



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Plantation & Allied Workers Union v Unilever Tea (K) Limited  
(Cause 10 of 2014) [2022] KEELRC 1381 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1381 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
CAUSE 10 OF 2014  
ON MAKAU, J  
MAY 19, 2022**

**BETWEEN  
KENYA PLANTATION & ALLIED WORKERS UNION ..... CLAIMANT  
AND  
UNILEVER TEA (K) LIMITED ..... RESPONDENT**

**RULING**

1. This ruling relates to the respondent/judgment debtor's notice of motion dated October 22, 2021. The application basically seeking the following orders: -
  - i. That the warrants of attachment issued by this Court on October 12, 2021 and any consequent Notice of Proclamation and Notification of Sale be discharged, lifted and/or set aside.
  - ii. That there be stay of execution of the judgment delivered on May 17, 2016 and decree issued on May 23, 2016 pending the hearing and determination of Nakuru Civil Appeal No E015 of 2020.
  - iii. Cost of the application.
2. The application is supported by the affidavit sworn on October 22, 2021 by the applicant's Legal Manager M/s Winnie Ochieng. In brief she acknowledges that there is a judgment/decree of the court dated May 17, 2016 by which the court reinstated the claimant to employment without loss of benefits and further awarded him twelve months' salary as compensation for unlawful termination of his employment.
3. She further deposed that the applicant was dissatisfied with the said decision, and filed Nakuru Civil Appeal No. E014 of 2020. The appeal was filed pursuant to the leave of the appellate court and it was scheduled for directions on May 27, 2021.



4. She further deposed that on October 13, 2021, five years after the date of the decree and while the appeal was still pending determination, the claimant served the applicant with a warrant of attachment issued on October 12, 2021. The warrants was for recovery of Kshs.1,024,029 by M/s Kalya Auctioneers.
5. She deposed further that on the said October 13, 2021, the Auctioneer proclaimed the applicant's goods pursuant to the said warrants of attachment. Among the goods attached were motor vehicles registration numbers KBM 486V and KBY 701M and a Notification of sale dated October 22, 2021 was issued.
6. The Respondent further avers that the Warrants of Attachment were unlawfully issued contrary to order 22 rule 18 of the *Civil Procedure Rules* (CPR) which requires that a notice to show cause be served on the judgment debtor if the period between the date of judgment and the application for execution exceeds one year. It was further argued that the execution based on unlawful warrants of attachment will prejudice the applicant.
7. Further, the applicant contends that there is risk of substantial loss of Kshs.1,019,515 if the execution is done since the claimant has left employment and his source of income is unknown. Besides, the Applicant has no knowledge of the whereabouts of the claimant's assets as such the recovery of the said funds will not be possible if the appeal succeeds after the execution.
8. It was further argued that the warrant of attachment, the proclamation and the notification of sale are of no legal effect by dint of order 22 rule 18 of the *CPRs*, and that the Applicant stands to suffer substantial loss should the auctioneers proceeds to attach and sell the proclaimed goods. Therefore, the applicant prayed for the orders sought pending the said appeal.
9. The claimant opposed the application by filing grounds of opposition dated November 5, 2021. The grounds raised are: that the application is misconceived, incompetent, frivolous and vexatious and gross abuse of court process; that the court is functus officio and lacks jurisdiction to grant the orders sought since the matter is now before the Court of Appeal; that the applicant ought to seek orders under rule 4 and 5 (2) of *Court of Appeal Rules* or seek review under Section 16 of the Industrial Court Act; that the respondent partially complied with the judgment of the court by only reinstating him to employment but failed to pay the damages awarded; and that the applicant should not be allowed the luxury of choosing which orders of the court to be executed against it.
10. The application was canvassed by written submissions which basically supported the parties respective arguments above. I will therefore not reproduce the same herein. Having considered the application, supporting affidavit, grounds of opposition and the rival submissions, the following issues arose for determination: -
  - i. Whether the court is functus officio and without jurisdiction to grant the orders sought.
  - ii. Whether the warrants of attachment issued on October 12, 2021 and the consequential proclamation and notification of sale are unlawful, null and void.
  - iii. Whether the judgment/decree herein should be stayed pending the hearing and determination of the Nakuru Civil Appeal No.E015 of 2020.

## **Jurisdiction**

11. Not much has been said on the alleged lack of jurisdiction. I will therefore not belabor the point that this court has jurisdiction to entertain the application before it. The court has not been asked to reconsider its decision on merits or to deal with any matters pending before the Court of Appeal.



12. All what the court is being asked to do, is to set aside the alleged unlawful execution and stay the execution of judgment pending the hearing and determination of the appeal before Court of Appeal. These are matters, over which the trial court has jurisdiction to determine even where there is an appeal to the Court of Appeal unless one of the parties approach the Court of Appeal for the same reliefs.

### **Unlawful Execution**

13. The Applicant alleged that the warrants of attachment and the subsequent proclamation and notification of sale is contrary to order 22 rule 18 because notice to show cause was not served on it before the warrants of attachment was sought. The said rule provides that: -

“(1) where an application for execution is made: -

- a) More than one year from the date of the decree;
- b) Against the legal representative of a party to the decree; or
- c) For attachment of salary or allowances of any person under rule 43;

the Court executing the decree shall issue a notice to the person against whom the execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against...

- (2) Nothing in sub rule (1) shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause delay or would defeat the ends of justice.

14. In this case there is no dispute that the decree was issued more than one year before the application for execution was made. In fact, the claimant did not dispute that fact. I have also confirmed from the record that from May 17, 2016 when the judgment was passed and May 23, 2016 when the decree was issued, the application for execution was not made until July 2021.

15. The record does not show copy of any NTSC served or the reasons, if any, recorded by the Deputy Registrar to dispense with the service of a notice to show cause as required by rule 18 (2) above. Consequently, I agree with the Applicant that the execution commenced by the Warrants of Attachments issued on 12<sup>th</sup> October 2021 is in breach of order 22 rule 18 of the CPRs and therefore unlawful.

16. I gather support from *Metro Petroleum Ltd v Turbo Highway Eldoret Ltd* (2006) eKLR where Azangalala J (as he then was) held that: -

“It is clear that between November 24, 2004 and February 22, 2006 a period of one year had elapsed. Accordingly, the Court should have issued a notice to show cause why the decree should not be executed against it. I have not traced a copy of such NTSC in this record. I take it therefore that no such notice was issued. I have not also seen reasons recorded dispensing with the requirement of the NTSC. In the premises, the execution in question having occurred without compliance with the rules regarding NTSC, is irregular.”

17. Besides, I have perused the court record and found that the claimant has up to date not filed any bill of costs for the court to determine the costs payable to him. The judgment awarded the claimant costs of



the suit and without such determination no party can execute a decree without leave of the court. No leave was sought in this case and execution was therefore irregular.

### **Stay Pending Appeal**

18. Order 42 rule 6 (2) of the [CPRs](#) sets out the threshold for granting of stay of execution of a decree pending appeal by the trial court: the applicant must prove that substantial loss will be occasioned if stay is denied, the application was made without unreasonable delay; and that applicant is ready to offer security as a condition for the performance as the court may order.
19. I have already observed above that costs in this matter have not been taxed by the taxing officer of the court. This court and other courts have held in the recent past that where costs are awarded in the judgment no execution can be commenced without the leave of the court. Therefore, the judgment debtor herein cannot be accused of unreasonable delay in making application for stay until the costs are determined and execution becomes a reality.
20. As regards substantial loss, the applicant is supposed to demonstrate that if execution is done, and the appeal succeeds, the claimant will not be able to refund the decretal sum. The applicant contended that the claimant has since left employment and his source of income is unknown. Besides the whereabouts of his assets is also unknown to the applicant.
21. The claimant did not file any replying affidavit to rebut the foregoing factual allegations. He has not demonstrated that he has capacity to refund the decretal sum if the appeal is successful. Consequently, I find and hold that the applicant has proved that a substantial loss may be occasioned on it if stay order is withheld.
22. The issue of security is quite a simple matter in this case because, the applicant has already deposited Kshs 1,000,000 in court as security for the interim stay pending this ruling. I will therefore direct that the said Kshs.1,000,000 already deposited in court shall continue to be held there as security for performance of the decree in case the Nakuru Civil Appeal No. E015 of 2020 fails.
23. The applicant has raised the issue that decretal sum secured is exaggerated. However, I will not comment on that issue of quantum of the decree because that seems to be the main crux of the pending appeal.
24. In conclusion, I allow the application dated October 22, 2021 in the following terms: -
  - a. The warrants of attachment issued on October 12, 2021 and the consequent notice of proclamation and notification of Sale of Property is discharged, lifted and/or set aside.
  - b. Pending the hearing and determination of the Nakuru Civil Appeal No E015 of 2020 the judgment delivered on May 17, 2016 and decree issued on May 23, 2016 is stayed.
  - c. The Kshs 1,000,000 deposited in court shall remain there as security pending the hearing and determination of the said appeal.
  - d. The costs of this application be awarded to the applicant.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 19<sup>TH</sup> DAY OF MAY, 2022.**

**ONESMUS N MAKAU**

**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> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

