



**Isinya Roses Limited v Kyalo (Miscellaneous Application  
E050 of 2022) [2022] KEELRC 1089 (KLR) (13 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1089 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E050 OF 2022**

**JK GAKERI, J**

**JUNE 13, 2022**

**BETWEEN**

**ISINYA ROSES LIMITED ..... APPELLANT**

**AND**

**ALEXANDER PETER KYALO ..... RESPONDENT**

**RULING**

1. Before me for determination is a notice of motion application dated April 8, 2022 seeking orders that:
  - i. The Application be certified as urgent and heard during the court's vacation/Easter recess.
  - ii. Pending the hearing and determination of this Application, there be a stay of execution of the decree ensuing from the default judgement issued on January 26, 2022 in Kajiado CMEL 10A of 2020 Alexander Kyalo v Isinya Roses.
  - iii. Any goods carted away by the auctioneer to be returned to the Applicant.
  - iv. Leave be granted to the Applicant to file an appeal against the exparte judgment dated January 26, 2022 against Applicant, out of time.
  - v. Pending the hearing and determination of the intended appeal, there be a stay of execution of the decree ensuing from the default judgement herein issued on January 26, 2022.
  - vi. The OCS Isinya Police Station to ensure there is compliance with these orders.
  - vii. This Honourable Court be pleased to issue any other orders it may deem fit in the interest of justice.
  - viii. The costs of this application be in the cause.



2. The application filed under certificate of urgency is expressed under Rule 3(2) of Part I of the High Court (Practice & Procedure) Rules made under Section 10 of the *Judicature Act*, Cap 8 of the Laws of Kenya, Order' 42, 43, Order 51, Rules 1, 3, 4 and 10, of the *Civil Procedure Rules, 2010* and Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 and all other enabling provisions of law.
3. The application is based on the grounds set out in paragraphs 1 – 11 of the notice of motion application and is supported by the affidavit of Avril Mbulwa, the Human Resources Manager of the Applicant who depones that there are serious grounds of appeal to wit:
  1. The learned magistrate erred in fact and in law in finding that the matter was undefended while there was a statement in response to the counterclaim filed electronically on January 20, 2021 and served on January 21, 2021.
  2. The learned magistrate erred in law and in fact by failing to find that the Applicant herein was not informed of case management conference.
  3. The learned magistrate erred in law and in fact by failing to find that the inter partes hearing date of December 15, 2021 was not served on the Applicant herein.
  4. The application has been brought timeously as the Applicant has only been made aware of the judgment in a proclamation carried out by Vintage Auctioneers on April 1, 2022 who has proclaimed “and or any other attachable asset belonging to the judgment debtor that can settle the decretal amount plus auctioneer costs”, leaving further room for abuse.
  5. The auctioneer has set its costs at Kshs 297,850/- yet the decretal amount is Kshs 1,248,714/- quoting unexplained overheads such as labour, transport, investigations, and many other factors.
  6. That the goods are grossly undervalued.
  7. That the proclamation lacks specificity of the items proclaimed.
  8. That the auctioneer forced his way into the premises.
  9. That the decretal sum is grossly exaggerated.
  10. That the Applicant is willing to deposit adequate security as will be ordered by the court.
  11. That was in the interest of justice to stay the execution of the decree and the judgement set aside for the suit to be head on merit and the Applicant stands suffer irreparable loss if the application is not allowed and substantial loss will result if the orders sought are not granted.
  12. That there is a possibility that the Respondent may attach and execute against the Applicant’s goods and property.
  13. That the Applicant has a triable defence raising arguable points such as: Whether the Claimant was its employee post March 3, 2020. The Claimant’s reliability and attendance. That on or about March 17, 2020 he was summoned to service the IT system but failed to do so. The Claimant had sufficient time to respond to the notice to show cause though the COVID-19 pandemic prevented a physical disciplinary hearing. Finally, that the Claimant had no contract of employment with the Applicant at the time of the purported termination and was an employee working on a casual basis.
4. The certificate came up on April 12, 2022 when the Court directed that:



- i. The notice of motion application was granted in terms of paragraphs 2, 5 and 6 and inter partes hearing was scheduled for April 26, 2022.
  - ii. The Applicant to serve within 2 days and the Respondent was to respond within 4 days of service.
5. The parties agreed that the matter be disposed of by way of written submissions 14 days a piece and the Applicant was granted leave to file a further affidavit in response to the Respondent's response and serve in 4 days.
6. In his response, the Respondent avers that the application is misconceived, incompetent and an abuse of the Court process and is premature.
7. That the orders sought are not efficacious because the prayers have been overtaken by events since the auctioneer had already carried away the proclaimed goods and is in the process of disposing them.
8. That the Applicant was forum shopping as its application for a stay of execution and setting aside of the default judgment is scheduled for ruling on June 2, 2022 by the Kajiado Chief Magistrates Court and thus the present application before the Court is not in good faith for lack of disclosure and thus an abuse of the Court process.
9. That the Applicant filed a miscellaneous application before the Machakos Employment and Labour Relations Court seeking a stay of execution pending filing and hearing of intended appeal among other prayers and the Applicant's application is sub judice.
10. That the cause was heard on December 15, 2021 after the hearing date had been served but the Applicant failed to attend and judgment was delivered on January 26, 2022 and a decree issued on 17<sup>th</sup> February 2022 and communicated to the Applicant on March 9, 2022.
11. That the Applicant filed a notice of motion application dated 11<sup>th</sup> March 2022 seeking stay and setting aside of default judgment and service was ordered. Respondent filed a replying affidavit sworn on 12<sup>th</sup> March 2022 and the hearing scheduled for March 23, 2022 but the Court did not sit. Hearing was fixed by consent for April 6, 2022 but the Applicant's Counsel did not attend and ruling is slated for 2<sup>nd</sup> June 2022.
12. That the Applicant filed another application dated 4<sup>th</sup> April 2022 seeking stay of execution among other prayers. The application is pending.
13. That the Applicant has filed other applications before the Kajiado Chief Magistrates Court and Machakos, Employment and Labour Relations Court to hinder the hearing and conclusion of the main cause to the detriment of the Respondent.
14. That the Applicant did not disclose that it had other applications pending before the Court at Kajiado and Machakos that the orders granted on April 12, 2022 were obtained by concealment and/or suppression of material information from the Court and the orders should be discharged.
15. That the Applicant's draft memorandum of appeal is not merited. That should the Court allow the application dated March 11, 2022 and the Court grants leave to file an appeal out of time, the orders could embarrass the Court.
16. That no plausible reason has been given why the appeal was not filed on time and the application should not be granted.



17. Finally, the Respondent depones that if the Court allows the application, the Applicant be ordered to deposit the decretal sum and costs of this suit in a joint account in the names of the parties' advocates within seven (7) days of the Court's directions.

### **Submissions**

18. By the time the Court retired to prepare this ruling on 29<sup>th</sup> May 2022, none of the parties had filed submissions in support of their positions.
19. The Court did not benefit from the insights and perspectives of Counsel for both parties which is regrettable.

### **Analysis and Determination**

20. I have considered the application, supporting and replying affidavits and the law. The twin issue for determination is whether the notice of motion application dated April 8, 2022 is merited and if the Applicant should provide security.
21. The law on application for stay of execution and provision of security pending appeal is well articulated in legions of decisions.
22. Order 42 Rule 6(2) of the [Civil Procedure Rules, 2010](#) provides as follows:
- (2) No order for stay of execution shall be made under subrule (1) unless—
- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
23. The power of the Court to grant a stay of execution is subject to ensuring that:
- i. The Applicant has sufficient cause.
  - ii. Substantial loss is likely to result if the order is not given.
  - iii. Application was made without unreasonable delay.
  - iv. Furnishing of security.
24. See *Visbam Ravji Halai v Thornton Turpin* [1990] KLR and *Michael Nthouthi Mitheu v Abraham Kivundu Musau* [2021] eKLR.
25. In the words of Warsame J. (as he then was) in [Samvir Trustee Limited v Guardian Bank Limited](#) [2007] eKLR:

“...The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to



the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion...”

26. The Court in agreement with these sentiments.
27. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the Court stated:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail,”
28. The Court in agreement with these sentiments.
29. On sufficient cause, the Applicant states that it filed a response to the counter claim on January 20, 2022 and served on 21<sup>st</sup> January 2021 yet the Learned Magistrate held that the suit was undefended. It is the Applicant’s case that inter partes hearing date of 19<sup>th</sup> December 2021 was not served and the Applicant was unaware of the case management conference.
30. It is the Applicant’s case that the Auctioneer’s proclamation carried out on April 1, 2022 states that the Auctioneer can proclaim “and or any other attachable asset belonging to the judgment debtor that can settle the decretal sum plus auctioneers costs”. The costs are assessed at Kshs 297,850/= with exaggerated overheads such as transport, labour, logistics, investigation police assistance etc.
31. On a balance of probabilities, the Court is satisfied that the Applicant has established a sufficient cause for a stay of execution.
32. As regards substantial loss, the supporting affidavit is explicit that the Applicant stands to suffer substantial loss if the Respondent (who is the decree holder) proceeds as he is doing on account that inter alia the proclamation lacks specificity and the Applicant could lose more assets than is necessary to satisfy the decretal sum in addition to the exaggerated Auctioneer’s fees and under valuation of goods by the auctioneer.
33. The Court takes the view that the Applicant has demonstrated that it stands to suffer substantial loss if the order for stay is not granted.
34. As to whether the application was timeously made, the Applicant states that its application was timely made as it learnt of the judgment recently.
35. Noteworthy whereas the judgment whose decree is sought to be stayed is dated January 26, 2022 the decree is dated February 17, 2022.
36. Having deponed that it was unaware of the case management conference as well as the inter partes hearing date, the Applicant acted within a reasonable time by filing the application on 8<sup>th</sup> April 2022, one month and 21 days after the decree was issued.
37. It is the Court’s finding that the application was filed timeously.
38. For the foregoing reasons, the Court is satisfied that the Applicant has on a preponderance of the evidence demonstrated that the application is merited.
39. Finally, as to whether the Applicant should furnish security, it is only fair that it does so. The scales of justice so demand in these circumstances.



40. As the Respondent depones in the replying affidavit, it is elemental that the Applicant provides security should the application be deemed meritorious. The Respondent proposes a deposit of the decretal sum in a joint account in the names of the parties' advocates or in Court.
41. On the other hand, the Applicant depones that it is ready and willing to deposit adequate security as ordered by the Court. Order 42 Rule 6 requires that the security provided by the Applicant must ensure due performance of the decree or orders. In *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others* [2015] eKLR, the Court stated as follows:
- “... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”
42. See also *Ndubiu Gitabi and Another v Anna Wambui Warugongo* [1988] 2 KAR and *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR on the adequacy of security to be provided.
43. Finally, the Respondent made no reference to his ability to repay the sum if the appeal was successful.
44. In the final analysis the Court makes the following orders:
- a. Stay of execution of the decree in Kajiado MC ELRC 10A of 2020 dated 26<sup>th</sup> January 2022 is granted as prayers No. 3, 4, 5 and 6 of the notice of motion dated April 8, 2022.
  - b. Applicant to provide bank guarantee for the decretal sum and costs within 30 days from today failing which the decree holder shall have liberty to execute the decree.
  - c. Costs of this application shall be in the cause.
45. Orders accordingly.

**DATED,SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13TH DAY OF JUNE 2022**

**DR. JACOB GAKERI**

**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 *Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

