



**Njenga v Muchiri t/a Neema Apartments (Cause 134 of 2018)
[2022] KEELRC 12955 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12955 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 134 OF 2018
DN NDERITU, J
OCTOBER 27, 2022**

BETWEEN

ROBERT NDUATI NJENGA CLAIMANT

AND

JOSEPH KIMANI MUCHIRI T/A NEEMA APARTMENTS RESPONDENT

RULING

I. Background

1. In a judgment dated and delivered on November 14, 2019 the court (Mbaru J) entered judgment in favour of the claimant herein in the sum of Kshs 617,414.40 with costs and interest thereon.
2. A certificate of costs was issued on January 21, 2021 in the sum of Kshs 183,320/= and on November 14, 2019, counsel for the claimant, Mugweru & Company Advocates, wrote to the applicant herein demanding settlement of the amount then due in the sum of Kshs 753,159.40 or in default execution to issue.
3. On March 3, 2020 the respondent/applicant herein (applicant) filed an application to set aside the ex parte judgment and stay of execution of the decree. That application was dismissed with costs on August 24, 2020.
4. The applicant filed another application dated September 23, 2020 seeking for stay of execution of the judgment delivered on November 14, 2019 and the decree thereof, that there be a review, vary and or setting aside of the ruling delivered on August 28, 2020, and that the respondent be allowed leave to file a response to the claim out of time. That application was dismissed with costs on November 10, 2020.
5. The applicant has now filed a Notice of motion dated March 29, 2022 seeking for the following –
 1. That this application be certified urgent, be heard on priority basis and service thereof in the first instance be dispensed with.



2. That pending the hearing and determination of this application, this honourable court be pleased to stay execution of the resultant orders of the ex parte judgment delivered on 14th November, 2019 against the unheard applicant.
3. That pending the hearing and determination of intended appeal at the Court of Appeal, this honourable court be pleased to stay execution of the resultant orders of the ex parte judgment delivered on November 14, 2019 against the unheard applicant.
4. That the costs of this application be provided for.
6. The application is expressed to be brought under the provisions of Section 3A of the Civil Procedure Act and order 42 Rule 6(2) and order 51 of the Civil Procedure Rules and all other enabling provisions of the law.
7. The application is based on the grounds on the face of it and supported by an affidavit of the applicant sworn on March 29, 2022 with several annexures thereto.
8. The application is opposed and the claimant swore a replying affidavit on March 20, 2022 with several annexures thereto.
9. On April 19, 2022 counsel for both parties consented that the application be heard by way of written submissions. Counsel for the applicant filed his written submissions on May 4, 2022 and counsel for the claimant filed on May 25, 2022.

II. Applicant's case

10. On May 19, 2022 this court issued a temporary order for stay of execution of the judgment and the resultant decree pending the inter-partes hearing and determination of the application herein. In the circumstances the only prayers for determination in this ruling are prayers 3 and 4.
11. Prayer 3 of the application is in the following terms:-

“That pending the hearing and determination of the intended appeal at the Court of Appeal this honourable court be pleased to stay execution of the resultant orders of the ex parte judgment delivered on November 14, 2019 against the unheard applicant.”
12. The applicant argues that an ex parte judgment was entered against him due to “indolence and reticence” on the part of his former lawyers, Sheikh & Co Advocates, who failed to defend the cause as instructed. The ex parte judgment was delivered on November 14, 2019.
13. Vide an application dated March 3, 2020 the applicant sought for stay of execution and setting aside of the ex parte judgment. The said application was dismissed with costs on August 24, 2020.
14. Subsequently, the applicant instructed his current lawyers, Mirugi Kariuki & Co Advocates, to act for him in this matter. Again, the new lawyers for the applicant filed an application seeking for review of the orders of August 24, 2020 which dismissed the application dated March 3, 2020. In the said application dated September 20, 2020 the applicant also sought orders for stay of execution.
15. The application dated September 20, 2020 was dismissed on November 10, 2020 and the court (Mbaru J) noted that the said application was an abuse of court process as the issue of setting aside the ex parte judgment and stay of execution had been heard and determined in an earlier ruling of August 24, 2020.



16. The applicant now urges that he has filed a notice of appeal in respect of the ruling delivered on November 10, 2020 and that if stay is not granted the intended appeal shall be rendered nugatory and a mere academic exercise.
17. The applicant has annexed a copy of the notice of appeal which clearly indicates that the appeal alluded to or intended is against the ruling (Mbaru J) delivered on November 10, 2020. It is therefore evidently clear that there is no appeal filed against the judgment in this cause.
18. It is on the basis of the foregoing that the applicant prays that an order for stay of execution be granted pending the hearing and determination of the intended appeal.

III. Claimant's case

19. The claimant in his replying affidavit deposes that the applicant deliberately failed to defend the claim after he had been properly served in accordance with the law.
20. The claimant states that this court is *functus officio* as far as the issue of stay of execution is concerned as the same prayer was dismissed in the two previous applications alluded to in an earlier part of this ruling.
21. The claimant points out that there is no appeal pending in regard to the judgment in this cause and the resultant decree and hence there is absolutely no reason why stay of execution may issue against a judgment and a decree that has not been appealed.
22. The claimant alleges that since filing the said notice of appeal against the ruling of November 10, 2020 the applicant has taken no steps in preparing the record of appeal and fixing the appeal for hearing and hence the said appeal is only intended to buy time and delay him from enjoying the fruits of the lawful judgment.
23. The claimant prays that the application be dismissed with costs as the same is intended to further delay the conclusion of this matter.

IV. Issues for determination

24. There is only one substantive issue for determination in this application that is whether the applicant should be granted stay of execution pending the hearing and determination of the intended appeal.

V. Determination

25. This is the third time that the applicant is seeking stay of execution of the judgment. For clarification, it is not a judgment that is executed but the decree drawn in pursuance of the judgment that is executed. While costs were taxed and a certificate of costs issued on January 21, 2021 there is no decree on record.
26. However, this same issue of execution of the judgment has been subject of two earlier rulings mentioned in an earlier part of this ruling. Surely, this court cannot sit on appeal in regard to the earlier two rulings by Mbaru J that denied the applicant stay of execution.
27. Further, the applicant is not asking this court to review the ruling by Mbaru J which is now subject of the intended appeal as per the notice of appeal exhibited by the applicant.
28. Again, there is no appeal or intended appeal against the judgment in this cause.
29. Clearly and evidently, this application is in blatant abuse of the process of court and intended to further delay settlement of the judgment.



30. On what basis would this court grant stay of execution in this cause? What would the stay be pending?
31. Judgment in this cause was delivered on November 14, 2019 and except for the temporary stay that was issued by this court on May 19, 2022 the Appellant has not made any efforts whatsoever towards settlement of the decretal sum plus costs. The claimant is entitled to the fruits of the judgment and this matter cannot be held in abeyance forever.
32. order 42 Rule 6(2) of the Civil Procedure Rules is specific on the conditions upon which stay of execution may be granted. The applicant has not demonstrated what substantial loss he would experience if stay was not granted. A lawful judgment or a court order that has not been challenged on appeal and execution of a decree arising therefrom cannot amount to substantial loss to a judgment debtor. In fact, the applicant herein is under a legal obligation to satisfy the decree.
33. The instant application was filed on March 30, 2022 over two (2) years and four (4) months after the judgment was delivered on November 24, 2019. There is no explanation for this delay whatsoever. The only probable explanation for the delay is that there has been two other previous applications over the same subject matter. This is the reason why this application is a total abuse of the court process.
34. This court has carefully gone through the pleadings filed by the parties herein and more so the submissions filed in support and in opposition of the instant application. There are no binding or persuasive decided cases or legal provisions cited by counsel for the applicant to found any merits in the application.
35. For the foregoing reasons the application dated March 29, 2022 is hereby dismissed with costs to the claimant.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU

THIS 27TH DAY OF OCTOBER, 2022.

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DAVID NDERITU

JUDGE

