



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE 485 OF 2017

EVANS OOKO NYAMOTA.....CLAIMANT/ RESPONDENT

VERSUS

BEEMTHO SERVICE LTD.....RESPONDENT/APPLICANT

RULING

1. Before me for determination is the Respondent/ Applicant's Application dated 2nd November, 2021 filed under certificate of urgency and seeking the following orders: –

1. Spent.

2. That this Honorable Court be pleased to stay execution pending the hearing of this application.

3. That the Honourable Court finds that the consent filed on 4.6.2021 on the settlement of the decretal amount in the judgment entered on 22.4.2-21 is binding on the parties and that the same cannot be enforced through execution contrary to the agreement between the parties.

4. That this Honourable Court be pleased to allow the Respondent to pay counsel for the claimant the taxed costs in 9 monthly installments as follows; Kshs 10,000 monthly for 8 months and the balance of Kshs 5,280 be paid in the ninth month.

5. That the auctioneer's costs be borne by the claimant /counsel for the claimant.

6. That the cost of this Application be awarded to the claimant/ Applicant.

2. The Application is supported by the grounds set out on the face of the Application and in the supporting affidavit deposed upon by **Thomas Machuma Nyamota** on the 2nd December, 2021 and based on the following grounds;

a. That ex parte judgement was delivered in this matter on the 24th August 2020 and the decree issued on the 27th August, 2020 for payment of Kshs 378,438 less statutory deductions.

b. Efforts to set aside the judgement did not bear any fruits and as a result the deponents herein, after several negotiations, entered into an agreement with the claimant who is his blood brother to reduce the decretal sum to Kshs 200,000 and Kshs 50,000 was paid on execution of the consent agreement with the balance to be paid in monthly installments of Kshs 10,000. The consent was filed in court on the 4.6.2021.

c. On 19.10.2021, the Bill of cost was taxed at Kshs 85,280 which the Respondent requested the claimant to allow it pay the same installment and in response the Respondent send auctioneers to proclaim the total sum of Kshs. 468,438.50 disregarding the lawful consent entered between the parties that reviewed the decretal sum to Kshs 200,000.

d. That the Executed amount is not justified since the only debt that the Respondent owed the Respondent was Kshs 150,000 together with Taxed costs of Kshs. 85,280 which the Respondent was in the process of making its monthly installments.

e. The Applicant then urged this Court to allow the application and direct parties to proceed with the consent entered and allow the Applicant pay the decretal sum together with costs in installments.

3. The Claimant/ Respondent in opposition to the Application swore a replying Affidavit deposed upon on the 16th December, 2021. The claimant vehemently denied ever entering into any consent with the Respondent and denied ever signing the said consent therefore that the consent filed in Court did not originate from him. Additionally, that the National Identity card indicated in the consent is not his and he then urged this Court to disregard the consent and allow the matter to proceed for execution.

4. This application was disposed of by way of written submissions with the Applicant filling its submissions on the 4th February, 2021 while the Claimant/ Respondent herein filed his submissions on the 7th March, 2022.

Applicant's Submissions.

5. The Applicant submitted that the parties herein entered into a consent agreement on the payment of the decretal sum and in evidence produced a consent and acknowledgement of payment both signed by the Claimant. It was argued that the Claimant allegation that the consent was not signed by him and that the Identity card indicated in the consent is not his in effect alleging that the documents were fraudulently acquired without giving any evidence as provided for under section 107 and 108 of the Evidence Act. In this the Applicant relied on the case of **Koinange & 13 others V Koinange [1986] KLR 23**.

6. It was argued that failure by the Claimant to adduce expert evidence to dispute the signature in the consent agreement rendered his argument without basis.

7. On whether the consent agreement is binding on the parties, it was submitted that both parties voluntarily consented to restructure the decretal sum and agreed on mode of payment which mode was acceptable by the Claimant who even acknowledged the first lumpsum of Kshs 50,000, therefore the claimant ought to be estopped from now reneging on the agreement.

8. The Applicant further submitted that having agreed on how the decretal sum was to be paid it was improper for the Claimant to go behind the Respondent back and commence execution proceedings. He then argued that the claimant ought to be condemned to pay the auctioneers fees together with costs of this Application.

Claimant/Respondent's Submissions.

9. The Respondent on the other hand submitted that the applicant has not met the threshold for grant of stay Orders as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules. In support the claimant relied on the case of **Naliaka Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR**.

10. It was argued that the Applicant has not demonstrated any reason that would persuade the Court to exercise its discretion, neither has it stated which loss if any that he would incur if stay is not granted. It was also argued that the delay was inordinate in filling this cause as such that the application is an afterthought and an abuse of Court process. In support of their case the Respondent relied on the case of **Chairman Cooperative Tribunal and 8 others Ex-parte Management Committee Konza Ranching and farming cooperative Society Limited [2014] eKLR**.

11. On whether stay of execution should be granted, the Respondent submitted that the applicant has failed to demonstrate any of the grounds pre-requisite for grant of stay of execution Orders and cited the case of **Rayat Trading Co. Limited V Bank of Baroda and Tetezi House Ltd [2018] eKLR**.

12. The Respondent further submitted and maintained that there was no consent between the parties and the consent agreement produced was not signed by him neither does the National identity card number appearing therein is his.

13. The Respondent then urged this Court to find in his favour and dismiss the Application herein and allow the execution proceeding to continue.

14. I have examined the averments of the parties herein. The applicant has averred that they entered a consent with the respondent to reduce the decretal sum herein to 200,000/=.

15. The respondent has denied ever signing the said consent. In any event the consent alluded to was never brought to the court's attention since July 2021 and has never been adopted as an order of this court.

16. I therefore find the consent now being contested is not a consent I can rely on unless the parties move court jointly for its adoption.

17. As to the mode of payment of the decretal sum, now that the consent has been denied, the payment can only be realized through execution or by agreement of the parties.

18. As for stay, the issue of stay has previously been brought to this court and determined. I therefore find the application is *res judicata*.

19. I find the application unmerited and I dismiss it accordingly with costs.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL, 2022

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Owuor for Claimant – present

Respondents – absent