balance of the decretal sum and also have part of the decretal sum deposited in court released forthwith.
5. The affidavit of Musa Mohammed Kaleve, the 1<sup>st</sup> claimant filed on December 1, 2021 reiterates the contents of the grounds upon which the application is based.
6. The second application is the respondent's Notice of Motion dated December 8, 2021 seeking the following orders;
- i. Spent
  - ii. That pending the hearing and determination of the instant application inter-partes, this Honourable court be pleased to issue a temporary injunctive order restraining the respondents herein jointly and severally, whether by themselves, their agents, members, servants, employees and/or representatives and in particular any auctioneers appointed by the said respondents from in any way seeking to execute the decree of this Honourable Court issued pursuant to a judgment delivered on 14<sup>th</sup> February 2020 whether by proclaiming, attaching, advertising or selling the applicant Company's property and/or goods.
  - iii. That this Honourable Court be pleased to issue a permanent injunction order restraining the respondents herein jointly and severally, whether by themselves, their agents, members, servants, employees and/or representatives and in particular any auctioneers appointed by the said respondents from in any way seeking to execute the decree of this Honourable Court issued pursuant to a judgment delivered on 14<sup>th</sup> February 2020 whether by proclaiming,



attaching, advertising or selling the applicant Company's property and/or goods pending the hearing of the existent appeal proceedings

- iv. That this Honourable Court do quash and/or be pleased to declare the Warrants of Attachments and Sale, as well the Proclamations both dated November 26, 2021 and served upon the applicant on November 29, 2021, null and void
  - v. That this Honourable Court be pleased to grant such further orders as it deems just
  - vi. That the costs of this application be provided for
7. The respondent/applicant states in its grounds in support of the application that through the judgment rendered by the court on February 14, 2020, the court decreed that the claimants be paid a cumulative sum of ksh 14,226,341.22 less statutory deductions; that the applicant was dissatisfied with the judgment of the court and appealed against it in its entirety *vide* its Notice of Appeal dated February 18, 2020; that subsequent to filing its appeal, the applicant filed an application for stay of execution and the court granted a conditional stay pending the hearing of the appeal; that the stay order required the applicant to pay ksh 14,226,341.22 within 21 days in a joint interest earning account but due to severe financial distress the applicant has and continues to experience, the applicant was unable to satisfy the said condition and *vide* its application dated May 28, 2021, it sought for varying/review of the orders of this court and made proposals to immediately deposit ksh 3,500,000 as an initial payment and thereafter pay the balance of the decretal sum of ksh 10,726,341.32 in eleven installments of ksh 975,122; that the applicant complied with the court orders and deposited the ksh 3,500,000 together with all due instalments until 30<sup>th</sup> September when the matter came up for ruling on the applicant's application dated May 28, 2021; that at the time of the ruling, the applicant had deposited ksh 7,400,488 in full compliance of the court's orders of June 14, 2021; that in its ruling delivered on September 30, 2021, the court dismissed the applicant's application for review and as a result the applicant filed an appeal against the said ruling *vide* a notice of appeal dated October 12, 2021; that in the ruling of the court delivered on September 30, 2021, the court ordered that the *status quo* issued on June 14, 2021 be extended on condition that the applicant pays the entire decretal sum within 30 days of its ruling. It is averred that the applicant complied with that order of the court and deposited the balance of the decretal sum into the Honourable Court's account being ksh 5,850,731; that despite the applicant having deposited the entire decretal sum in court, and despite there being a pending appeal before the court of appeal, the respondents/claimants have gone ahead to threaten execution against the applicant. It is contended that the execution attempts are illegal as the respondents/claimants intend to attach the applicants tools of trade and have not issued the applicant with a notice to show cause why execution should not proceed.
8. The application is supported by the sworn affidavit of the Roseline Ominde, the Legal Counsel of the applicant in which she reiterated the grounds above.
9. The claimants filed a replying affidavit dated February 23, 2022 sworn by Musa Mohammed Kaleve, the 1<sup>st</sup> Claimant in opposition of that application.
10. It would appear that the respondent did not file a response to the claimants' application dated December 1, 2021.
11. Be that as it may, the claimants filed written submissions dated June 10, 2022 in respect of their application dated December 1, 2021 and the respondent's application dated December 8, 2021.



12. I need to mention here that before the two applications were determined, the respondent's counsel, Daly Inamdar Advocates LLP filed an application to cease acting dated September 19, 2022 which application was allowed on October 3, 2022.
13. I have considered both the applications and the submissions on record.
14. The respondent has averred that it has paid the entire decretal sum as ordered in this court's ruling delivered on September 30, 2021. A perusal of the receipts on record reveals that the respondent has indeed paid ksh 13,250,975 comprised of ksh 975,122 paid on 1<sup>st</sup> July 2021 *vide* reference no SE0780210713622, ksh 3,500,000 paid on June 18, 2021 *vide* reference no SE07802106180480, ksh 1,950,000 paid on September 7, 2021 *vide* reference no SE0780210907404, ksh 975,122 paid on September 29, 2021 *vide* reference no SE07802109294, ksh 4,875,609 paid on 1<sup>st</sup> November 2021 *vide* reference no FT213005KQND and ksh 975,122 paid on November 2, 2021 *vide* reference no FT21306NS5KW.
15. Based on the foregoing, I do not think that it would be in the interest of justice for the claimants to be allowed to proceed with execution against the respondent as it has been demonstrated to the court that the respondent has complied with the court orders and deposited the decretal sum in the court's account.
16. In the end, I allow the application dated December 1, 2021 by the claimant's in terms of prayer (iii) only being that the respondent pays the auctioneer's fees.
17. With regard to the respondent's application dated December 8, 2021, as stated above, the respondent already complied with the court order to deposit the entire decretal sum. I therefore allow the respondent's application but only grant stay of execution pending hearing and determination of the appeal. The appeal to be filed in 90 days failing which claimants to move the court for the deposited funds to be released as prayed in prayer (ii) of the claimants' application.
18. The respondent shall bear the costs of the two applications.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023**

**MAUREEN ONYANGO**

**JUDGE**

