



**Isinya Roses Limited v Kyalo (Miscellaneous Case E050 of 2022)
[2022] KEELRC 13220 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13220 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E050 OF 2022
JK GAKERI, J
NOVEMBER 17, 2022**

BETWEEN

ISINYA ROSES LIMITED APPLICANT

AND

ALEXANDER PETER KYALO RESPONDENT

RULING

1. Before the court for determination is a notice of motion application dated September 1, 2022 by the applicant seeking orders that:-
 - i. Spent.
 - ii. Pending the hearing and determination of this application, there be a stay of execution of the judgement entered on January 26, 2022 and the ensuing decree dated February 17, 2022.
 - iii. The warrants of attachment issued to Vintage Auctioneers and proclamation on September 1, 2022 be set aside entirely.
 - iv. The costs of this application be awarded to the applicants.
2. The application filed under certificate of urgency is expressed under the *High Court Practice and Procedure (Vacation) Rules*, Articles 159 of the *Constitution* of Kenya, 2010, relevant provisions of the *Civil Procedure Rules*, 2010, *Insolvency Act* and all other enabling provisions and is based on the grounds stated on its face and supported by the affidavit of Avril Mbulwa dated September 1, 2022 who deposes that she is the Human Resource Manager of the applicant.
3. The affiant states that the applicant had already provided the requisite bank guarantee and an appeal had already been filed to wit Appeal No 109 of 2022 and a copy of the memorandum of appeal was attached and counsels were in talks on a possible compromise of the appeal.



4. It is deposed that despite the foregoing, the auctioneers forced their way into a truck owned by I&M Bank Ltd and the applicant herein, Fuso F1V1 KDD 053L in Nairobi, Industrial Area as it was transacting company business on the morning of September 1, 2022.
5. That the auctioneer had neither set their costs nor stated the date of the decree and the jointly owned lorry was grossly undervalued and the proclamation was lacking in specificity and the auctioneer failed to introduce himself and forced his way to the vehicle.
6. The affiant states that the decretal amount is exaggerated and the application was filed timeously.

Respondent's response

7. In his replying affidavits sworn on September 16, 2022, the respondent deposes that the orders of stay of execution of judgment and decree dated January 26, 2022 and February 17, 2022 respectively were inefficacious as they had been overtaken by events since the auctioneers had carted away the proclaimed goods and were in the process of disposing them.
8. That Vintage Auctioneers had attached a truck Fuso F1V1 Reg No KDD 053L.
9. That the applicant had filed a similar application dated April 8, 2022 seeking similar orders and the court directed the applicant to provide a bank guarantee within 30 days failing which the decree holder had liberty to execute the decree.
10. That the 30 days lapsed on July 12, 2022 and the applicant had not provided a bank guarantee within the 30 days but served the same upon the decree-holder's advocate on July 15, 2022.
11. The affiant stated that the proclamation dated September 1, 2022 was proper.
12. The affiant further stated that the applicant's prayer to set aside the Warrant of Attachment issued to Vintage Auctioneers and proclamation on September 1, 2022 was an abuse of court process.
13. That the multiple applications by the applicant were intended to frustrate the decree-holder from enjoying the fruits of his judgement.
14. That the decretal sum had not been grossly exaggerated.
15. It is the decree-holder's case that the instant application was unmerited and should be dismissed with costs.

Applicant's submissions

16. The Application came up for hearing on September 19, 2022 and both counsels were ready to proceed.
17. While the decree-holder's counsel relied on the replying affidavit dated September 16, 2022, the applicant's counsel made oral submissions.
18. Counsel submitted that the instant application sought the setting aside of the proclamation order dated September 1, 2022 on the grounds that:
 - a. The applicant provided a bank guarantee and it was accepted by the respondent and also retains the proclaimed truck. It was urged that the decree-holder could keep both.

Second, counsel submitted that a copy of the log book on record showed that the vehicle was co-owned by the applicant and Investment & Mortgages Bank Ltd.



Thirdly, the applicant had filed an appeal against the decision of the lower court in Appeal No E109 of 2022 and the decree-holder could not purport to proclaim when the appeal was underway.

19. The decree-holder's counsel submitted that by its orders issued on June 13, 2022, the court directed the applicant to issue a bank guarantee within 30 days failing which the decree-holder had liberty to execute and execution commenced after the duration lapsed. That the decree-holder had liberty to take that option.
20. Counsel admitted that the proclaimed truck was co-owned by the applicant and a bank.
21. It was further submitted that the existence of an appeal does not necessarily mean that stay orders had been overtaken by events.
22. Finally, it was submitted that the application was unmerited and should be disallowed.

Determination

23. The singular issue for determination is whether the application herein is merited.
24. It is not in dispute that the applicant herein filed an application dated April 8, 2022 under certificate of urgency seeking inter-alia stay of execution of the decree ensuing from the default judgement issued on January 26, 2022 in Kajiado CMEL 10A of 2020 and a similar order was sought in the current application.
25. The only addition in the current application is the setting aside of the warrants of attachment issued to Vintage Auctioneers and proclamation on September 1, 2022.
26. When the application came up on September 6, 2022, the court issued interim orders pending the hearing and determination of the application.
27. A stay of execution of the judgement entered on January 26, 2022 and the ensuing decree.
28. The orders are dated September 12, 2022.
29. A similar order had been made on June 13, 2022.
30. As matters stand, there is already an order of stay in force dated September 12, 2022. The court is satisfied that no such order is necessary at this stage.
31. As regards the prayer for lifting of the warrants of attachment issued to the Vintage Auctioneers, the applicant relied on the submissions that the applicant provided a bank guarantee dated July 15, 2022 which the decree-holder's counsel on record accepted and that it had already filed an appeal and a copy of the memorandum of appeal was attached.
32. Although the memorandum of appeal is dated July 7, 2022, there is no evidence that further action has been taken to prosecute the appeal. There is no evidence that a request for typed proceedings has been made and there are no timelines for preparation of the record of appeal.
33. That is all the court can say on that issue.
34. In its ruling dated June 13, 2022 delivered in court virtually on even date, the court directed the applicant herein provide a bank guarantee for the decretal sum and costs within 30 days from that date failing which the decree holder would have liberty to execute the decree.



35. From the submissions by counsel and the supporting and replying affidavits and annexures to the application, it is clear that the bank guarantee was not provided within the prescribed duration.
36. The document on record is dated July 15, 2022 and it is unclear when it was served upon the decree-holder's counsel.
37. The supporting affidavits sworn by Avril Mbulwa dated September 1, 2022 assails the auctioneer's conduct and the proclamation but is reticent on when the bank guarantee was provided.
38. Contrary to the decree-holder counsel's submission that the 30 days lapsed on July 12, 2022, the duration indeed lapsed on July 13, 2022.
39. It is unclear to the court why the applicant's counsel did not apply for extension of the duration if client had challenges securing the bank guarantee within the 30 days period. The applicant has not faulted the duration in any way but has not demonstrated why the guarantee was not provided on time to obviate execution of the decree.
40. The court is in agreement with the decree-holder counsel's submission that nothing prevented the decree-holder from executing the decree after July 13, 2022.
41. However, acceptance of the bank guarantee by counsel for the decree-holder after taking possession of motor vehicle Reg No KDD F1V1 was improper as it accorded the decree-holder double security without justification and one must be surrendered forthwith.
42. It requires no belabouring that the current application filed under certificate of urgency was necessitated by the applicant's failure to obey court directions and failure to seek extension of time. The execution process initiated by the decree-holder was at the time a lawful process.
43. Needless to emphasize, the ruling dated and delivered on June 13, 2022 addressed the circumstances in which a grant of execution may be made using relevant judicial authority and the issue of provision of security was sufficiently canvassed as the applicant had indicated that it was ready and willing to provide adequate security which it did not provide within the timeline given by the court.
44. This position finds support in [*Mwaura Karuga t/a Limit Enterprises V Kenya Bus Services Ltd & 4 others*](#) (2015) eKLR, where 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 judgement sum unless the latter two were not granted which is seldom. The security to be given is measured on that yardstick.”
45. The issue of adequacy of the security was also addressed in *Ndubiu Gitabi & another V Anna Wambui Warugongo* (1988 – 92) 2 KAR 100.
46. Evidently, the applicant did not provide adequate security as required by law. For the foregoing reasons, it is the finding of the court that the applicant's application dated September 1, 2022 is unsustainable and is accordingly dismissed.



47. However, as adverted to elsewhere in this ruling, the decree-holder is directed to surrender the bank guarantee or the motor vehicle to the applicant within 2 days of the date hereof.

48. There shall be no order as to costs.

49. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF NOVEMBER 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 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 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

