



REPUBLIC OF KENYA



KENYA LAW
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Mutua v Marshview Limited (Cause 79 of 2017)
[2022] KEELRC 3950 (KLR) (16 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3950 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE 79 OF 2017
DKN MARETE, J
SEPTEMBER 16, 2022

BETWEEN

MWANGANGI MUTUA CLAIMANT

AND

MARSHVIEW LIMITED RESPONDENT

RULING

1. This is an application by way of notice of motion dated September 29, 2021. It seeks the following orders of court;
 1. That this application be certified urgent and be heard exparte in the first instance due to the reasons of urgency.
 2. That the execution of the decree herein be stayed pending the hearing and determination of:
 - a. The appeal No 7, 8, 9, 10 and 11 of 2019 in Court of Appeal, Nyeri.
 - b. The intended reference against the ruling of the deputy registrar made on September 7, 2021 in this matter.
 3. That the execution of the decree herein be stayed pending the hearing and determination of this application.
 4. That the warrant of attachment issued herein be lifted.
 5. That the costs of the application be paid by the claimants in any event.
2. It is grounded thus;
 1. That the issuance of the warrant of attachment irregular and in contravention the mandatory provision of order 22 rule 18 (1, a) of the *Civil Procedure Rules*.



2. That it is wrong and improper for the claimant to enforce a decree which they are challenging in the court of appeal.
 3. That it is in the interest of justice that the decree be stayed pending the appeal and related reference in this court.
 4. That unless a stay is granted, the respondent/applicant herein will suffer irreparably as the claimant will not be in position to refund the decretal amount in event the intended reference is allowed.
 5. That unless the defendant is not restrained by this court, the application and entire suit will be rendered nugatory.
 6. That in addition to the above, a stay of execution should be granted pending the hearing and determination of the intended reference before this court.
 7. That the claimants should abandon the appeal before proceeding with the execution.
 8. That unless a stay of execution is granted, the auctioneer will proceed to auction the vehicles before the application is heard which will render the same nugatory.
 9. That in any event, a stay should be granted to afford a chance to applicant to exercise of it rights to challenge the deputy registrar ruling through reference.
3. The claimant/respondent in a replying affidavit sworn on October 7, 2021 opposes the application. He acknowledges his filing of an appeal but avers that this is yet to be disposed off for lack of quorum in the Court of Appeal at Nyeri. Again, there is no stay of the judgment and that under order 42 rule 6, no appeal serves as a stay of proceedings howsoever.
 4. It would appear that the respondent/applicant's view of this matter is that the application touches on the issue of costs and she is of the view that this was properly dealt with by the taxing master and fully dispensed with. Any other issue of costs can be handled at the Court of Appeal and this shall in all be a separate matter.
 5. The respondent/applicant further denies any knowledge of service of a reference on taxation and argues that this, if at all, is not a reference as this was filed out of time and in contravention of rule 11 (1) of the [Advocates Remuneration Rules](#). This requires that each notice of challenging the deputy registrar or order on costs be had within fourteen days. This also applied to a quest for reasons behind taxation.
 6. It is the claimant/respondent's submission that the procedural aspects of execution are in order and that this application is an attempt to stall these proceedings therefore denying him the fruits of judgment.
 7. I buy the argument of the respondent/applicant that it is out of form to seek execution in a matter that a claimant has chosen to appeal against. In the instant case, it is not in dispute that the claimant has a pending appeal against the decree and judgment of court at the Court of Appeal.
 8. This makes clumsy this attempt at execution. Inasmuch as it is argued that an appeal is not per se a bar to execution; or that there is no subsisting order of stay of execution. I would consider the attempt at execution unfortunate. It is indeed an abuse of the process of court. The claimant in the circumstances is bent on having his egg intact, and eating it as well. This is against the spirit of fairness and justice. He should opt for one, and not the other or both.



9. The respondent/applicant has adduced evidence of the filing of an appeal against the judgment of court set to be executed. This is not disputed. Again, she has not met the threshold of a stay of execution as enunciated by order 42 of the *Civil Procedure Rules*.
10. I am therefore inclined to allow this application with orders that;
- i. That the execution of the decree herein be stayed pending the hearing and determination of:
 - a. The appeal No 7, 8, 9, 10 and 11 of 2019 in Court of Appeal, Nyeri.
 - b. The intended reference against the ruling of the deputy registrar made on September 7, 2021 in this matter.
 - ii. Each party shall bear their costs of the application.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

Miss.Makaba instructed by Paul Mwangi & Co.Advocates for the Respondent/Applicant.

Mr. chiuri instructed by Chiuri & Chiuri Co.Advocates for the Claimant/Decree Holder.

