

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA
APPEAL NO. E011 OF 2023

JOASH AMBOGO ONGWESO APPELLANT

VERSUS

GREEN PASTURES FARM RESPONDENT

*(Being an appeal from the judgment and decree issued in Bungoma
CMC ELRC No. E013 of 2022 by Hon. Cosmas Maundu (CM)
delivered on 11th July 2023)*

(BEFORE HON. JUSTICE DAVID NDERITU)

RULING

I. INTRODUCTION

1. In a judgment dated and delivered on 26th June 2024 (Keli J) this appeal was allowed in the following terms –

The claim dated 1st July 2022 is allowed as follows: -

- 1. A declaration that the termination of employment of the claimant was unlawful and unfair.*
- 2. Notice pay of Kshs.35,000*
- 3. Accrued leave in lieu of Kshs.22,000*
- 4. Compensation for unfair termination Kshs.350,000*

(Awards b, c, and d above payment subject to statutory deduction of PAYE)

- 1. Interest at court rates from the date of the judgment of the trial court until payment in full.***
 - 2. Costs of the claim.***
 - 3. Cost of the Appeal to the appellant.***
 - 4. Stay of 30 days.***
 - 5. It is so ordered.***
2. In a notice of motion dated 31st January 2025 (the application) filed through Masinde & Company Advocates the respondent is seeking for the following orders –
- i. This motion be certified as urgent and the same be heard on priority basis and service be dispensed in the first instance due to imminent execution that will destroy the substratum of the applicant case and rendering the same nugatory in even of success.***
 - ii. Leave be granted to the firm of Masinde & Co. Advocates to come on record and replace the firm G.B.G Ouma and Co. Advocates who have been acting for the applicant in the lower court and in the appeal herein.***
 - iii. There be a stay of execution of the decree of the honourable court pending the hearing and determination of the motion herein.***

submissions. Counsel for the respondent/applicant Miss Mutunda filed written submissions dated 24th March 2025 while counsel for the respondent Mr. Nabibia filed submissions dated 11th March 2025.

II. THE EVIDENCE

6. In the supporting affidavit it is deposed that the appellant was a farm manager with the respondent for a period of over two years but his services were terminated by mutual consent on or about 26th May 2022.
7. It is after the termination that the appellant filed a claim in Bungoma CMC ELRC No. 013 of 2022 pleading unlawful termination and seeking for a variety of reliefs.
8. It is deposed that the respondent instructed Charles B G Ouma & Co. Advocates to defend it in the above cause in the lower court and appearance was entered and a defence filed. It is further deposed that matter apparently proceeded ex parte without the counsel on record informing the respondent and an ex parte judgment was rendered by the lower trial court.
9. It is further deposed that an application to set aside the ex parte judgment was filed on 21st August 2023 and the same was allowed on 18th December 2023 on the condition that the respondent was to pay thrown away costs of Kshs30,000/= within 30 days and in default the ex parte judgment was to remain in force.

10. It is deposed that in the meantime the appellant filed this appeal against the judgment of the lower court and in a judgment dated and delivered on 26th June 2024 the court (Keli J) enhanced the award of the lower court from Kshs35,000/= to Kshs377,000/=.
11. It is deposed that the counsel for the respondent failed to advise it properly and or take appropriate steps both in the lower trial court and on appeal in this court causing the respondent not to participate in the proceedings resulting in it being condemned unheard.
12. It is deposed that the respondent then instructed J O Makali & Co. Advocates but the said law-firm withdrew from acting for the respondent on 28th January 2025.
13. It is deposed that the respondent deposited the decretal sum plus costs in the sum of Kshs607,000/= in court on 28th December 2024 in compliance with orders issued by the court.
14. It is further deposed that had the counsel on record afforded the respondent adequate legal representation the respondent had a good defence in the lower court and a good response in the appeal. It is deposed that the mistakes of the counsel should not be visited upon the respondent.
15. In the replying affidavit by the appellant it is deposed that the application is *res judicata*, lacking in merit, and filed in total abuse of the court process.
16. It is deposed that the respondent previously filed an application for

stay of execution dated 4th October 2024 that was allowed on 27th December 2024, pending the respondent filing an appeal in the Court of Appeal in Kisumu, and the respondent was ordered to deposit the decretal sum plus costs of Kshs607,000/= with the court and it complied.

17. It is further deposed that the respondent filed an application dated 21st August 2023 to set aside the judgment and the proceedings of the lower court and the said application was allowed on condition that the respondent paid thrown away costs of Kshs30,000/= to the appellant but the respondent failed and or refused to comply with that order.
18. It is deposed that the respondent did not file an appeal against the judgment of the lower court as the appeal herein was filed by the appellant. It is deposed that the respondent is seeking to have this court sit on appeal of its own judgment.
19. It is further deposed that the respondent is seeking to set aside orders allegedly made by the court on 26th June 2023 yet no orders were issued or a judgment delivered on the said date.
20. It is deposed that the judgment delivered on 26th July 2024 was regularly and unlawfully entered. It is deposed that the respondent has filed an application in the Court of Appeal seeking to file an appeal out of time in Kisumu Civil Appeal No. E143 of 2024 which was slated for hearing in March 2025. A copy of the application is

annexed.

21. It is deposed that the respondent was all along aware of the proceedings herein and the deponent who has sworn the affidavit in support of the application swore the affidavits in all the other applications and proceedings and as the proprietor of the respondent she was always aware of the proceedings from the lower court, to this court, and now in the Court of Appeal.
22. It is deposed that the application herein was filed as an afterthought after inordinate delay with the sole purpose and intention of denying the appellant the fruits of a lawful judgment.
23. It is deposed that the respondent is wrong in blaming its former counsel for not informing it of the proceedings yet the record confirms that the said counsel participated in the proceedings including the various applications filed and taxation of costs.

III. SUBMISSIONS BY COUNSEL

24. Counsel for the respondent submitted that it is the former counsel for the respondent who failed to inform it of the proceedings both in the lower court and in this appeal. It is submitted that the former counsel failed to inform the respondent of the order to pay Kshs30,000/= as thrown away costs in order for the matter to be heard de novo in the lower trial court and for that the respondent lost an opportunity to defend the claim.
25. It is further submitted that when the former counsel was served with

the notice and memo of appeal in this appeal, he failed to inform the respondent and as such the respondent was condemned unheard contrary to the ***Rules of Natural Justice*** as anchored in ***Articles 50 & 159 of the Constitution***. It is submitted that based on the supporting affidavit the said former counsel had no instructions to act for the respondent in this appeal. It is submitted that even if the notice and memo of appeal were served upon the former counsel the court was wrong in assuming that the said counsel had instructions to act for the respondent.

26. It is submitted that the failure by the former counsel to offer profession representation to the respondent prejudiced it in both courts.
27. Counsel cited several old decisions in support of the application including ***Patel V Cargo Handling Services Ltd (1974) E.A 75, Shah V Mbogo (1969) EA 16, and Sebei District Administration V Gas Yali (1968) E.A 300***. It is submitted that this court has unfettered discretion in setting aside the judgment to avoid injustice to the respondent. It is submitted that if not set aside the judgment shall cause undue hardship to the respondent. It is further submitted that from the evidence availed the failure by the respondent to defend the trial in the lower court and in the appeal was inadvertent and an excusable mistake.
28. It is submitted that since the decretal sum plus costs in the sum of

Kshs607,000/= has been deposited with the court the appellant shall not be prejudiced as the amount is secured. It is submitted that the respondent is ready and willing to pay any costs that may be ordered by the court and meet any other conditions that may be imposed in allowing the application.

29. On the other hand, counsel for the appellant submitted that the application is *res judicata* based on **Section 7 of the Civil Procedure Act**. It is further submitted that an application for stay of execution dated 4th October 2024 was compromised and the respondent granted stay of execution upon depositing the decretal sum and costs in the sum of Kshs607,000/=. It is submitted that the respondent complied with the orders and deposited the said monies and as such there is no danger of execution and hence prayer (i) in the application is of no consequence.
30. It is submitted that prayer (ii) for leave by Masinde & Co. Advocates to replace C. B. G. Ouma & Co. Advocates was not argued and the said advocates are thus not properly on record for the respondent and hence any documents or pleadings signed and filed by the said advocates are a nullity.
31. It is further argued that prayer (iii) seeking for stay of execution is *res judicata* as there is in force an order for stay of execution issued as stated above.
32. In regard to prayer (iv) it is submitted that no judgment was

delivered on 26th June 2023 yet the prayer is seeking to set aside a judgment that was allegedly delivered on the said date. It is submitted that the respondent was granted the stay of execution alluded to above pending the hearing and determination of an appeal in the Court of Appeal but there is no evidence that an appeal was ever filed. It is submitted that what the respondent filed is an application to appeal out of time that is pending and was coming up for hearing on 26th March 2025.

33. It is submitted that having filed the said application in the Court of Appeal, it is an abuse of the court process for the respondent to then file the instant application seeking the orders set out in the introductory part of this ruling. It is submitted that the respondent was all along aware of the proceedings in the lower court and this appeal as per the affidavits sworn by its proprietor annexed to the application herein. It is submitted that the respondent through its counsel participated even in the taxation of costs long after the judgment in the appeal had been delivered.
34. It is further submitted that the application is bad in law and misconceived as it is calling upon this court to sit on appeal of its own judgment.
35. The court is urged to find and hold that the application has no merits and the same is filed in blatant abuse of the court process and proceed to dismiss the application with costs.

IV. ISSUES FOR DETERMINATION

36. The court has gone through the application and the submissions filed by counsel and indeed the entire proceedings from the lower trial court and the appeal herein. In my view, there is only one main issue for determination - *Whether the application has merits.*

V. ANALYSIS & DETERMINATION

37. In a judgment dated and delivered on 11th July 2023 the lower trial court awarded to the appellant (claimant in the lower court) a sum of Kshs35,000/= being one month's salary in lieu of notice plus costs of the suit. Dissatisfied with this decision the appellant filed this appeal and, in a judgment dated and delivered on 26th June 2024, the court (Keli J) allowed the appeal and awarded the appellant as stated in the introductory part of this ruling.

38. The respondent did not appeal this judgment and no application for review was filed. From the evidence and submissions by counsel for both parties, an application was filed by the respondent in the Court of Appeal at Kisumu seeking for leave to file an appeal out of time and seeking for stay of execution. At the time of authoring this ruling this court has no information on the fate of that application.

39. However, following an application dated 4th October 2024 the respondent was granted stay of execution pending the hearing and determination of an appeal that the respondent purported to have filed in the Court of Appeal but upon depositing the decretal sum

- and costs in court. A sum of Kshs607,000/= was deposited in court.
40. It is subsequent to all the foregoing that the respondent filed the instant application dated 17th February 2025 seeking for the orders set out in the introductory part of this ruling.
41. For many reasons, some of them alluded to by the appellant's counsel in the submissions, in the opinion of the court the application herein is incompetent, devoid of merits, and filed in blatant abuse of the court process.
42. From the record the counsel appearing for the respondent did not seek and or obtain leave to act as such before prosecuting the application. In the circumstances, the law-firm of Masinde & Co. Advocates did not procedurally replace that of G. B. G. Ouma & Co. Advocates to act for the respondent. However, even if the court was to overlook that glaring omission, the application shall still fail for the following reasons.
43. Prayer (iii) seeking for stay of execution pending the hearing and determination of the application is moot and overtaken by events as the respondent was granted stay of execution following the application dated 4th October 2024 as detailed above. The consent order on the stay was issued on 6th November 2024, months before the instant application was filed. The stay was granted pending the hearing and determination of an appeal purportedly or intended to be filed in the Court of Appeal at Kisumu.

44. As it now turns out no appeal was filed as purported. What was filed was an application seeking to file an appeal out of time. The fit of that application was not disclosed to this court other than that it was coming up for hearing sometimes in March 2025. In the circumstances, the respondent misled the court that an appeal had been filed or was to be filed yet none was filed. It is on the understanding that there was an appeal filed or to be filed that this court granted the respondent stay of execution pending the hearing and determination of that appeal.
45. For all the foregoing reasons, the order for stay of execution issued by this court on 6th November 2024 is hereby set aside and revoked. The net effect is that the sum of Kshs607,000/= deposited in court shall forthwith be released to the appellant, the decree-holder.
46. Prayer (iv) prays that the judgment delivered on 26th June 2024 be set aside and that the appeal be heard *de novo* and that the same orders be issued against the judgment of the lower trial court. This prayer at the very minimum does not make sense. It is contradictory and counter-productive. If the court was to order that the appeal be heard afresh, it means that the decision of the lower trial court shall remain subject to the outcome of the appeal. The respondent was given an opportunity to have the matter in the lower court heard afresh but it failed to pay the thrown away costs of Kshs30,000/= as ordered and the chance was thus lost.

47. The evidence on record confirms that the law-firm of G. B. G. Ouma handled the matter for the respondent in the lower trial court and came on record for it in the appeal. This is so because on 24th July 2024, after the judgment in the appeal had been delivered on 24th June 2024, a Mr. Onyango holding brief for Mr. Ouma appeared for the respondent for taxation of costs in this appeal. The said law-firm also filed an application dated 4th October 2024 seeking for stay of execution. A copy of the notice of appeal served upon the counsel for the respondent was annexed to that application.
48. The court is satisfied that the respondent was all along aware of the proceedings both in the lower trial court and in this appeal but failed and or neglected to act. Mr. Ouma, the former counsel for the appellant has not filed any evidence through an affidavit or otherwise confirming that he was either indisposed and or unaware of the proceedings in the lower trial court and this appeal. Either way, the evidence on record is that the respondent was all along aware of the proceedings both in the lower trial court and in this court.
49. In my considered view, the respondent has applied all tactics to delay the finalization of this matter. The appellant is in possession of a lawful judgment and decree for the award made on appeal. The said judgment has neither been appealed nor has an application for its review filed. This court is unwilling to engage in the hide and

seek by the respondent. Litigation has to come to an end.

50. This court is *functus officio* as far as the judgment of 26th June 2024 is concerned. If the respondent is dissatisfied with the same it ought to have either filed an appeal or applied for review. As stated above, the evidence on record is that the respondent through its counsel was always informed and or was aware of the proceedings herein and in the lower court trial. There are no reasons whatsoever to convince this court to set aside the judgment in the appeal or the proceedings in the lower trial court.
51. Likewise, it is now evidently clear that there is no appeal pending in the Court of Appeal by the respondent. It is thus the view of this court that the application is vexatious and only intended to further delay the settlement of the lawful judgment delivered in favour of the appellant.
52. The court has said enough in demonstrating that the application herein by the respondent lacks in merits and the same is for dismissal and it is hereby so dismissed with costs.

VI. ORDERS

53. Flowing from the foregoing, the court makes the following orders –
- a) The application by the respondent dated 31st January 2025 is hereby dismissed.***
 - b) The order for stay of execution issued on 6th November 2024 is hereby set aside.***

- c) The sum of Kshs607,000/= deposited in court by the respondent shall forthwith be released to the appellant.*
- d) Costs of the application to the appellant.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT
KAKAMEGA THIS 16TH DAY OF OCTOBER, 2025.**

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DAVID NDERITU
JUDGE