



**Omondi & 3 others v English Press Limited (Cause 1605 of 2017)
[2022] KEELRC 13508 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13508 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1605 OF 2017
SC RUTTO, J
DECEMBER 9, 2022**

BETWEEN

**WALTER OMONDI 1ST CLAIMANT
ALEXANDER MWANIA 2ND CLAIMANT
DOMINIC USEA 3RD CLAIMANT
THOMAS NYAMORA 4TH CLAIMANT**

AND

ENGLISH PRESS LIMITED RESPONDENT

RULING

1. The respondent/applicant has moved this court vide a notice of motion application dated 7th September, 2022, brought under a certificate of urgency. The motion which is expressed to be brought under sections 1A, 1B, 3A, and 34 of the *Civil Procedure Act*, order 21 rule 8 and 9, order 22, order 51 rule 1 and 15 of the *Civil Procedure Rules* seeks the following orders:
 - a. That there be a stay of execution of the judgment delivered by Hon Stella Rutto dated March 18, 2022
 - b. That there be a stay of execution of the judgment delivered by Hon Stella Rutto dated March 18, 2022 and subsequent decree issued against the Respondent pending the hearing and determination of this Application.
 - c. That the warrants of attachment dated August 31, 2022 and the proclamation Notice dated September 7, 2022 be lifted, set aside and/or vacated.
 - d. That the execution proceedings in this matter be declared a nullity.
 - e. That the Claimants bear the Auctioneers costs.



- f. That this Honourable Court make further orders and issue further directions as it may deem just and expedient.
2. The Application is supported by the grounds appearing on its face and on the Affidavit of Ms Rachel Karugu. Briefly that:
 - a. The Claimant's agents, M/S Expeditious Auctioneers, proclaimed the Judgement Debtor's movable property vide a proclamation notice dated September 7, 2022 which proclamation is apparently set to lapse on September 13, 2022.
 - b. The said agents will remove the proclaimed items from the Judgement debtors' possession at any time and proceed to dispose of the same by way of Auction.
 - c. As far as the Applicant is aware, no decree and/or certificate of costs has been extracted in this matter and none has ever been sent for approval or served upon the Respondent/Judgement Debtor.
 - d. As at the date that the warrants of attachment were issued the Respondent/Applicant communicated through telephone to obtain Bank Details to deposit the Decretal sum and interest thereof arising from the Judgement dated March 18, 2022.
 - e. As at August 26, 2022 the Respondent/Applicant through the Advocate in conduct of the matter proceeded to call the Claimant/Respondent for purposes (sic) were willing to deposit the decretal sum and proceeded to request for service of the Decree and Certificate of Taxation to which the Claimant/Respondent chose to ignore.
 - f. The said execution proceedings have also been brought in bad faith as the parties herein were willing to deposit the decretal sums and interests in settlement of the matter.
 - g. The warrants of attachment and proclamation notice that the Claimants are relying on and any subsequent steps in execution are therefore illegal and an abuse of the Courts process and ought to be recalled and set aside accordingly.
 - h. The Claimant/Applicants ought to be condemned to pay the costs of this Application as well as the Auctioneers fees.
 - i. The Judgement Debtor remains unaware of the Decree as obtained to procure the warrants of attachments.
 - j. Great prejudice will be occasioned to the Respondent/Applicant as they are now under threat of attachment and sale yet they were ready and willing to settle the Decretal sum.
 - k. The Applicant is deserving of this Court's discretion as the Respondent are guilty of material non-disclosure and ought not to benefit directly or through their agent from their refusal to remit bank details for payment.
 - l. The Respondent/Judgement Debtor stands to suffer irreparably if this application is not allowed.
3. The Claimants opposed the Application through a Replying Affidavit sworn by their Counsel on record, Mr Moses Njuru. Briefly, he avers that:
 - a. The Application is an afterthought, bad in law and an abuse of the court process and prays that the same be dismissed in limine.



- b. Judgment was delivered on March 18, 2022 in the presence of the Advocates of both parties. No orders of stay of execution were sought by the Respondent.
- c. After delivery of the Judgment in the matter on March 18, 2022, the Claimant filed a Bill of Costs dated March 31, 2022 and served the same upon the Respondent's Advocates.
- d. The bill of costs was scheduled for hearing on April 27, 2022 when the Respondent purported that they had filed submissions in response to the Bill of Costs which was not true. They were directed to serve the Claimant with their submissions and the matter slated for mention on May 19, 2022 to take a Ruling date.
- e. On May 19, 2022, the Respondent sought leave to file submissions which request the court did not take kindly given that they had alleged to have filed the same on April 27, 2022 and since it was apparent that they were buying time.
- f. The court in the interest of justice allowed them to file their submissions within 7 days and slated the bill of costs for Ruling on August 25, 2022. That they never complied with the orders of May 19, 2022 and further never bothered to attend court on August 25, 2022 for delivery of the Taxation Ruling.
- g. During their phone conversation, the Respondent's advocates on record never sought to be served with any documents and never sought for his bank details.
- h. The Respondent has alleged in the main body of the application that the Applicant had requested for bank details but this allegation does not appear anywhere in the Supporting Affidavit. That the only reasonable explanation for this is that the deponent of the Supporting Affidavit does not want to perjure herself.
- i. That in any event, the Respondent did not need their bank details in order to pay the decree since they would simply have written a cheque. Under the Banking Act and Rules a cheque can be written for any amount up to Kshs 999,999/=.
- j. The Application is thus a red herring and an afterthought meant to delay and deny the Claimants from enjoying the fruits of their judgment.
- k. It is not open for the Respondent to give excuses that it cannot pay the judgment sum because it has not been served with the decree and certificate of costs yet they fully participated in the court proceedings and their advocates were present during delivery of judgment.
- l. The *Civil Procedure Rules, 2020* (sic) do not have any requirement for service of a decree and/or certificate of taxation prior to commencement of execution proceedings.
- m. Under order 22 rule 6 of the *Civil Procedure Rules, 2010* the only document required to be served prior to commencement of execution proceedings is a ten (10) days' notice of entry of judgment where judgment in default of appearance or defence has been entered against a Defendant.
- n. In any event the Respondent had all the time from March 18, 2022 to pay the judgment sum but failed to do so but only to make a part payment of the decree on September 9, 2022 after proclamation.
- o. Order 21 rule 8 (2) of the *Civil Procedure Rules, 2010* is not couched in mandatory terms and does not make it compulsory for a draft decree to be sent for approval by other parties and



that under order 21 rule 8 (7) of the *Civil Procedure Rules, 2010* the court is granted unlimited powers to approve a draft decree at any time.

- p. There is no requirement at the Employment and Labour Relations Court registry for parties to first forward draft decree to other parties for approval and the Claimant cannot be faulted for not forwarding the draft decree to the Respondent for approval.

Submissions

4. The Application was canvassed through written submissions which I have considered. On its part, the Applicant submitted that the Claimants' application for attachment, was not done with clean hands. That it was not afforded an opportunity to consider and approve the decree in accordance with order 21 rule 8 of the *Civil Procedure Rules*. In support of its arguments, the Applicant cited the case of [*Ecobank Kenya Limited v Afrikon Limited*](#) [2017] eKLR.
5. On the other hand, the Claimants submitted that the execution proceedings were undertaken pursuant to valid warrants of attachment and sale duly signed by the Deputy Registrar of this Court on August 31, 2022. That order 21 rule 8(2) of the *Civil Procedure Rules* does not impose any consequences for failure to forward the draft decree to the other party for approval. That further, the provision is not couched in mandatory terms. To buttress this position, the Claimants placed reliance on the case of [*Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another*](#) [2018] eKLR.

Analysis and determination

6. The main issue for determination is whether the Court should halt the execution proceedings for being unlawful.
7. The Applicant has cited the Claimants for commencing the execution process without complying with the provisions of order 21 rule 8 and 9 of the *Civil Procedure Rules*.
8. Order 21 rule 8 which provides for the preparation of decrees and orders, is couched as follows:
1. A decree shall bear the date of the day on which the judgment was delivered.
 2. Any party in a suit in the High Court may prepare a draft decree and submit it for the approval of the other parties to the suit, who shall approve it with or without amendment, or reject it, without undue delay; and if the draft is approved by the parties, it shall be submitted to the registrar who, if satisfied that it is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
 3. If no approval of or disagreement with the draft decree is received within seven days after delivery thereof to the other parties, the registrar, on receipt of notice in writing to that effect, if satisfied that the draft decree is drawn up in accordance with the judgment, shall sign and seal the decree accordingly.
 4. On any disagreement with the draft decree any party may file the draft decree marked as "for settlement" and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.
 5. The provisions of sub-rules 2, 3 and 4 shall apply to a subordinate court and reference to the registrar and judge in the subrules shall refer to magistrate.



6. Any order, whether in the High Court or in a subordinate court, which is required to be drawn up, shall be prepared and signed in like manner as a decree.
7. Nothing in this rule shall limit the power of the court to approve a draft decree at the time of pronouncing judgment in the suit, or the power of the court to approve a draft order at the time of making the order.
9. The main contest revolves around Order 21 Rule 8 (2). A plain reading of the said provision reveals that the same is not cast in mandatory terms. In my view, the mischief sought to be cured through the said provision is to ensure that decrees are in consonance with the Judgment of the Court.
10. In the instant case, the Applicant has not indicated or suggested that the decree is at variance with the Judgment of the Court. I have had the occasion to peruse the said decree and note that it accords with the Judgment of the Court.
11. As I see it, Applicant's only contention appears to be the manner in which the decree was extracted, and not its substance.
12. On this issue, my thinking accords with the Court in *Eco Bank Ltd v Elsek (Kenya) Limited & 3 others* [2015] eKLR where it was held as follows:

“The plaintiff has not denied it did not forward the draft decree for approval as provided under the above mentioned Rules. What is the effect of that failure? In my view that failure cannot lead to the setting aside of execution. it would only lead to the setting aside of the execution if the decree was shown not to conform the judgment...”
13. I am therefore of the view that failure by the Claimants to forward a draft copy of the decree to the Applicant is a procedural issue and is not so grave as to stay the execution proceedings.
14. On this issue, I concur with the sentiments of the court in the case of *Florence Cherugut v Cheptum Murei Annah* [2022] eKLR thus:

“It is not every other failure to forward a decree for approval by learned counsel results in setting aside execution. For a party to rely on such a failure to challenge execution and pray that it be set aside for skipping the step, particularly where the decree corresponds with the terms of the judgment, it in my view amounts to nothing except a fine technicality which article 159(2)(d) of the 2010 *Constitution* came in to cure perfectly.”
15. In any event, a decree has to be approved by the Registrar who has to confirm its accuracy alongside the judgment of the court.
16. Over and above, it is instructive to note that a decree is a document emanating from the Court as it has to be duly signed by the Registrar for it to be valid. On this issue, I wish to echo the sentiments of the court in the case of *Masinde Muliro University of Science and Technology v Alfatech Contractors Limited; Kenya Commercial Bank Limited & another (Garnisbee)* [2021] eKLR where the learned judge reckoned thus:

“A decree is an instrument that issues from the court, duly executed by the registrar and bearing the seal of the court. It is, therefore, a court instrument, issued at the instance of the court, as a purport of the outcome of court proceedings as set out in the judgment of the court. In an ideal situation, the decree should be generated by the court, but Rule 8 gives the parties an opportunity to initiate the process. Where they choose to initiate it, it



becomes mandatory that the draft be placed before the other party for approval. Whether it is approved by the other party or not should not be an obstacle to the finalization of the matter, the registrar should still take charge and generate the decree. Of course, part of the reason for letting the parties draft the decree is that they may be possessed of information, as they do in this case, that ought to assist in preparing the draft, which information the registrar might not be privy to.

The bottom-line is that the final decree or order is a document that is approved and signed by the registrar. The registrar has the final say in the process. Whether the initial draft had emanated from one of the party is neither here nor there, for ultimately it has to be approved by the registrar, and it issues at the hand of the registrar.”

17. I have further noted from the record that the applicant participated in the taxation proceedings. Therefore, it was aware of how the matter was progressing. It was not in the dark hence cannot term the execution process as an ambush.
18. To this end, I find no reason to halt the execution proceedings which have commenced pursuant to a lawful process.
19. The claimants shall have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF DECEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Obonyo for the applicant/respondents.

Mr. Njuru for the claimants.

Court Assistant Abdimalik Hussein.

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 March 15, 2020 and subsequent directions of April 21, 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 had 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.

STELLA RUTTO

JUDGE

