



**Mwangi & 162 others v Aegis Kenya Ltd t/a Leopard Beach Hotel & another
(Cause E658 of 2020) [2023] KEELRC 3242 (KLR) (11 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3242 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E658 OF 2020
AK NZEI, J
DECEMBER 11, 2023**

BETWEEN

JUDY WANJIRU MWANGI & 162 OTHERS CLAIMANT

AND

AEGIS KENYA LTD T/A LEOPARD BEACH HOTEL 1ST RESPONDENT

KENYA COMMERCIAL BANK 2ND RESPONDENT

RULING

1. When the suit herein came up for hearing on 14/11/2022, the Court referred it to Kwale Labour Officer for conciliation. The said conciliator filed his report, together with a certificate of agreement duly signed by the parties herein and their respective Advocates on record. The same was filed on 10/1/2023. On 16/1/2023, the following order was recorded by the Court, with concurrence by Counsel for the parties:-

“The Conciliation agreement contained in the Conciliator’s certificate of agreement dated 5/1/2023 is hereby adopted as a judgment of this Court, and judgment is accordingly entered.”

2. According to the judgment entered, the Respondent was to pay the Claimants’ a total of ksh. 25,158,990 by monthly instalments of ksh. 500,000 by or before 5th day of every month starting from 5th February 2023. It was a further term of the judgment that in default of any installment(s), as agreed, the entire outstanding debt would immediately become due and payable, and the Claimants would be at liberty to institute execution proceedings to recover the same.
3. Subsequently, on 28/2/2023, parties recorded another consent in Court agreeing on the costs payable by the Respondent to the Claimants at ksh. 350,000; payable by 3 monthly installments beginning 15/3/2023. The suit was marked as settled and closed.



4. A decree is shown to have been drawn and issued on 23/6/2023; followed by issuance of warrants of attachment and sale to Sure Auctioneers on 26/7/2023; for recovery of ksh. 23,022,990.
5. On 31/7/2023, the Respondent filed an evenly dated Notice of Motion seeking the following orders:-
 - a. that the Court be pleased to order stay of execution of the warrants of Attachment dated 26/7/2023 pending inter-partes hearing of the application.
 - b. that the Court be pleased to set aside the Warrants of Attachment dated 26/7/2023.
 - c. that the applicant be at liberty to apply for further orders and/or directions as the Court may deem just to grant.
 - d. that costs of the application be provided for.
6. The application, shown to be brought under Sections 1A, 1B, & 3A of the *Civil Procedure Act*, Order 22 Rule 22 and Order 51 Rule 1 of the *Civil procedure Rules*, is based on the supporting affidavit of one John Momanyi, the Respondent's Financial controller, sworn on 31/7/2023. It is deponed in the said affidavit that the Respondent/Applicant had inadvertently defaulted on settlement of one (1) installment owing to extremely difficult and dire financial circumstances it was faced with; leading to issuance of warrants of attachment.
7. The application was placed before me under a Certificate of Urgency on 31/7/2023, and I granted interim stay of execution on condition that the Applicant/Judgment debtor paid the defaulted installments, including the installment payable in August 2023, within 21 days of the Order. The Court fixed the application for directions on 18/9/2023.
8. On 18/9/2023, Counsel for the Applicant/Judgment debtor informed the Court that the applicant/judgment debtor had complied with the Court's order dated 31/7/2023, and had also paid the installment for September 2023; thus, regularizing liquidation of the decretal sum by installments. This was not controverted by the Claimant/decreed holder.
9. The application is opposed by the Claimant/Respondents vide a replying affidavit sworn by the 1st Claimant/decreed holder on 18/9/2023. Parties filed written submissions on the application, which I have considered.
10. Although the judgment herein was entered pursuant to a negotiated agreement signed by the parties herein before the Conciliator, the Court still retains discretion to either stay or decline to stay execution, on such terms as are just, if there are just reasons to do so. It is not denied that the Respondent/Applicant defaulted in payment of one installment, and that the situation has since been regularized as already stated in this Ruling.
11. I have noted that the default clause in the judgment reads as follows:-
 - “4. In the event of default of any instalment (s) as agreed above, the entire decretal outstanding debt will immediately become due and payable, and the Claimants will be at liberty to institute execution proceedings to recover the same.”
12. A question arises from the foregoing default clause. Does the right to institute execution proceedings vest in the Claimants upon default of any instalment or instalments”. Does the word instalment(s) cover the two situations.”



13. The Court has not been told that the Claimant/decreed holders called for payment of the defaulted installment before taking out execution proceedings, in view of the foregoing slight ambiguity in the default clause. One letter, an email or even a phone call between the parties and/or their Advocates would, possibly have saved the parties from unnecessary costs.
14. I allow the Notice of Motion dated 31/7/2023 and set aside the warrants of attachment dated 26/7/2023. The setting aside order is, however, not a bar to future execution proceedings in the event of default in payment.
15. Each party will bear its own costs of the application.
16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 11TH DECEMBER 2023.

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... Claimant

..... Respondent

