



**Abula v Gachanja t/a Showcase Properties (Cause 498 of 2013)
[2024] KEELRC 2037 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2037 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 498 OF 2013**

JK GAKERI, J

JULY 25, 2024

BETWEEN

TIMOTHY MUSINZI ABULA CLAIMANT

AND

FRANCIS GACHANJA T/A SHOWCASE PROPERTIES RESPONDENT

RULING

1. Before the court for determination is the Respondent/Applicant's Notice of Motion dated 12th March, 2024 filed under Certificate of Urgency seeking orders that:-
 1. Spent.
 2. Spent.
 3. The Honourable Court do enlarge and extend time within which the Respondent/Applicant is to provide the security deposit of Kshs.643,627/=.
 4. The Honourable Court be pleased to review, set aside and/or vary its orders made on 14th February, 2024 directed to the Respondent to deposit the decretal sum of Kshs.643,627/= together with interest accrued in a joint interest earning account in the joint names of the advocates for the Claimant and the Respondent within thirty (30) days and substitute the same with an order directing the Respondent to deposit the original log book in respect to Trailer Registration Number ZC 1809, a 3 Axle Trailer valued at Kshs.900,000/= as security within thirty (30) days.
 5. The costs of this Application be provided for.
2. The Notice of Motion is expressed under Article 159(2)(d) of the *Constitution* of Kenya, Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, Order 50 Rule 6 of the *Civil Procedure Rules*, 2010 and Sections 1A, 1B and 3A of the *Civil Procedure Act* and is premised on the



grounds set out on its face and the Supporting Affidavit sworn by Francis Gachanja on 12th March, 2024.

3. It is the applicant's case that despite applying himself diligently, he is unable to secure the funds owing to the financial distress he is in and cannot raise the decretal sum in lumpsum so as to deposit the same as directed by the court.
4. The applicant deposes that as a director of Gachanja Muhoro & Sons Ltd, he has secured an asset belonging to the company which he is ready to deposit as security for the decretal sum with leave of court; a 3 Axle Trailer Registration Number ZC 1809 valued at Kshs.900,000/= and the company has no objection to the proposed course of action.
5. The affiant states that since the 30 day period lapsed on 14th March, 2024, the period within which he could deposit the security should be extended as he is apprehensive that the Claimant would commence execution by way of attachment.
6. That he has appealed the ruling, the subject matter of the instant Notice of Motion and applied for stay of execution but the same was not certified urgent and directions were given by the Court of Appeal on the application for stay.
7. That it is in the interest of justice that leave be granted to substitute the security and the application be dispensed of expeditiously.

Respondent's Case

8. By his grounds of opposition dated 15th April, 2024, the Respondent argues that the directions of the court that the file be transferred to the trial court under the jurisdiction of Hon. Lady Justice Maureen Onyango was not done.
9. That in its ruling on 14th February, 2024 (incorrectly stated as 12th February, 2024), the court expressly prohibited the Respondent/Applicant from filing any further applications without leave of the court and no leave was sought and as such the applicant has no audience
10. The Respondent states that the applicant attempted to appeal the ruling in Court of Appeal, Civil Appeal Application E084 of 2024 which was subsequently declined and dismissed and cannot therefore pursue a new application for review.
11. The Claimant further argues that there exists no error on the face of the record of the impugned ruling for review and the applicant is in contempt of court for failing to comply with the judgment and decree dated 18th August, 2017 wherein he was ordered to pay Kshs.643,627/= and the amount has accrued interest and is approximately Kshs.1,485,143.67 as of 15th April, 2024/=.

Applicant's Submissions

12. Counsel for the applicant submits that applicant is not challenging the orders dated 14th February, 2024 but is seeking time to comply and was not seeking to set aside the orders.
13. That attempts to pool resources to raise the sum of Kshs.643,627/= have been unsuccessful and was ready and willing to provide an alternate security by way of a 3 Axle Trailer belonging to Gachanja Muhoro & Sons Ltd and the company has no objection.
14. Counsel cites the decisions in *Jayesh Hasmukh Shab v Narin Haira & another* (2015) eKLR and *Mobamed Ali Osman T/A Hanan Petroleum v Juanco Group Ltd* Civil Appeal No. 044 of 2021 to



- urge that the court has discretion to order the substitution of the security to be provided by the party bound to do so.
15. Reliance was also made on the decisions in *Mwaura Karuga T/A Limit Enterprises V Kenya Bus Services Ltd* (2015) eKLR as well as *Arun C. Sharma V Ashana Raikundalia T/A Raikundalia & Co. Advocates* (2015) eKLR on the purpose of security under Order 42 of the *Civil Procedure Rules*, 2010 to submit that the applicant has furnished adequate security that guarantees the due performance of the decree and satisfaction of the judgment as the 3 Axle Trailer is comprehensively insured and will continue to be insured and can satisfy the decretal sum.
 16. That the application was filed without delay but prays for time to comply and cites Order 50 Rule 6 of the *Civil Procedure Rules*, 2010.
 17. Reliance is made on *Nicholas Kiptoo Arap Salat V Independent Electoral and Boundaries Commission & others* (2014) eKLR on the principles attendant to the exercise of discretion.
 18. On 22nd May, 2024, the Claimant's counsel, Mr. Okemwa informed the court that he had not received the applicant's submissions and the same had not been filed and promised to file by close of business on even date and had not filed by 24th June, 2024 when the court retired to prepare this ruling.

Analysis and Determination

19. The only issue for determination is whether the applicant's Notice of Motion dated 12th March, 2024 is merited.
20. Before delving into the merits of the instant Notice of Motion, it is essential to recapitulate the history of this matter in order to place the instant application into context.
21. The instant suit was filed on 10th April, 2013 and judgment was delivered on 18th August, 2017 and the Bill of Costs was taxed at Kshs.75,636/= vide a Ruling delivered on 24th October, 2017 by Hon. Ngumi.
22. By an application dated 13th December, 2017, the applicant herein sought a temporary stay of execution of the judgment, that it be set aside as well as setting aside or recalling or lifting the warrants of attachment.
23. The application was dismissed with costs for want of merit by a ruling delivered on 10th August, 2018.
24. Similarly, by an application dated 13th November, 2019, the applicant applied for the setting aside of the judgment dated 18th August, 2017 and the enjoining of his company to the case for purposes of responding to the claim.
25. The application was found unmeritorious and dismissed with costs.
26. Undeterred, by an application dated 28th January, 2022, the applicant sought a review of the ruling delivered on 21st January, 2022 and grant of Prayer No. 2 for a new counsel to come on record, similar to the order sought in December 2017.
27. The court dismissed the application with costs for want of merit vide Ruling delivered on 12th October, 2022.
28. On his part, the Claimant/Respondent filed an application dated 12th October, 2022 seeking orders that the same be heard on priority basis and the Respondent/Applicant be ordered to deposit the sum of Kshs.643,629.5 in an interest earning account in the name of the parties advocates.



29. By a ruling delivered on 14th February, 2024, the court granted the orders sought and restrained the applicant herein from filing any application in court until the deposit is made.
30. This is the ruling which precipitated the appeal and the instant application.
31. The applicant prays for temporary stay of execution, enlargement of time to comply with orders of the court and a review, setting aside or variation of the orders made on 14th February, 2024 and costs.
32. Significantly, the applicant has also admitted that he has already appealed the ruling dated 14th February, 2024 at the Court of Appeal and sought a stay of execution pending the hearing and determination of the appeal and the Court of Appeal has already issued directions on the filing and exchange of submissions by counsel.
33. The directions were given via email message dated 29th February, 2024 at 9.06 am before the instant application was filed.
34. Clearly, since the application for stay of execution is being litigated at the Court of Appeal, the same is beyond this court's jurisdiction to entertain. In any case the applicant herein made the instant application after the Court of Appeal declined to certify the application for stay of execution urgent and is to all intents and purposes using this court as a fall back which is a discreditable practice.
35. As regards enlargement of time to comply with the orders made on 14th February, 2024, whereas the court appreciates that it has discretion to do so under Order 50 Rule 6 of the *Civil Procedure Rules*, 2010, the court is alive to the fact that the ruling the applicant seeks comply with is the subject of appeal before the Court of Appeal.
36. Having filed an appeal against the ruling delivered on 14th February, 2024, the applicant ought to have sought all the orders it deemed necessary to safeguard its interests and cannot be allowed to seek orders at the Court of Appeal and this court simultaneously as it has the effect of keeping two files active for no justifiable reason, an injudicious utilization of judicial time, in the court's view by a single party.
37. Finally, as regards the order for review, setting aside and variation of the orders issued on 14th February, 2014, on the deposit of the sum of Kshs.643,627/=, the Respondent has not provided any material on which the order is sought.
38. Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 provides that;
 1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgement or ruling –
 - a. if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - b. on account of some mistake or error apparent on the face of the record;
 - c. if the judgement or ruling requires clarification; or
 - d. for any other sufficient reason.
39. The applicant has not cited any of the above reasons to justify the order of review or setting aside or variation of the ruling as it regards to the amount to be deposited by the applicant.



40. The court is in agreement with the Claimant’s counsel’s argument that no error apparent on the face of the record of the impugned ruling has been demonstrated to justify review of the ruling.
41. More significantly, however, even if the applicant evidentiary demonstrated that there was sufficient justification for review of the ruling delivered on 14th February, 2024, would the court be acting properly if it proceeded to review the ruling?
42. The court is not persuaded that it would be exercising its jurisdiction properly as Rule 33(1) cited above makes it unambiguously clear that an application for review of a ruling or judgment can only be made in circumstances in “which no appeal is preferred” or where “no appeal is allowed”.
43. The applicant herein has already preferred an appeal against the impugned ruling and allowing him to have it both ways would be in contravention of Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and an abuse of the court process. See the sentiments of Odunga J. (as he then was) in *HA V LB* (2022) eKLR.
44. The foregoing is fortified in the sentiments of Odunga J. (as he then was) in *Ndithya v Total Kenya Ltd* Misc. App. E2018 OF 2021 (2022) KEHC 10080 KLR as follows;

“It is clear from the foregoing that the review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot exercise both the right of appeal and review at the same time. See *Orero v Seko* (1984) KLR 238”.

45. Similarly, in *Serephen Nyasani Menge v Rispah Onsase* (2018) eKLR, the Court stated as follows;

“Order 45 Rule 1(a) and (b) in addition to setting out the conditions that an applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party.

Once a party has opted for a review, the option of an appeal cannot at the same time be available to the party. Sub-rule (2) of Order 45 of the *Civil Procedure Rules* further makes the matter clearer . . . In my view, a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of review upto appeal and now wishes to go back to the same order she sought review of and failed and to try her luck with an appeal. The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail . . .

Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and evidence”.

46. The court expressed similar sentiments in *Martha Wambui v Irene Wanjiru Mwangi & another* (2015) eKLR that;

“From the above provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, it is clear that one cannot exercise the right of appeal and at the same



time apply for review of the same judgment/decree or order. One must elect either to file an appeal or apply for a review . . .”

47. See also *Multichoice (K) Ltd v Wananchi Group (K) Ltd & 2 others* (2020) eKLR.
48. The foregoing sentiments apply on all fours to the circumstances of the instant Notice of Motion.
49. Having elected to appeal the ruling delivered on 14th February, 2024, the applicant cannot simultaneously apply for its review.
50. For the foregoing reasons, the Notice of Motion dated 12th March, 2024 fails and it is accordingly dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF JULY 2024

DR. JACOB GAKERI

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 March 2020 and subsequent directions of 21st April 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 has 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.

DR. JACOB GAKERI

JUDGE

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