



**Kitohe v Steelmakers Ltd (Cause 647 of 2015)
[2022] KEELRC 13511 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13511 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 647 OF 2015
AK NZEI, J
DECEMBER 13, 2022**

BETWEEN

HASSAN SULEIMAN KITOHE CLAIMANT

AND

STEELMAKERS LTD RESPONDENT

RULING

1. Judgment in the suit herein is shown to have been delivered on July 12, 2018, whereby the claimant was awarded a total of ksh. 638,111, costs of the suit and interest from the date of judgment until payment in full. On May 24, 2019, the Claimant filed a Party and Party Bill of Costs which was on May 7, 2019 taxed at Ksh. 204,598.40. A decree issued on July 26, 2022, and thereafter execution is shown to have issued against the Respondent. The respondent/judgment debtor's movable properties are shown to have ben proclaimed by M/s Fantasy Auctioneers on July 20, 2022 in execution of this Court's aforesaid decree.
2. On August 1, 2022, the respondent/applicant filed an urgent notice of motion evenly dated, seeking orders:-
 - a. that the application be certified urgent, and be heard ex-parte in the first instance.
 - b. that the court be pleased to grant an order to effect change of Advocates from M/S M.L. Alwenya & Co. Advocates to M/S Kamoti Omollo & Company Advocates.
 - c. that the court be pleased to set aside the execution proceedings herein and to stay execution and warrants of attachment against the respondent/applicant as it is irregular or illegal as it contravenes the mandatory provisions of order 22 rule 18 of the [Civil Procedure Rules](#) 2010, and the same be declared void ab initio.



- d. that there be stay of execution of the judgment and decree issued by this Court pending hearing and determination of the application.
 - e. that there be a stay of execution of the judgment and decree issued by this court pending the hearing and determination of the intended appeal from the said judgment to the Court of Appeal.
 - f. that costs of the application be provided for.
3. The application is based on a supporting affidavit of Johnson Samuel Vasant wherein it is deponed, inter-alia:-
- a. that being dissatisfied with this court's judgment delivered on 12/7/2018, the Respondent/Applicant intends to appeal, and that the intended appeal is not frivolous.
 - b. that on 28/7/2022, the clamant/respondent send M/S Fantasy Auctioneers to attach the respondent/applicant's goods in execution of this court's decree, and that the goods were due for removal by the Auctioneers on 4/8/2022 for auction, unless a stay was granted.
 - c. that the warrants, proclamation and attachment are irregular, illegal and unprocedural as no notice to show cause was issued or served upon the respondent/applicant in contravention of order 22 rule 18 of the *Civil Procedure Rules* 2010, since it is one year since the decree was passed.
 - d. that unless a stay of execution pending the hearing and determination of the Respondent/Applicant's appeal is granted, the appeal shall be rendered nugatory.
 - e. that unless a stay of execution is granted pending hearing and determination of the respondent/applicant's appeal, substantial loss may occur to the respondent/applicant as the claimant herein is a man of straw and will not be able to refund the decretal sum.
 - f. that the respondent/applicant is willing to deposit any security as the court may deem fit to impose.
4. The application was placed before the duty court on August 2, 2022 whereupon the application was certified urgent and the following orders made:-
- a. that the application is certified urgent as is considered in the first instance in absence of parties and be served forthwith not later than 3/8/2022 for inter-partes hearing or further orders on Tuesday 20/9/2022 at 9.00am or soon thereafter before Nzei J, as will be listed and per video link to be provided by the Deputy Registrar.
 - b. that pending inter-partes hearing or further orders by the Court, there be stay of execution of the decree herein subject to the Applicant depositing by 30/8/2022 the full judgment sum subject of the execution proceedings and in an interest earning account in the joint names of the parties' Advocates.
 - c. that pending inter-partes hearing or further orders by the court, leave is granted for the applicant to change Advocates to Kamoti Omollo & Company Advocates and notice of change of Advocates be filed and served by close of 3/8/2022.
 - d. that pending the inter-partes hearing or further orders by the court, parties are encouraged to compromise the application including the issue of auctioneer's fee and costs as may already be incurred and with a view of recording a consent in court.



- e. that costs in the cause and the Respondent are at liberty to apply as may be necessary and, pending the inter-partes hearing.”
5. There is no affidavit of service on record, and it is, therefore, not possible for the court to know whether or not the order on service of the application was complied with.
6. Nevertheless, the claimant/respondent filed a replying affidavit on August 31, 2022, sworn by himself on August 26, 2022. It is deponed in the replying affidavit:-
 - a. that judgment was delivered on July 12, 2018 and a Certificate of Costs duly issued on November 7, 2019.
 - b. that the applicant filed a notice of appeal on July 17, 2018, but has not taken any steps to file the memorandum of appeal and a record of appeal, and is therefore not interested in pursuing the appeal.
 - c. that this court does not issue orders in vain, and that the claimant is entitled to enjoy the fruits of his judgment.
 - d. that the applicant has filed the present application more than 4 years after judgment was delivered, and that no reason has been given. That this court, being a court of equity, does not help the indolent.
 - e. that execution had been taken out as the Applicant is not keen on proceeding with the intended appeal.
 - f. that the Applicant has not demonstrated what substantial loss it will suffer if the decretal sum is paid to the Claimant/Respondent, and that the application is an academic exercise meant to deny the Claimant enjoyment of his judgment.
 - g. that the application is based on wrongful assumption that the intended appeal is arguable, (and has) high chances of success.
 - h. that justice delayed is justice denied, and that the Claimant has been waiting for more than 4 years since judgment was delivered, with the Respondent/Applicant not taking any step to compensate him.
7. On October 25, 2022, I directed parties herein to file written submissions on the Notice of Motion dated August 1, 2022, which is the application before me. The respondent/applicant filed written submissions on November 7, 2022, while the Claimant has not filed any submissions. I have considered the submissions, the averments and depositions made in the affidavits in support of and in opposition of the application before me.
8. The single issue for determination in the present application is whether an order for stay of execution of this court’s decree, pending hearing and determination of the respondent/applicant’s intended appeal, is deserved.
9. The respondent/applicant has not addressed the court on whether or not the condition on which interim stay of execution was on August 2, 2022 granted has been complied with by depositing the full judgment sum in an interest earning account in the joint names of the parties’ Advocates. Indeed, it has not been demonstrated that this court’s said order was complied with. The respondent/applicant has not even submitted to having complied with the said order.



10. Rule 32(2) of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides that rules on execution of an order or decree of this court shall be in accordance with *Civil Procedure Rules*. Under order 42 rule 6(2) of the *Civil Procedure Rules*, a stay of execution of this Court's decree pending appeal can only be allowed if:
- a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without undue delay, and
 - b. such security as the court orders for the due performance of such decree or order as may be ultimately binding on him has been given by the applicant.”
11. As already stated in this Ruling, the Respondent/Applicant has not demonstrated that it furnished security for due performance of the decree herein as ordered by the court on August 2, 2022.
12. On substantial loss, an applicant must satisfy the court that substantial loss will result to the applicant unless the stay order sought is granted. This can only be done on the basis of material placed before the court by the party seeking stay. It is not enough for an applicant to allege that a decree holder will not be able to refund the decretal sum if the appeal succeeds, or that the decree holder is a man of straw. The burden is upon the applicant to prove that kind of an allegation. The applicant in the present case has not discharged that burden.
13. It was held as follows in the case of *Indus Trading Limited & Another -vs- Charles Aricha* [2021] eKLR: _
- “...the Applicants have not laid any basis for believing that the Respondent will not be able to refund the decretal sum in question.
- ...the Respondent has disclosed that he is not a man of straw. while he may have been having financial liabilities that eat into his gross income, that ought not to be taken against him. He is a successful litigant and is entitled to enjoy the fruits of his judgment. Accordingly, I am not satisfied that a substantial loss may result to the Applicants unless the order is made.”
14. In the Indus Trading Case (supra), the Court agreed with the opinion expressed in Bungoma High Court Misc. Application No. 42 of 2011 – *James Wangalwa & Another -vs- Agnes Naliaka Cheseto*, and I also agree, that:-
- “The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party in the appeal. This is what substantial loss would entail.”
15. It was stated as follows in the case of *Kenya Shell Limited -vs- Kabiru* [1986] Klr 410 (Platt Ag. JA):-
- “...if there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss, in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented.
- Therefore without this evidence, it is difficult to see why the Respondents should be kept out of their money.”
16. Further, although the law under which the application before me is brought (order 42 rule 6 of the *Civil Procedure Rules*) specifically and mandatorily requires that an application for stay of execution pending appeal shall be brought without unreasonable delay, the present application was filed over



four years from the date of the decree whose execution is sought to be stayed. This is unreasonable delay, and the same has not been explained, though no amount of explanation, in my view, can explain this kind of delay.

17. I have noted that a notice of appeal was filed on July 18, 2018, and that the court's proceedings have long been typed and certified. the respondent/applicant has, however, not demonstrated that any appeal was ever lodged in the court of Appeal in accordance with that court's rules, over four years down the line.
18. When all is said and done, it must be appreciated that execution of a court's decree is a lawful process that is legitimately taken out by a successful litigant. A party seeking stay of such lawful process must demonstrate that the stay sought is deserved.
19. I find no merit in the Notice of Motion dated 1st August 2022, and the same is hereby dismissed with costs to the claimant/respondent. The interim stay orders dated 2nd August 2022 are hereby vacated.
20. For avoidance of doubt, if the judgment sum or any part thereof has been deposited pursuant to this Court's now vacated orders given on August 2, 2022, the same shall be released to the claimant/respondent as execution issues for recovery of the balance of the decretal sum.
21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF DECEMBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Wanyama for Claimant/Respondent

Mr. Omollo Respondent/Applicant

