



**Kenya Union of Commercial Food and Allied Workers v Almasi Beverage Limited (Cause 87 of 2016) [2022] KEELRC 1481 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1481 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
CAUSE 87 OF 2016  
ON MAKAU, J  
JUNE 2, 2022**

**BETWEEN**

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS ..... CLAIMANT**

**AND**

**ALMASI BEVERAGE LIMITED ..... RESPONDENT**

**RULING**

1. There are two applications before the court.
2. The first is by the claimant dated March 25, 2022 brought pursuant to section 12 of the *Employment and labour Relations Court Act*, the *Judicature Act*, the inherent powers of the court and all other enabling provisions of the law. It seeks the following orders:
  - a. That this application be certified urgent, service thereof be dispensed with and the same be heard ex parte in the first instance.
  - b. That pending hearing and determination of this application the honourable court do order and direct the respondent to fully implement the judgment dated April 26, 2017 and the orders dated September 7, 2021.
  - c. That the claimant/applicant be and is at liberty to execute for recovery of the unpaid decretal sums due and payable to the grievants.
  - d. That pending hearing and determination of this application the honourable court be pleased to issue summons to appear against: Ms. Joyce Macharia (Chief Executive Officer), Mr. Xavi Selga (Managing Director), Japheth Ngetich (General Manager) and John Mwendwa (Human Resource Director) all of Almasi Beverages Ltd to appear before this Court to show cause why they should not be punished and/or committed to civil jail for willful disobedience of the



judgment of the court delivered and dated 26t April, 2017 and the orders of the Court issued on July 27, 2021 and dated September 7, 2021.

- e. That in default to honor the summons, this Honourable Court do and hereby orders the OCS Embakasi Police Station to arrest and produce in Court the said; Ms. Joyce Macharia (Chief Executive Officer), Mr. Xavi Selga (Managing Director), Japheth Ngetich (General Manager) and John Mwendwa (Human Resource Director).
  - f. That this Honourable Court do punish or jail the said Ms. Joyce Macharia (Chief Executive Officer), Mr. Xavi Selga (Managing Director), Japheth Ngetich (General Manager) and John Mwendwa (Human Resource Director) for their outright disobedience of this Court's judgement and Order.
  - g. That this court do issue any other order it deems fit and appropriate to meet the end of justice.
  - h. That the cost of the application be provided for in favour of the claimant/applicant.
3. The application is premised on the grounds that:
- a. This suit was initially initiated by the claimant against Kisii Bottlers Limited in the year 2016 and later the respondent was brought in after it acquired Kisii Bottlers Limited.
  - b. That judgment was delivered in this matter on the April 26, 2017 in favour of the claimant as against the respondent and the respondent was directed to forthwith reinstate the grievants back to employment and further pay them 2 months' salary for the unfair termination.
  - c. Aggrieved by these orders the respondent filed a notice of appeal on the May 10, 2017 and further sought stay Orders pending the determination of the intended appeal which was granted by the court on the November 16, 2017 on condition that the respondent was to deposit Kshs 3,450,508 into a joint interest earning account, being the grievants net salaries accruing for the period up to October, 2017.
  - d. It is averred that the respondent failed to reinstate the grievants and further disobeyed the court order directing it to deposit the money into a joint account and instead deposited the said money into their advocates account in Kisii. Subsequently, this court made orders on the June 2, 2020 to transfer the said money into the court deposit account.
  - e. After about a year later, the claimant sought to withdraw the notice of appeal by the Respondent vide its civil application No. E275 of 2020 and it is at that time that the Respondent served it with its Civil Application No. 44 of 2020 having been filed on May 29, 2020.
  - f. The Civil Application No. 44 of 2020 sought for extension of time to file Memorandum of appeal but the court dismissed it. Consequently, the claimant filed notice of withdrawal of its Civil Application No. E275 of 2020.
  - g. Despite the dismissal of the respondent's application, they have failed to comply with the court orders to date and the dues payable to the claimant keep rising by the day.
4. The Application is supported by the claimant's Kisii Branch secretary, George Obong'o wherein he reiterates the grounds on the face of the application and adds that, after the Civil Application No.44 of 2020 was dismissed the stay orders were vacated and the claimant accessed the fund deposited in court and forwarded to the grievants.



5. The Respondent has opposed the instant Application and filed a replying affidavit sworn on 22<sup>nd</sup> April 2022 by Timothy M. Muthini, the Respondent's Human Resource manager in which he contended that there has not been any willful disobedience of the Court Orders. He deposed that the Respondent partially fulfilled the Orders of the Court by depositing money in Court.
6. He further stated that there was a valid Court Order issued on the 16<sup>th</sup> November, 2017 that stayed the execution and proceeding in this matter and therefore the failure to act on the judgment entered by the Court was due to the stay Order. He further stated that immediately the stay order was discharged the respondent lodged an appeal vide Civil Application number 85 of 2021, which, parties are now awaiting its outcome.
7. Accordingly, it was averred that the Respondent has not willfully disobeyed the Orders of the Court to warrant them being cited for contempt of Court.
8. The Respondent then filed its Application dated 20<sup>th</sup> April, 2022 brought under certificate of urgency pursuant to section 12(3) of the *Employment and Labour Relations Court Act* and article 159(2) of *the Constitution* of Kenya 2010, seeking the following Orders;
  - a. That the Honorable Court be pleased to certify this application as urgent and be pleased to entertain the same exparte in the first instance for grant of prayer(b) herein.
  - b. Pending inter parte hearing of the application, this Honourable Court be pleased to issue temporary Order staying further proceedings consequent upon and in enforcement of its Orders of 27<sup>th</sup> July, 2021 and or decree herein.
  - c. Pending interpartes hearing and determination of Nakuru Court of Appeal Civil Application number E085 of 2021, this Honourable Court be pleased to issue a temporary Order staying further proceedings consequent upon and in enforcement of it Orders of 27<sup>th</sup> July, 2021 and or the Decree herein.
9. This application is supported by the averments on the face of the application and the affidavit of Timothy M. Muthini, the Respondent's Human Resource manager, sworn on the 20<sup>th</sup> April, 2022 and based on the following Grounds;
  - a. That the Claimant made an application dated 9<sup>th</sup> July, 2021 seeking, among others, to have the Applicant's stay orders discharged and the Court allowed the said application on the 27<sup>th</sup> July, 2021; vacating the Orders issued on 16<sup>th</sup> November, 2017, ordered the release of Kshs 3,450,508 deposited in the Court's Account and further directing the respondent to release the interest earned at Sidian Bank.
  - b. The respondent states that it was aggrieved by this Orders and filed an application dated 15<sup>th</sup> September, 2021 seeking to set aside those Orders because they had not been served with the application prior to hearing of the same. Subsequently, their application was dismissed prompting the respondent to lodge a Notice of Appeal of the decision of the court of 9<sup>th</sup> December, 2021 and then lodge Civil Application No. E085 of 2021(Application number 85) seeking stay of execution of the Orders of this Court issued on the 27<sup>th</sup> July, 2021.
  - c. The Civil Application No. 85 of 2021 was certified urgent and the Court gave direction for filing of submissions which both parties have fully complied with and the matter is pending for disposal.
  - d. The respondent avers that the Orders sought in the application of 25<sup>th</sup> March, 2022 are grievous as it has the effect of rendering the Civil Application number 85 of 2021 nugatory,



the applicant right of appeal will be rendered an academic exercise, the persons cited in the application are likely to lose their freedom, property among others on account of contempt of Court. Further that if the decree is allowed for execution the Respondent is likely to lose more than 9 million shilling which cannot be recovered if the appeal succeeds and also that if the grievants are reinstated and paid salaries the Respondent will be unable to recover the same if the appeal succeeds.

- e. The respondent contends that its application ought to be decided on priority basis in light of the circumstances.
10. The Claimant opposed the application by filing a Replying Affidavit sworn on 9<sup>th</sup> May, 2022, by George Obong'o, the Claimant's Kisii Branch secretary. According to the Claimant, the Orders of 27<sup>th</sup> July, 2021 which were issued by the Court on the 7<sup>th</sup> September, 2021 have largely been executed with save for the direction to release the interest earned in his account at Sidian Bank in relation to the sum of Kshs 3,450,508 and payment of cost of the said application.
11. The affiant stated that the Orders sought in the instant Application are a mirror reflection of the Orders sought in their Civil Application number 85 of 2021 in Nakuru Court of Appeal, and similar to the Orders sought earlier by the Respondent in its Application dated 15<sup>th</sup> September, 2021 before this court. The latter orders were declined in the ruling delivered by this Court on the 9<sup>th</sup> December, 2021 and therefore the Court is functus officio and the instant Application is res-judicata.
12. The affiant also averred that the appeal is premised on the fact that the respondent was not served with the application dated 9<sup>th</sup> July, 2021 when the application and the Court Order forwarded to their official email indicated the hearing date as evidenced by the Exhibit-8 herein.
13. It is also stated that the respondent has not complied with the provision of order 42 rule 6 of the Civil Procedure Rules to warrant them being granted stay orders.
14. The parties filed list of authorities then their counsel Mr. Nyumba and Mr. Nyamurongi argued the applications orally in the open court via MS Teams. The submissions basically reiterates the facts summarized above and as such in need not repeat the same.

### **Issues for determination and analysis**

15. As it is evident from the orders sought, the claimant is seeking to enforce the judgment/decree of the court herein and the orders made on 27<sup>th</sup> July, 2021 while the respondent is seeking stay of further proceeding consequent upon and in enforcement its orders made on 27<sup>th</sup> July, 2021 and the decree pending hearing and determination of Nakuru Court of Appeal Civil Application No. 85 of 2021.
16. I will begin with the Respondent's application dated 20th April, 2022 in which the main issue is whether the applicant has met threshold for granting stay pending appeal set out by the law.
17. Order 42 Rule 6(2) of the Civil Procedure Rules states that: -
  - “No order for stay of execution shall be made under sub-rule (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.”



18. The foregoing provision is couched in mandatory terms and it basically means that granting of an order of stay pending appeal is a discretionary power that must be exercised judiciously upon the said threshold. The court has to consider whether it will be in the interests of justice to grant the same. The underlying interest ought to be that an appeal should not be rendered nugatory. Appeal becomes nugatory in my view if the successful appellant is unable to recover all the decretal sum paid or does so with much difficulties. This is what the above provision refers to as substantial loss to the applicant.
19. The question that arises is whether the applicant herein has demonstrated that it stands to suffer substantial loss if stay is denied pending appeal. The appeal at stake is with respect to the ruling of this court delivered on December 9, 2021 by which I dismissed the Notice of Motion dated September 15, 2021 seeking setting aside of the orders made on 27<sup>th</sup> July, 2021 and refund of the money paid to the claimant from the court deposit account.
20. The claimant has confirmed that the money has since been released by the court and distributed to the beneficiaries (grievants) in execution of the impugned ruling of 27<sup>th</sup> July, 2021. The money was held as security for the grievants net salaries for a specific period following their reinstatement to employment vide the judgment/decree. There is no appeal challenging the primary judgment/decree.
21. In my view, the said appeal No. E085 of 2021 has no relation with the primary judgment/decree of the court. In addition, the orders made on 27<sup>th</sup> July 2021 have since been executed save for the payment of the interest earned and costs. There is therefore no evidence that the appeal will be rendered nugatory by the denial of the stay order sought.
22. Allowing the application as prayed will have the effect of granting stay of execution of the primary judgment/decree pending nothing because, it is common ground that there is no appeal pending in the court of appeal by which the primary judgment/decree is impugned. It would also be entertaining an application which is res judicata since that issue was fully determined by this court on 16<sup>th</sup> November, 2017.
23. Having found that the applicant in the instant suit has failure to prove that substantial loss will be occasioned if the order of stay pending appeal is withheld, the respondent's application dated 20<sup>th</sup> April, 2022 must fail.
24. I gather support from the case of *Lucy Waitbera Kimanga & 2 Others vs John Waiganjo Gichuri* [2015] eKLR where Gikonyo J held that;

“As a general rule, stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. The mere fact that an appeal is arguable alone does not fit the constitutional yardstick used to gauge whether a stay of proceedings should or not be imposed. That is only one of the factors which the court should consider. There are other equally important factors to consider namely;

- i. The need for expeditious disposal of cases and the impediment the stay would place on the right of the Respondent to have the case determined expeditiously;
- ii. The interest of justice in the case; the pros and cons of granting or not granting the order;
- iii. The prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one,
- iv. The scarcity and optimum utilization of judicial time and



- v. Whether the application has been brought expeditiously.”
25. Turning to the Contempt of Court Application by the claimant dated March 23, 2022, the issue for determination is whether the applicant has met the threshold for the court to cite the respondent/judgment debtor for contempt of court.
26. Contempt of court is that conduct or action that defies or disrespects authority of court. *Black’s Law Dictionary* 9th Edition, defines contempt as:
- “The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.”
27. Simply put, contempt is conduct that impairs the fair and efficient administration of justice. Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish for contempt. Again section 12 (3) (viii) of the *Employment and Labour Relations Court Act* gives the court power to make any appropriate relief that it may deem fit in the exercise of its jurisdiction. The said appropriate reliefs in my view would include punishment for contempt of court.
28. Mativo J restated the test for establishing contempt in his decision in *Samuel M. N. Mweru & others v National Land Commission & 2 others* [2020] eKLR where he stated –
- “40. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove:
- i. the terms of the order.
  - ii. Knowledge of these terms by the Respondent,
  - iii. Failure by the respondent to comply with the terms of the order.

Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-

- “There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-
- a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
  - b. the defendant had knowledge of or proper notice of the terms of the order;
  - c. the defendant has acted in breach of the terms of the order; and
  - d. the defendant’s conduct was deliberate...”

Upon proof of these requirements the presence of willfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut this inference by contrary proof on a balance of probabilities.”



29. It is prayer 4 of the claimant's application of March 25, 2022 seeks for the respondent officials listed therein to be held in contempt of court. The Orders in which the claimant alleged to have been breached under that prayer is the judgment delivered on April 26, 2017 and the orders made on July 27, 2021.
30. The judgment ordered the respondent to reinstate the grievants with effect from April 27, 2017 at 8.00 hours and pay each two months' salary as compensation for unlawful termination plus costs.
31. There was no stay of the judgment until November 16, 2017 when by the consent of the parties, the court ordered that there be stay of execution of judgment and decree of the court on condition that the respondent deposits Kshs 3,450,508 being the net salaries accruing for the period upto October, 2017. The money was to be deposited within 30 days from the date of the order, in a joint interest earning account in the names of counsel for the respondent and the claimant union. However, money was deposited in the respondent's advocates' sole account at the Sidian bank until 2<sup>nd</sup> June 2020 when the court directed the respondent to deposit the money in court.
32. The order dated July 27, 2021 discharged/vacated the stay order issued on November 16, 2017 and directed that the Kshs.3,450,508 deposited in court be released to the claimant. The court also directed the respondent to release the interest earned from the said money while deposited at the Sidian bank also be released to the claimant. Finally, the respondent was condemned to pay costs of the application dated July 9, 2021.
33. It is not in doubt that the Respondent was aware of the Judgment and Orders of the Court given on 27<sup>th</sup> July, 2021, and that indeed the order was complied with save for of interest and costs.
34. With regard to costs, there is nothing on record to show that the costs payable to the claimant, were taxed/determined and as such the Respondent cannot be blamed for failing to pay cost of that application.
35. However, it is clear that the release of interest earned on Kshs 3,450,508 at Sidian Bank, the Respondent has not been released to the claimant yet, as argued by the claimant, there is no stay order since July 27, 2021. The Civil Application filed in Nakuru Court of Appeal that is E085 of 2021 does not and cannot in any way operate as stay of execution of the judgment/decree or the order made on 27<sup>th</sup> July 2021.
36. In view of the foregoing observation, I find that the claimant has demonstrated that the respondent/ judgment debtor has willfully and deliberately failed to comply with the judgment/decree delivered on April 26, 2017 and the Orders made on 27<sup>th</sup> July, 2021. Therefore I cite Ms. Joyce Macharia (Chief Executive Officer), Mr. Xavi Selga (Managing Director), Japheth Ngetich (General Manager) and John Mwendwa (Human Resource Director) for contempt of court by disobeying the judgment/decree of this court dated 26<sup>th</sup> April, 2017 and Court Orders of 27<sup>th</sup> July, 2021.
37. As a result I direct that the respondent comply with judgment/decree of the court and release to the claimant the interest on the Kshs. 3,450,508 as per the Orders issued on 27<sup>th</sup> July, 2021 forthwith, failure to which they shall physically appear before this court at Nakuru law Courts on June 29, 2022 at 9.00a.m. to show cause why they should not be punished for contempt of court.
38. Those are the Orders of the Court.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 2<sup>ND</sup> DAY OF JUNE, 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**

