



**C. Dorman Limited v Mukhwana (Miscellaneous Application
E220 of 2021) [2022] KEELRC 1129 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1129 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E220 OF 2021**

AN MWAURE, J

JULY 7, 2022

BETWEEN

C. DORMAN LIMITED APPLICANT

AND

AGGREY AMULAKHO MUKHWANA RESPONDENT

RULING

1. The Claimant has brought an application dated 9th May 2022 and he is praying for the following:
 - i. The honourable Court be pleased to set aside vary or discharge the orders granted on 7th December 2021 stay of execution pending hearing and determination of the application.
 - ii. That this honourable Court be pleased to set aside, vary or discharge the orders granted on 7th December 2021, an order issued to the Court Registrar to facilitate production of the lower Court file before this honourable Court for speedy disposal of the appeal pending determination of this application.
 - iii. That this honourable Court set aside vary or discharge the orders granted on 7th December 2021, an order issued to the Court Registrar to facilitate production of the lower Court file before this Honourable Court for speedy disposal of the appeal pending determination of this application.
 - iv. That this honorable Court be pleased to set aside, vary or discharge the orders granted on 7th December 2021, an order for the Applicant to deposit the decretal amount of Kshs 1,541,716 pending hearing and determination of this application.
 - v. That the Respondent be granted leave to file an application for execution in lower Court file number 610 of 2018 and same be determined.



Applicant's Case

2. On 7th December 2021 the Claimant was issued with orders pursuant to application supporting affidavit dated 24th November 2021 before this honourable Court.
3. The Claimant was given stay of execution pending hearing and determination of Employment and Labour Relations Court Appeal number 139 of 2021 which the Applicant has not served the respondent with any papers related to memorandum of appeal.
4. That on 7th December 2021 the Claimant was also issued with the order to Registrar to facilitate production of the lower Court file before this honorable Court for speedy disposal of this appeal but the same is not being taken care of.
5. That the Claimant was ordered to deposit the decretal amount of Kshs 1,541,716/50 with the lower Court within 30 days of the ruling but the Applicant has failed to honour the same.
6. That the Claimant has failed to comply with Court orders even though issued with interim in his favour.
7. That the Claimant has abused the Court process thereby denying the respondent herein its right.
8. That from the foregoing it is in the interests of justice that the orders granted on 7th December 2021 be set aside, varied or discharged.

Respondent's Replying affidavit

9. The Respondent refers to Order 46 of the [Civil Procedure Rules](#) in response to the application which states as follow:-
 6.
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under decree or order appealed from except appeal case of in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.
10. The Respondent states that this Court having finalized on the stay of execution is now functus officio to this case. The respondent referred to the case of [Mohamed Khamis Hemed v Almasi Beverages Ltd](#) [2020] eKLR where it was held:

“The Court has considered the material on record and the parties’ respective submissions. The Court finds that if the Applicant is dissatisfied with the order of stay of execution pending appeal, then the procedure is to apply to the Court of Appeal as per order 41 Rule 6(1) of [Civil Procedure Rules](#). The Court finds that in view of that provision the Court is clearly *functus officio* and it was misconceived for the Applicant to invoke the Court’s inherent jurisdiction. It is also clear that the Respondent has taken steps towards filing the



record of appeal and the Applicant would fail in alleging that the Respondent had failed to take such steps.

11. The Respondent further avers he has applied for a decree, a copy of judgment and typed proceedings from the lower Court vide letter dated 9th November 2021.
12. He says when he failed to procure the lower Court file he filed the miscellaneous application dated 7th December 2021 seeking stay of execution and also to deposit the decretal sum within 30 days of the ruling.
13. He says he wrote to the registry about where to deposit the decretal amount and he says he has not got the requested details despite following up with the registry severally. He says todate he has been following on the invoice but is receiving a message “awaiting approval by registry”.
14. The Respondent in conclusion says there is no communication from the ELRC registry on whether the lower Court file was retrieved and no communication if the file from the lower Court has been retrieved. He says in the absence of the lower Court proceedings the Respondent cannot make any headway without the proceedings. The Respondent prays the application be dismissed with costs to the respondent.

Decision

15. The Respondent’s prayers as per notice of motion dated 9th May 2022 is for setting aside stay of execution orders pending appeal. The reason given for this prayer is that the Applicant was issued with Court order in his favour and up to date Respondent has not complied with any Court order. The Applicant’s averments is that the respondent is sleeping on the matter and so is delaying justice.
16. The Claimant on the other hand avers he has attempted to procure the proceedings from the lower court and also to get an invoice to deposit the decretal sum but to no avail.
17. The Court is persuaded that since the stay of proceedings order were granted by this Court its hands are now tied and the best recourse is to make such Application to the Court of appeal. Ideally and a general rule apart from exceptions which follow, judgments or orders which have been formally recorded or entered can only be varied or discharged on appeal.
18. The Court is supported by case of *Mohamed Khamis Hemed v Almasi Beverages Ltd* cause No 449 of 2015 where it was held:

“The Court has considered the material on record and the parties’ respective submissions. The Court finds that if the Applicant is dissatisfied with the order of stay of execution pending appeal, then the procedure is to apply to the Court of Appeal as per order 41 Rule 6(1) of *Civil Procedure Rules*. The Court finds that in view of that provision the Court is clearly functus officio and it was misconceived for the Applicant to invoke the Court’s inherent jurisdiction. It is also clear that the respondent has taken steps towards filing the record of appeal and the Applicant would fail in alleging that the respondent had failed to take such steps.”

19. In the same line of observation in the case of *Rogers Absai T/A Absai & Company Advises and Wachira Wararuru & Another* Civil Application no 19 of 2014 in relation to delay on provision of proceedings the Court observed:

“However all said and done, without the copies of proceedings and judgment, the party seeking to appeal cannot mount any successful appeal. In fact if it attempted to do so, the



same appeal would not see the light of the day. It would be struck out as incompetent. It is therefore not idle that the respondent waited, all for too long, for the copies of the proceedings and judgment they sought vide their advocates' letter of 30th May 2007 to be supplied before they could prepare and file the record of appeal. In the application No. 26 of 2009, we have referred to which was between the same two parties a here and which was decided by this Court on the same issue, this Court differently constituted stated:

“In the case before us, the Deputy Registrar has not replied to the request of the Respondents and has not indicated at all whether any of the documents, certified or not are available. Further, Mr. Ogutu does not know whether these documents are available or not. He has none of them himself.

In the absence of any reply from the Deputy Registrar as to whether certified or certified copies of proceeding and judgment are available or not, it would be the height of injustice to condemn the respondents who have been ably represented by Mr. Echessa, for failing to take an essential step to lodge the requisite record of appeal.”

20. In the present case the Respondent has demonstrated steps he has taken to procure the proceedings and the file in the lower Court but to no avail. He has also demonstrated effort taken to obtain an invoice in the registry to enable them to deposit the decretal amount. As observed in the case of *Rogers Absai T/A ABSAI & Company Advocates (supra)* the party that has applied for such copies has no executive powers on the Court's registry and this while agitating the registry to act quickly to supply the copies, must, in practice accept that the registry has its own system of work which it must honour.
21. In view of the foregoing the Court is of the view the matter is functus officio before it and the remedy available for the Respondent under Order 41 of the *Civil Procedure Rules* lie with the Court of Appeal and not the trial Court and the party aggrieved by the order of stay of execution pending appeal may so apply there.
22. The Court is truly concerned by the delay herein and the frustration by the Applicant to benefit from the fruit of his judgment and so the Court Registrar ELRC is urged to facilitate production of the lower Court file before this honourable Court for speedy disposal of the appeal and facilitation of the depositing of the decretal amount in Court without any further delay and if possible within the next 30 days from today's date.
23. But this application cannot stand and is thereby dismissed and each party bear their own costs of this application.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 7TH DAY OF
JULY 2022.**

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st 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 *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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

