



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2531 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 11th November, 2020)

CECILIA MARTHA NJERI NDUATI.....1ST CLAIMANT

RACHEAL MUTHONI MWANGI.....2ND CLAIMANT

VERSUS

THE PRESBYTERIAN UNIVERSITY OF AFRICA.....RESPONDENT

RULING

1. The Respondent/Applicant, Presbyterian University of East Africa filed a Notice of Motion application dated 24th September 2020 seeking to be heard for orders: -

1. Spent.

2. THAT this Honourable Court's order made on 24th September 2020 dismissing the Respondent's application dated 14th September 2020 be set aside.

3. THAT the application dated 14th September 2020 be reinstated for hearing on its merits.

4. THAT the status quo and the dismissal of the application dated 14th September 2020 maintained/restored, that is, the order of stay of execution be restored.

5. THAT this Honourable Court be pleased to grant such further or other order as it may deem fit and just to meet the ends of justice.

6. THAT costs of this application be provided for.

2. The Application is based on the grounds that the Respondents' application dated 14/09/2020 was dismissed for non-attendance by the Respondent but that the Respondent's advocate could not establish a link in time or at all with the Honourable Court so as to be heard virtually as expected. That the failure to attend court was neither deliberate nor intentional and that the mistake of Counsel should not be visited on the client. That the Respondent has been left in a lurch as it cannot be heard and its movable goods risk being carted away and also sold by public auction and that the Claimants will suffer no prejudice as they will eventually be paid their decretal amounts. Further, that there is sufficient reason to set aside the order of dismissal and that it is meted and just to grant the orders sought.

3. The Respondent/Applicant also filed a Supporting Affidavit sworn by its advocate, Jason Kiambi who avers that he had timeously prepared to argue the said dismissed application but suffered the dilemma of failing to link up online with the Honourable Court. That he has all along pursued the case herein with zeal as can be attested by the proceedings preceding the filing of the said application and which led to this Honourable Court granting a stay of execution and ordering the case to be heard on 24/09/2020 as scheduled. That it would be in the cause of justice to set aside the order of dismissal, restore the order of stay and allow the application to be heard on its merits so that the fate of the attached goods is not sealed on a technical fact of non-attendance.

4. He further avers that he believes this Court granted stay pursuant to the aforesaid application because it realized that the Respondent would suffer greater harm if it did not grant the stay. He regrets the default and believes the Respondent who was not privy to the default, ought not to bear the consequences of the same. He also avers that the Respondent has not sought to obstruct or delay the course of justice whether by evasion or otherwise.

5. The Claimant did not file any reply to the instant application.

6. In the said Notice of Motion dated 14th September 2020, the Respondent is seeking the court's leave to pay the decretal amount by monthly instalments of Kshs. 200,000/= after a down payment of Kshs. 300,000/=. The application is based on the grounds that the Claimants applied for warrants of attachment which were issued on 08/09/2020 and allocated to Bemac Auctioneers who proceeded to attach the Respondent's movable goods on 10/09/2020. The Respondent thus moved the Court as it is not in position to pay the decretal amount at once.

7. In response to the Application dated 14/09/2020, the 1st Claimant filed a Replying Affidavit dated 18th September 2020. She avers that the Respondent's application dated 14/09/2020 is misleading for indicating that the Respondent's goods have been attached, yet all that was done was a proclamation on 10/09/2020. That the said proclamation is what the Applicant/Respondent has attached to their application and which allows 14 days from the date of proclamation. That the Applicant/Respondent has not adhered to **Order 21 Rule 12** which requires that sufficient cause must be shown for the decreed amount to be paid in instalments.

8. The Applicant/Respondent has also failed to demonstrate its inability to pay the full decretal sum or its assertion that the Claimants will not be prejudiced if the said application is allowed and has rushed to court to seek payment in instalments without any consultation whatsoever with the Claimants.

9. The 1st Claimant further avers that the Applicant/Respondent has offended **Order 9 Rule 9 of the Civil Procedure Rules** by attempting to come on record after judgment and without consent of the previous advocate on record. That the Applicant has also not proved the claim that it is financially embarrassed and that it should not cite COVID-19 as a reason of their inability to pay because judgment was passed more than one year before the Corona disease came. That the Respondent's application for stay of execution is meant to deny the Claimants the fruits of their judgment and should be dismissed with costs and that the Applicant ought to have paid a substantial portion of the decretal sum first as a show of good faith. Further, that the proposal to pay monthly instalments to settle the decretal sum is unreasonable as it will take 12 months or one year to settle down the claim and especially after the Respondent has been silent for one year since judgment and has only come out after auctioneers showed up.

Respondent/Applicant's Submissions

10. On the application dated 24/09/2020, the Applicant/Respondent submits that it was not indolent since it immediately filed the application to set aside the dismissal order on the same day it was issued. That declining to give a party a hearing would go against the spirit of the provisions of **Article 159 of the Constitution of Kenya** and that the overriding objective principle states that the courts should lean towards a course of action that ensures substantial justice is done. Further, that the Constitution has always protected the right to a hearing which is also the corner stone of the rule of law. It cites the case of **Philip Chemwolo & Another -vs- Augustine Kubede (1982-88) KAR1040** (Quoted in the annexed **HCCA NO. 604 AOF 2012 Burhani Decorators & Contractors -vs- Morning foods Ltd & Another**) that: -

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

11. On the application dated 14/09/2020, the Respondent/Applicant draws the attention of this Court to the proclamation which it says speaks for itself as a proclamation of attachment of movable goods with the appropriate action taken by the auctioneer ticked in the relevant bracket provided. It submits that the Claimants failed to distinguish between an attachment of movables and distraint for rent, the latter which allows the tenant 14 days before removal of the goods.

12. It is the Applicant's submission that the Claimants, in executing the decree, failed to take out a notice to show cause and serve it upon them as required under **Order 22 rule 18(a) of the Civil Procedure Rules 2010**. That the Respondent can meet its financial obligations including decrees obtained against it from the fees received from its students but that it was paying other decrees obtained in **ELRC Cause No. 126 of 2015 and ELRC Cause No. 1527 of 2015** when the Claimant obtained the warrants of attachment herein. Further, that learning in its institution was suspended due to COVID-19 and it consequently closed, which diminished its financial base.

13. It submits that the court has discretion to grant leave to a Respondent to pay the decretal amount by instalments after paying a fair amount of down payment and urges the Court to take judicial notice of the retrogressive outbreak of COVID-19 pandemic which has affected the ability of people to honour their financial obligations. That the court should also note that re-opening of learning institutions has been put off and extend the date for commencement of payment of the balance of the decretal amount to a later date. That in the circumstances of this case, the lesser prejudice will be suffered by the Claimants who will continue to receive payment until the decree is satisfied as opposed to the Respondent (and third parties) who will suffer the greater prejudice if the attached goods, most of which are tools of trade of the Respondent, are sold.

Claimants' Submissions

14. The Claimants submit that the Respondent's application for stay of execution and payment in instalments is an abuse of the Court process because within 17 days; between 15th September 2020 and 2nd October 2020, the Respondent has obtained 4 different orders from 3 different Courts in regard to this matter. They submit that the Respondent is coming to seek equity but with unclean hands as it has never made any attempt to propose instalments for almost two years but are now suddenly seeking to pay in small instalments. Further, that the Applicant/Respondent has offended the rules on change of advocates after judgment and the Court should take notice that the Respondent's advocates are not properly on record.

15. They submit that this Court should not consider the cases presented by the Respondent where they were previously allowed to pay in

instalments because the two cases are not related to the instant one and that they should not be used to deny the Claimants the fruits of their judgment, especially after a cunning and well calculated delay. That the Applicant/Respondent has also not produced any evidence to support its assertion that it is unable to pay and that in the absence of bank account statements, there is no other way of ascertaining the truthfulness of the same.

16. They cite the case of Hildegard Ndelut v Letkina Dairies Ltd & Another [2005] eKLR where the Court held that the judgment debtor might genuinely be in a difficult position in paying the decretal amount at once but he has to show seriousness in paying the amount i.e. show his bona fides by arranging fair payment proposals to liquidate the amount. That in Mohamed Akbar Khan vs Kasturchand Daga cited in Keshavji Jethabhai & Brothers Ltd v Saleh Abdul [1959] EA 260 the Court held that the mere fact the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting leave to pay by instalments and that each case has to be decided on its own merits, with the predominant factor being the bona fides of the judgment debtor. That in Miscellaneous Case No. 1 of 2017, KTK Advocates vs Baringo County Government the court dismissed an application to pay in instalments and stated that: -

“It is my considered view, that the Applicant has not shown bona fides in this matter. This is so because although the decree was extracted in November 2017, there has not been any attempt to make payment towards its settlement or that it has made provision for payment despite stating that it is willing to pay. Moreover, the Applicant has stated that as a sign of good faith it has paid Kshs. 4 million towards liquidation of the decree. It is worth noting that the amount was paid in 2016 before the bill was taxed and the decree extracted. That cannot be a sign of good faith. It is not bona fides on the part of the Applicant to use it to justify exercise of the Court’s discretion. Although the Applicant is a County Government and it relies on budgetary allocations that is not in itself a ground for allowing the application. The Court must be satisfied that the Applicant has shown bona fides in its effort to settle the indebtedness to deserve the discretion.”

17. I have examined the averments of the Parties herein. The judgment in this Court was entered against the Respondent on 29/10/2018. The Respondents sought stay orders and were granted 15 days stay.

18. On 23/11/2018, the Respondents filed yet another application for review of the Court’s judgement. On 24/9/2020, the application was dismissed for want of prosecution.

19. The Applicant/Respondents have now filed another application through J. K. Mungania and Company Advocates who are not properly on record as the previous Counsel on record P. M. Kamaara & Associates have not ceased from acting given that judgement was entered when Kamaara Associates were on record and J. K. Mungania cannot come on record without leave of this Court.

20. I therefore find the application is improperly on record. I accordingly dismiss this application with costs to the Claimant/Respondents.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Gatore for Claimant – Present

Mungania for Respondent – Present