



**Abdullahi v City Oil (K) Limited (Cause 109 of 2016)  
[2022] KEELRC 13507 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13507 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 109 OF 2016  
HS WASILWA, J  
DECEMBER 13, 2022**

**BETWEEN**

**ADAM MOHAMMED ABDULLAHI ..... CLAIMANT**

**AND**

**CITY OIL (K) LIMITED ..... RESPONDENT**

**RULING**

1. Before me for determination is the respondent's application dated August 12, 2022, filed pursuant to article 50(1) & 159(2)(a) of the [Constitution of Kenya](#) 2010, sections 1A, 1B, 3, 3A & 80 of the [Civil Procedure Act](#), order 9 rule 9, order 12 rule 7, order 22 rule 22, order 45 and order 51 of the [Civil Procedure Rules](#) and all other enabling provision of the law, seeking for orders that:-
  1. Spent.
  2. Pending hearing of this application this honourable court do issue an order of injunction restraining Direct "O" Auctioneers from taking away and selling the respondent's motor vehicle as outlined in the proclamation notice dated August 5, 2022.
  3. This honourable court be pleased to grant a stay of judgement or execution of the decree and all consequential orders herein pending hearing of this application interparty.
  4. This honourable court do grant orders in terms of prayer 2 herein above pending hearing and determination of the application.
  5. This honourable court do set aside the judgement of May 31, 2022.
  6. Leave be granted to the applicant to file all documents relevant to this suit.
  7. Costs of this application be in the cause.



2. The application is supported by the grounds on the face of the application and the affidavit of Abdullahi Suleiman Ali, the chief executive officer of the respondent, deposed upon on the August 12, 2022. These grounds are that;
  - a. That judgement in this case was entered in favour of the claimant as against the respondent on the May 31, 2022.
  - b. That the last time the cause herein was in court, the respondent/applicant herein was represented by Okonji Advocate who sought for an adjournment but on objection of the claimant's advocate, the court directed the claim to proceed for hearing on the same day. However, the respondent's advocates was unable to proceed because they had not complied with pre-trial. Nevertheless, the claimant's case proceeded till conclusion and judgement delivered in his favour.
  - c. That there are documents that were yet to be filed by the respondent and thus pray for the judgement of court entered on May 31, 2022 be set aside and the respondent be allowed to defend this suit.
  - d. That Direct "O" Auctioneers have now attached and threatened to cut away with the respondent's motor vehicle if the decretal sum is not paid in full, when the judgement was irregularly obtained.
  - e. That the attachment was done after the claimant had instituted garnishee proceedings against the respondent's bank account number xxxx held at First Community Bank Limited.
  - f. He stated that the motor vehicle which is attached and threatened with sell is the respondent's tool of trade as such they are bound to suffer loss if stay orders are not allowed.
  - g. That the defence raises triable issues with high chances of success if they respondents are allowed to file the documents in support of their defence.
  - h. It is stated that there will be no prejudice that will be visited upon the claimant and in any case that the claimant will be awarded damages if any prejudice will be visited upon him.
3. The application is opposed, with the claimant/respondent herein filing an affidavit deposed upon on the August 19, 2022 stating that the application is defective because the applicant has not sought orders to stay execution, set aside the judgment and re-open the case for hearing. Also that the applicant has not demonstrated the grounds for grant of stay of execution and thus the application should be dismissed and the orders granted discharged.
4. Together with the affidavit, the respondent filed grounds of opposition dated September 20, 2022 based on the following grounds;
  - a. That the applicant has cited wrong provisions of the law and has thus wrongly invoked this honourable court's jurisdiction, rendering the application fatally defective. The [Civil Procedure Rules](#) do not apply to the [Employment and Labour Relations Court](#) save where the [ELRC Procedure Rules](#), 2016 expressly provides.
  - b. That the applicant failed to serve the substantive ex- parte application within the stipulated 3 days timeline envisioned under rule 32(2) of the [ELRC Procedure Rules](#), 2016 as read with order 40 rule 3 of the [Civil Procedure Rules](#) thus rendering the application fatally defective and the interim orders of injunction have automatically lapsed by operation of law.



5. In the subsequent replying affidavits deposed upon by the claimant and the claimant's advocates, Lawrence Mutai Terer, deposed upon on September 20, 2022, they aver that the applicant served the claimant with the substantive affidavit 10 days after the issuance of the orders contrary to procedural rules.
6. With regard to the garnishee proceedings, the respondent stated that the same is inconsequential because, the garnishee wrote them a letter stating that the said bank account is non-existent, necessitating the commencement of execution proceedings.
7. It is stated that the applicant has sought to set aside the judgment only and not the proceedings. Also that the applicant has not demonstrated grounds for their application.
8. The respondent avers that this matter had dragged and on October 7, 2021, when it was slated for hearing, the applicant's advocates sought for adjournment and the court marked it as the last adjournment and on March 10, 2022 when the matter was to proceed, counsel once again sought for adjournment claiming his witness left employment and when the court denied them adjournment, counsel informed court that it will not participating in the proceedings. In a nutshell that the applicant has always delayed the conclusion of this matter, and the application herein is another tactic to make further delays.
9. The respondent prayed for the application to be dismissed with costs and their execution proceedings proceed to realize the decretal sum.
10. The application was disposed of by way of written submission, with the applicant filing on the October 11, 2022 and the respondent on the September 21, 2022.

#### **Applicant's Submissions.**

11. The applicant submitted on two issue; whether the delay in bringing this application was inordinate and whether there is response to the statement of claim with merit to proceed to trial.
12. On the first issue it was submitted that the applicant was not aware of the judgement until its property was proclaimed by the respondents agents on the August 5, 2022, that it moved with speed and filed this application. It was argued that period from the date of the judgement till the filing of this application is 74 days, which in their opinion was not inordinate in the circumstances. It was argued that inordinate delay depends on the circumstances of each case as there is no yard stick to measure such delay. In this, they relied on the case of *Safaricom Limited v Josenga Company Limited ad 4 others* [2021] eKLR where the court relied on the case of *Utalii Transport Company Limited and 3 others v NIC Bank & Another*[2014] eKLR where the court held that;-

“whereas there is no precise measure of what amounts to inordinate delay and whereas what amount to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and excusable. On applying court minds on the delay, caution is advised for courts not to take the work inordinate in its dictionary meaning but in the sense of excessive as compared to normality.”

13. The applicant beseeched this court to set aside its judgement and argued that it is willing to pay throw away costs if ordered to be allowed defend this suit.



14. It is also submitted that the applicant has defence on record which was filed on the July 30, 2016 which defence raised triable issues regarding the claimant's discipline, which issues are likely to dislodge the *ex-parte* judgement if the applicant is allowed to defend this claim.

### **Respondent's Submissions.**

15. The respondent submitted that the application was served outside the rules, in that the substantive application was served upon them on August 22, 2022, 10 days from the time orders were issued instead of the 3 days provided for under order 40 rule 3 of the *Civil Procedure Rules* and reinforced by rule 32(3) of the *Employment and Labour Relations Court Rules(Procedure) Rules*, 2016. He argued that failure to observe such procedural rules renders the application inconsequential and the orders lapses by operation of law. He thus prayed for the application be dismissed on that ground.
16. On whether the application was filed timeously, the respondent submitted that the applicant was aware of the judgement of the court, a fact which they were reminded of by the garnishee proceeding but because the garnishee proceedings were inconsequential, they failed to take action, till the proclamation notice was issue that they rushed to this court and sought stay of execution orders. It was argued that the delay was inordinate in the circumstances, in any case that the applicant was aware about these proceedings all along.
17. The respondent maintained that the application herein is based on the wrong provisions of the law, because the *Civil Procedure Act*, does not apply to employment matter unless, this court rules have expressly provided for its applicability, which is not the case herein. To support this argument, they relied on the case of *Vincent Mwatsuma Nguma and 5 others v Kilifi Mariakani Water and Sewarage Company Limited (KIMAWASCO)* [2021] eKLR, where the court decline to grant order because they were based on the wrong provisions of the law and held that the error is not technical but jurisdictional issue.
18. The respondent in conclusion, Submitted that the applicant has never been keen with prosecuting it's defence and therefore the opportunity it is seeking now will not be of any use to it. He prayed for the application to be dismissed with costs.
19. I have examined the averments of the parties herein. The respondent applicant avers that they were not able to proceed with the hearing of this case on date allocated because they had not proceeded with pre-trial directions.
20. I have looked at the court proceedings and I note the 1<sup>st</sup> direction in hearing of this case was granted on 15/7/2016 by Radido J who directed that the respondents file their response. The matter was then mentioned on 5/12/2016. Directions were then taken and the court ordered hearing to proceed on 15/3/2017.
21. Various hearing dates were taken for hearing and this never took off.
22. On 7/10/2021, when the matter was set to be heard, counsel for respondent asked for adjournment indicating that their counsel had contracted Covid. The court allowed adjournment and now set the hearing on 10/3/2022.
23. On this day hearing was scheduled to proceed at 10.45am. At the allocated time the respondent sought an adjournment again. The court rejected the application and directed that hearing should proceed. Hearing proceeded and judgment was delivered on 26/5/2022.



24. The averment that the respondents had not taken pre-trial directions on the matter is therefore not true because this matter was filed in 2016 and direction had been given on hearing by J Radido and J Mbaru before I took over the conduct of this matter in 2021.
25. The delay in prosecuting this matter can only be attributed to the respondent and it is even surprising that in 2022 May, they are claiming that there were documents not filed 6 years down the line.
26. The application to set aside the judgment of this court of May 2022 in my view has no merit and is denied.
27. On the prayer to stay execution, the applicants have not demonstrated any ground that would enable this court grant the orders. The stay ought to be premised on some event which in this case is lacking.
28. The application can only be sustained if the respondent pays the decretal sum.
29. I therefore decline to grant the orders sought and direct execution to proceed or in the alternative the respondent pays the decretal sum accordingly.

**RULING DELIVERED VIRTUALLY THIS 13<sup>TH</sup> DAY OF DECEMBER, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Wachira for Respondent – present

Applicant – absent

Court Assistant – Fred

