



Transport Workers Union v Classic Pelican Sacco (Employment and Labour Relations Cause 1265 of 2016) [2024] KEELRC 1712 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1712 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1265 OF 2016**

MN NDUMA, J

JULY 4, 2024

BETWEEN

TRANSPORT WORKERS UNION CLAIMANT

AND

CLASSIC PELICAN SACCO RESPONDENT

RULING

1. The applicant filed a notice of motion application dated 6th December 2023 seeking the following prayers:-
 1. Spent
 2. That the defendant/applicant was wrongly sued in these proceedings and the correct party to be served was supposed to be Hillspark Investment.
 3. That pending inter-parties hearing of this application that this honourable court be pleased to stay any further execution proceedings of the decree emanating from the judgment delivered on the 28th day of September 2023 and all consequential orders.
 4. That this honourable court be pleased to set aside judgment delivered on the 28th day of September 2023 together with any consequential decree and orders of the court as the court may deem fit and just.
 5. That this honorable court be pleased to declare that the defendant/applicant is not a party to the suit and wrongly sued or enjoined in this proceedings.
 6. That costs of this application be provided for.



2. The application is premised on grounds (a) to (m) which may be summarized that the suit was heard and determined on 28/9/2023 without the knowledge of the defendant/applicant as to the existence of the suit.
3. That defendant was never made aware that its advocate on record by then Nyambega Mose and Co-Advocates ceased to act on its behalf. That the defendant became aware of the judgment when service of the decree dated 3/10/2022 was made on the company. That the claimant has never been an employee of the respondent. That the defendant should not be condemned unheard as it has an arguable case.
4. That claimant will not be prejudiced if the stay of execution is granted.
5. The claimant/respondent opposes the application stating that the suit and summons to enter appearance was served on the respondent/applicant on 19/4/2016 and the respondent retained M/s Mose Nyambega and Co-Advocates to enter appearance for the respondent which they did.
6. That the respondent/applicant, wrongly alleges that they were wrongly served which is not true. That all matters raised in the application were litigated in the suit before judgment was delivered on 28/9/2023.
7. That the respondent participated in the suit for a period of seven (7) years from the time of conciliation before the Ministry of Labour to this court.
8. That the applicant is not candid with the court by introducing third parties namely Hillspark Investment, when in fact, the respondent filed a defence to the suit and filed a witness statement of a fleet manager of the respondent named Mr. Yuvinasi Nyaino. That at all material time, the respondent did not state it was the wrong party to be sued until now.
9. That the application lack merit and it be dismissed.

DETERMINATION

10. From the outset, the court observes that the applicant has not been truthful and candid with the court by stating in the grounds in support of the application that:
11. That the suit was heard and judgment delivered on 28th day of September 2023 without the knowledge of the defendant/applicant as to the existence of this suit.”
12. The record of the court from 27/9/2017 up to the date of judgment on 28/9/2023 demonstrates clearly that that allegation by the applicant is not truthful. The respondent fully participated in entry of appearance through its advocates, numerous mentions; setting of the hearing dates until the matter was determined.
13. The applicant has not provided any good reason why it did not participate in the hearing of the suit. The applicant having failed to tell the truth from the outset cannot benefit from the discretion of the court to set aside the judgment.
14. The argument that it is a wrong party cannot hold in the circumstances of this case the matter having not been raised in the statement of defence and witness statements filed.
16. The court proceeded to formal proof by affidavit evidence and considered the merits of the case. The court is not satisfied that the applicant has explained the inordinate delay in raising the matters raised in this belated application after judgement.



17. The applicant has not provided security for costs and judgment of the court in this matter. The suit has taken over seven (7) years to be determined and the claimant would suffer injustice if the orders for stay of execution of the judgment of the court without any demonstrable justifiable cause by the applicant.
18. A right for hearing as stated in Civil Application No. 63 of 2019 Muteze Harison and another versus Ahmed Said Kulmiye [2020] eKLR applies to both parties for justice delayed is justified denied.
19. In Ridge versus Baldin [1964] AL 40 (1963) 2 All ER 66 the court stated:-

The principle of fairness has an important place in the administration of justice and is also a good ground upon which court's ordinarily exercises discretion to intervene and quash the decision of a tribunal or subordinate court made in violation of right to fair hearing and due process."
20. In this matter the respondent/applicant was accorded every opportunity to prosecute the suit but failed for no justifiable reason given for that omission.
21. The application is dismissed with costs.

DATED AT NAIROBI THIS 4TH DAY OF JULY, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Ndege for claimant/respondent

Mr. Muindi for respondent/applicant

Mr. Kemboi Court Assistant

