



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPLICATION NO. 18 OF 2017 (UR 9/2017)

BETWEEN

KENNETH KAUNDA OGOLLA

T/A KELLYS BAR & RESTAURANT.....APPLICANT

AND

KENYA HOTEL & ALLIED WORKER'S UNION....RESPONDENT

*(An application to set aside orders issued by this Honourable Court against the application for stay of execution pending the hearing of an intended appeal*

RULING OF THE COURT

[1] By an application dated 20<sup>th</sup> February, 2017 and filed on the same day, the applicant seeks an order that the application dated 29<sup>th</sup> September, 2016 be reinstated to hearing.

The application which is brought under **Rule 56 (3)** of the Court of Appeal Rules is supported by the affidavit of **Lore G. Omondi**, the applicant's counsel. It is opposed by the respondent on the grounds contained in the replying affidavit of **Wycliffe Sava Mundu**, the Secretary General of the respondent.

[2] The applicant has not filed the relevant material before the Court. However, it is apparent from the application that on 18<sup>th</sup> June, 2016, the Employment and Labour Relations Court entered judgment against the applicant for payment of certain sums of money to its former employee who was represented by the respondent. This was in the **Employment Cause No. 262 of 2013**. The respondent indicates that the decretal sum is currently Shs. 144, 565/=. The applicant was dissatisfied with the decision and filed a notice of appeal dated 22<sup>nd</sup> July, 2016. On 29<sup>th</sup> September, 2016, the applicant filed a notice of motion before this Court apparently under **Rule 5(2) (b)** of the Court of Appeal Rules for the order that the execution of the decree be stayed pending the hearing of the intended appeal.

That application was dismissed for non-appearance on 8<sup>th</sup> February, 2017 under **Rule 56 (1)** of the Court of Appeal Rules.

The applicant's counsel explains that he failed to attend Court for the hearing of the application because the legal assistant in his chambers failed to enter the hearing date in the diary.

[3] The application is opposed on the grounds *inter alia* that the notice of appeal is defective having been filed out of time and that the application is brought in bad faith the applicant having previously offered to settle the decretal amount.

[4] We have considered the application. The application is competent since it was brought within 30 days from the date of the dismissal of the application as stipulated by **Rule 56 (4)** of the Court of Appeal Rules. However, as provided by **Rule 56 (3)** of the Rules, the applicant is required to show that he was prevented by sufficient cause from appearing for hearing.

[5] The explanation given is that the advocates' clerk did not record the date of the hearing of the application in the diary. A copy of the diary has been annexed but that entry is for 8<sup>th</sup> January, 2017 and not for 8<sup>th</sup> February, 2017 when the application was dismissed. It follows therefore that no sufficient cause has been shown for non-attendance on 8<sup>th</sup> February, 2017.

[6] There are other relevant circumstances to be considered. The respondent says that the application is brought in bad faith. The application which was dismissed sought stay of execution of the decree pending appeal. The notice of appeal is dated 22<sup>nd</sup> July, 2016. It was lodged far outside the 14 days stipulated by **Rule 75 (2)**. There is no indication that the applicant has filed an application for extension of time. By the time the application was filed nearly 1<sup>1/2</sup> years had elapsed since the date of the decision and yet no appeal had been filed. The appeal should have been filed within 60 days of the decision. **(Rule 82 (1))**. If the appeal is not lodged within the stipulated period, the notice of appeal is deemed to have been withdrawn. **(Rule 83)**. There is no indication that the applicant has applied for extension of time to file the record of appeal.

[7] Lastly, on 27<sup>th</sup> March, 2017, the application was adjourned at the request of the parties to give them time to negotiate a settlement.

The respondent has annexed a letter from the applicant's advocates dated 20<sup>th</sup> March, 2017 by which the applicant gave a settlement proposal. In the affidavit to support the dismissed application, the applicant states that he initially had the intention of settling the matter but later changed his mind. He does not give the reasons for the change of mind.

[8] For the foregoing reasons, the application has no merit. Accordingly, the application is dismissed with costs to the respondent.

**Dated and Delivered at Kisumu this 22<sup>nd</sup> day of February, 2018.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**