



REPUBLIC OF KENYA



KENYA LAW
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Gisimba General Enterprises Limited v Neptune Paradise Beach Resort & Spa Ltd (Civil Suit 98 of 2016) [2025] KEHC 12094 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEHC 12094 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 98 OF 2016
F WANGARI, J
JUNE 30, 2025**

BETWEEN

GISIMBA GENERAL ENTERPRISES LIMITED PLAINTIFF

AND

NEPTUNE PARADISE BEACH RESORT & SPA LTD DEFENDANT

RULING

1. The Defendant/ Applicant filed the Notice of Motion dated 20/06/2024. The Application seeks the following Orders:
 - i. Spent
 - ii. Spent
 - iii. That the execution process commenced by the Plaintiff be declared as void ab initio, and the Warrants of Attachment and Sale issued on 12th June 2024 and the Proclamation Notice served on 14th June 2024, be set aside, and on order be issued prohibiting any such subsequent mode of execution in enforcement of the judgment dated 27th October 2023.
 - iv. That costs be provided for.
2. The Application is premised on the Grounds stated inter alia as follows:
 - i. That the Plaintiff was awarded a global sum of Kshs. 10,000,00/=
 - ii. That the Party-Party Bill of Costs is yet to be taxed.
 - iii. That the execution process has commenced pending taxation and issuance of Decree by the court.
 - iv. That no leave was obtained from the court before commencement of execution proceedings.



- v. That the execution process was irregular and illegal
 - vi. The Applicant shall suffer irreparable loss if the execution proceeds.
3. The Respondent through the Grounds of Opposition dated 18/07/2024 opposed the Application materially on the ground that the application had been overtaken by events as payment of the decretal sum had already been made.
 4. It was stated that nothing stopped the Respondent from executing since the decretal sum and interest have already been declared by the court. The global amount was fixed. The application was therefore an abuse of the court process.
 5. In respect to the payment of the decretal sum, the same was said to have been paid under duress as there was imminent threat of execution.
 6. Both parties relied on their filed pleadings.

Analysis

7. I have perused through the pleadings filed and the oral submissions by the advocates on record. The issues for determination are;
 - a. Whether the application has been overtaken by events
 - b. Whether the Appellant has satisfied the conditions for the grant of stay of execution pending Appeal.
8. On the first issue, it has not been disputed that the decretal amount has already been paid. The Applicant says they paid out of duress as there was imminent risk of execution. The Warrants of Attachment of movable property issued on 12/06/2024 and the Proclamation Notice were served on 14/06/2024
9. The Applicant says that the payment was done under duress. It has been stated that duress occurs when a party is under the improper pressure from the other party to make a certain decision or act in a certain way not consistent with free will.
10. In *John Mburu v Consolidated Bank of Kenya* [2018] eKLR, the Court of Appeal the Privy Council decision in *Pao & Others v Lau Yiu & Another* [1979] 3 ALL E.R. 65, which addressed the issue of duress as follows: -

“...Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree...that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent.....In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it...”
11. There is no evidence that there was coercion on the part of the Applicant to pay. There is also no evidence that there was any objection/ protest raised. Applying the factors material to determine whether there was coercion and/or duress as set out by the court in *John Mburu* (supra), it is imperative



to consider whether there was any protest by the Applicant. I am least persuaded that there was any iota of duress.

12. I have said enough to show that the issue of duress does not arise. Having proceeded to pay the decretal sum, the horse already bolted. On the issue of execution before taxation is done, I am unable to agree with this line of argument.
13. Section 94 of the [Civil Procedure Act](#) provides for execution of this court's decrees before costs are taxed and/or ascertained. It provides as follows: -

“Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”
14. The above position is restated in Order 21 Rule 9 (2) of the Civil Procedure Rules. The fact that costs have not been taxed or ascertained is not a bar to execution of the decree so long as it has emanated from this court. The position is different in the subordinate courts more so after the introduction of Sub-rules 9A, B and C under the Civil Procedure (Amendment) Rules, 2020. This argument therefore fails.
15. Having found as above, it is my finding that the application dated 20th June, 2024 has been overtaken by events and it would be an academic exercise to consider the issue of stay of execution.
16. On the issue of costs, the court reserves the discretion to award or deny the same. Each party to bear its own costs.

Determination

17. The upshot of the foregoing is that the following orders do issue: -
 - a. The Notice of Motion application dated 20th June, 2024 having been overtaken by events is hereby dismissed;
 - b. Each party to bear its own costs.It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF JUNE, 2025.

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F. WANGARI

JUDGE

In the presence of;

Mr. Ondabu Advocate for the Plaintiff/ Respondent

Ms. Osewe by the Defendant/ Applicant

Ms. Getrude, Court Assistant

