



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 248 OF 2019

CONSOLIDATED WITH

CAUSE NO. 247 and 249 of 2019

MUSA MOHAMED KALEVE1ST CLAIMANT

PETER NDUNGU MATHERI.....2ND CLAIMANT

CHARLES MAINA JESSE.....3RD CLAIMANT

VERSUS

EAST AFRICA PORTLAND

CEMENT COMPANY LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. On 5.2.2021 I delivered a ruling in which I allowed the respondent/ Judgment debtor's application dated 3.3.2020 in the following terms:
 - a. An order for stay of execution of the judgment delivered on 14.2.2020 be and is hereby granted pending the hearing and determination of the intended appeal on condition that the whole decretal sum be deposited, within 21 days of today, into an interest earning account to be opened in a reputable financial institution in the joint names of the counsel on record for both parties herein.
 - b. In default by the applicant to comply with the said condition, the stay order shall lapse automatically after the expiry of the 21 days' period.
 - c. For avoidance of doubt, should the default be caused by the claimant, the applicant will have the liberty to seek leave to deposit the said security in Court.
 - d. Cost of this Application shall be in the Appeal.
2. The respondent did not comply with the above conditions for the stay order and proceeded to change its counsel who brought the instant Notice of Motion dated 28.5.2021 seeking the following order:
 - (a) THAT the Court be pleased to review and vary its orders of 5.2.2021 requiring the applicant, as condition for stay, to deposit, in the joint names of the parties' Advocates, the entire decretal sum of Kshs 14,226,341.32 within 21 days of the said orders.
 - (b) THAT the court be pleased to order that the review of its orders of 5.2.2021 in the following terms:
 - (i) The order of stay of execution granted on 5.2.2021 be extended;
 - (ii) The applicant do deposit in a joint interest earning account held in the joint names of the Advocates for parties herein, immediately it is opened, the sum of Kshs.3,500,000;

(iii) The balance of Kshs.10,756,341.32 be deposited in the said joint account in 11 equal monthly instalments of Kshs.975,122 and which instalments are to be paid beginning the end of every next month after the joint account is opened.

(iv) In default of payment of any of the sums mentioned either in (ii) or (iii) above, within the timelines set out therein, the stay of execution do automatically lapse and the respondents be at liberty to execute without any further reference to this Court.

(c) Costs of the application be provided for.

3. The application is brought under section 3, 12 and 20 of the Employment and Labour Relations Court Act and Rule 17 and 33 of the ELRC Procedure Rules. It is based on the grounds set out in the body of the motion and it is supported by the Affidavit sworn on 26.5.2021 by the respondent's Head of Legal Ms. Roseline Ominde. The gist of the application is that the applicant is broke and cannot afford to comply with the conditions set by the court for the stay of execution.

4. The claimant has opposed the application by filing a Notice of preliminary Objection dated 8.6.2021 and a Replying Affidavit sworn on even date by Mr. Musa Mohamed Kaleve. The gist of the claimants' response is that the application is incompetent and without merits.

5. The application and the objection were argued together on 14.6.2021. Mr Muchiri, learned counsel urged the application for the applicant. He submitted that the applicant is not challenging the merits of the stay order but rather seeking review of the amount to be deposited and the period for making the deposit. He contended that the applicant is undergoing financial turmoil and has recently recorded a loss of more than one billion Kenya shillings.

6. He submitted that the said financial turmoil constitutes a sufficient cause to justify review under Rule 33 of the ELRC Procedure Rules. He contended that the stay order should be reviewed to allow the applicant to deposit Kshs.3,500,000 and thereafter deposit the balance of the decretal sum in 11 equal monthly instalments in joint interest earning account.

7. He contended that the applicant has preferred an appeal which has good chances of success and it will be rendered nugatory if the stay is withheld since the claimants have commenced execution against its tools of trade.

8. He relied on **David Kipkemoi Koskei v Kenya Commercial Bank & 2 others [2020] eKLR** where the court reviewed conditions for a stay order for pecuniary reasons. He urged this court to follow the above precedent because the applicant herein is unable to deposit the whole security due to pecuniary reasons. He contended that security should not be a punishment to the appellants.

9. As regards the claimant's preliminary objection, he contended that the court is not *functus officio* since the application is for review. He referred to a few precedents to oppose the objection and urged the court to allow the application.

10. Mr Nyabena learned counsel for the claimant opposed the application and urged for the preliminary objection to be allowed. He contended that the conditional stay order was to lapse automatically if the applicant failed to deposit the entire decretal sum as security after 20 days. He contended that the applicant defaulted and the order lapsed.

11. He submitted that there is no extension of the compliance period sought and the applicant cannot be granted the order of stay afresh.

12. He further submitted that the application is incompetent because the new counsel did not serve a notice of Change of Advocates.

13. On the other hand the counsel submitted that the application is an afterthought being made after the proclamation following its failure to cooperate in opening an escrow account for depositing the decretal sum as directed by the court. He reminded the court that during the hearing of the application for stay, the applicant had averred that it was capable of settling the decree at any time. Consequently, he submitted that the applicant has not demonstrated any sufficient cause for reviewing of the impugned stay orders.

14. He further submitted that no appeal has been filed since the applicant has not stated the appeal number. Therefore he prayed for the application to be dismissed with costs.

15. In a brief rejoinder, Mr. Muchiri submitted that a notice of appeal has been lodged but the appeal is not yet filed because typed proceedings have not yet been supplied by the court.

16. He urged the court to allow the applicant to comply with the stay order by instalments and in default of any one instalment, execution to proceed. He reiterated that the applicant has should sufficient cause for reviewing the stay order by filing as exhibits its Financial Report and the Report of the Auditor General. He argued that the application was made without unreasonable delay considering that he had to get the file from the former counsel and then seek instructions from the client.

17. He admitted that the stay order had lapsed but submitted that the court can still review the order and extend the period for depositing the decretal sum. He also contended that the auctioneers are on the ground and execution will lead to collapse of the company.

18. Finally, he submitted that he had served the claimants' counsel with Notice of change of Advocates and as such he is properly on record.

Analysis and determination

19. I have considered the application, affidavits and submissions filed by the two counsel. The main issues for determination are:

- (a) Whether the application is incompetent in law;
- (b) Whether the applicant has established any sufficient cause for reviewing the impugned stay order.

Whether the application is incompetent.

20. The claimant contended that the application is incompetent because it is *res judicata*, the court is *functus officio* and the application offends Order 9 Rule 9 (3) of the Civil Procedure Rules. However, I agree with the applicant that the application is properly before the court because it is seeking review and not stay orders afresh. Consequently, the application is not *res judicata* and the court is not *functus officio*.

21. I also find that the application does not offend the requirement of Order 9 Rule9 (3) of the Civil Procedure Rules because the applicant's new counsel filed a consent signed by the former counsel allowing the Change of Advocate after the judgment. Further the applicant submitted that it had served the claimant with the Notice of Change of Advocate on the hearing date and there was no denial. Consequently the claimant's preliminary objection is overruled.

Whether the applicant has established sufficient cause to warrant review.

22. The applicant contended that due to her financial turmoil, it could not meet the conditions for stay set by the court and the stay order has since lapsed. It urged the court to review the stay order and allow it to deposit Kshs.3,500,000 and thereafter deposit the balance by 11 equal monthly instalments of Kshs.975,122 otherwise the auctioneer are on the ground and if execution is done the company will collapse. It further contended that its intended appeal will also be rendered nugatory.

23. The claimants has however contended that since the stay order has already lapsed the application has no merit and cannot be granted because extension of the period for compliance with the stay order has not been sought.

24. Having considered the above submissions, I agree that the application does not seek for reinstatement of the conditional stay order nor does it seek extension of the time for compliance and as such even if the court was to exercise discretion to allow depositing of the security by instalments, the same would be in vain since the conditional stay order is non- existence and the period for compliance has since lapsed. Consequently, upto that point, the application is devoid of merits.

25. The applicant submitted that the court can still grant the orders in the circumstances of the case and cited the case of **Arun Sharma v Ashana Raikundalia & Co. Advocates [2014] eKLR** for emphasis. However, the said submission fell short of seeking leave of the court to amend the application.

26. Further, I must point out that the facts in the above case were different from the instant case because in this case the stay order lapsed before compliance while in the cited case the stay order was extended before lapsing. Consequently, and with sympathy to the applicant who has so far shown utmost good faith, I dismiss the application with costs.

27. However, in order to give the applicant an opportunity to consider the next move including going to the appellate court, I extend the order for *status quo* granted on 14.6.2021 for 30 days subject to meeting the condition set thereunder.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY SEPTEMBER, 2021.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE