



REPUBLIC OF KENYA



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**Parapet Limited v Ogolla (Civil Appeal 113 of 2024)
[2025] KEELRC 618 (KLR) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 618 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CIVIL APPEAL 113 OF 2024
K OCHARO, J
JANUARY 16, 2025**

BETWEEN

PARAPET LIMITED APPELLANT

AND

FREDRICK OKOTH OGOLLA RESPONDENT

RULING

Introduction

1. Before this Court is the Appellant's/Applicant's application dated 25th September 2024, wherein it seeks the following orders: -
 - I. Spent
 - II. That pending the inter partes hearing of this application this Honourable Court to temporarily vacate its order made on 20th September 2024 discharging the interim stay of execution of trial Court's decree and by so doing temporarily reinstate the interim stay of execution of the trial Court's decree.
 - III. That pending the hearing and determination of the Application dated 3rd September 2024, this Honuorable Court be pleased to review its orders of 20th September 2024 and thereby reinstate the interim stay of execution of the trial Court's decree.
 - IV. Costs be in the cause.
2. The application is premised on the grounds set out on the face the of, and the supporting affidavit sworn by the Counsel Kimani Njoroge on 25th September 2024.
3. The Respondent has opposed the application on the grounds obtaining on his Replying affidavit herein filed, sworn on 8th October 2024.



4. Pursuant to the directions of this Court, the parties have filed their respective submissions for and against the application.

The Application

5. The Appellant/Applicant states that it moved this Court on 4th September 2024 seeking interim orders of stay of execution pending the hearing and determination of the application dated 3rd September 2024.
6. On 5th September 2024, the Court issued a temporary stay of execution pending an inter partes hearing of the application, subject to it depositing the entire decretal sum, Kshs. 416,300 in court within Fourteen days. The Court set the application for mention for 20th September 2024 for checking on compliance with the order.
7. The Appellant/Applicant stated that when its Counsel informed them of the conditional stay of execution, it immediately expressed to him the difficulty that there was to be in complying, as its Finance Director was out of Office.
8. As at the mention date, 20th September 2024, the Appellant hadn't complied with the order by depositing the decretal sum in court. Consequently, the Court discharged the interim order of stay.
9. Following the discharge of the order and the resultant exposure to an execution being levied against it, the Appellant requested its Counsel to deposit the decretal sum in court on its behalf, undertaking to refund the same immediately the Finance Director reported back to office.
10. On the same day, 20th September 2024, Counsel proceeded to deposit the entire sum in court, and notified the Respondent's Counsel.
11. The Applicant's failure to comply with the timelines that were set in the interim stay order wasn't deliberate but as a result of the reason that the Finance Director was out of office.
12. Notwithstanding the fact that he was notified of the deposit, Counsel for the Respondent instructed auctioneers on 24th September 2024, to proceed and levy execution against it.
13. If the orders sought herein aren't granted, the application dated 3rd September 2024, and the appeal herein shall be rendered nugatory.

The Response

14. The Respondent contends that the instant application is frivolous, vexatious, misconceived, and otherwise an abuse of the Court process. The Applicant hasn't set out ground that are sufficient to attract the review order sought.
15. The orders sought in the application were denied by the Court on 5th September 2024. As such, the application is res judicata.

The Parties' Submissions

16. I have carefully considered the respective submissions filed by the parties herein, they both miss the point. They have largely addressed the instant application as if it is an application for stay of execution pending under the provisions of Order 42 of the Civil Procedure Rules, yet it isn't. As a result, time shouldn't spend in summarizing them herein. However, the Parties should take comfort that I have noted their submissions on res judicata and review.



Analysis and Determination

17. With great respect, it isn't easy to comprehend how to characterize the Appellant's/Applicant's application. The application isn't couched with clarity. However, considering the Applicant's submissions under item 4.7.6 and that the application is expressed to be under the provisions inter alia Section 80 of the Civil Procedure Act, and Order 45 of the Civil Procedure Rules, I will take it that the application was intended to be and is an application for review of the Court's order of 20th September 2024.
18. It is trite law, and Order 45 of the Civil Procedure Rules which the Appellant/Applicant has invoked speaks to it, that the authority bestowed upon Courts by the law to review their orders and judgments, is not an authority at large. It is a fettered authority, only exercisable in favour of an Applicant where he or she has satisfied particular conditions, thus; there is a discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time the decree was passed or order made or there is some mistake or error apparent on record, or that there is sufficient to justify the review.
19. I have carefully considered the grounds set out on the face of the instant application, the supporting affidavit and even the submissions by Counsel for the Appellant and see nowhere where it is explicitly stated which of the three grounds, the Applicant's application is anchored. Therefore, it seems the Appellant/Applicant wants this Court to venture into the realm of speculation. This Court isn't ready to.
20. In my view, an application for review must expressly state the which of the three statutory grounds, it is premised, or clearly link the grounds the basis for the application to the three grounds or any of them. Where there is a failure to, the application will certainly fail.
21. The Appellant/Applicant contends that the failure to deposit the ordered sum in court within the 14 days was occasioned by the absence of the Finance Director from office. Assuming for a moment that the it is advancing the "sufficient reason" under Section 80 of the Civil Procedure Act, I will still be unconvinced that the Applicant merits the order for review.
22. The golden rule is that a person deponing to an affidavit must depose to matters that are within his knowledge. Further, an Advocate shouldn't swear an affidavit in a case on matters that are contentious. In my view, the matters deposed to in the Replying affidavit, and more specifically those surrounding the Finance Director's absence from office and the resultant failure to make the deposit, would properly be deposed to by the Director and not Counsel for the Appellant. Therefore, what the Counsel deposed to on this pivotal fact[s], remained hearsay and of no aid to the Appellant's application herein.
23. Reasonably, the Finance Director or any Person from the Respondent's with knowledge on the alleged absence of the Director and how it accessioned the failure, would be expected to swear the affidavit. Inexplicably, this didn't happen. This Court is left with no option other than make an adverse inference that had the Director or such person sworn the supporting affidavit, it couldn't have been helpful to the Applicant's instant application.
24. The sketchiness with which the alleged absence of the Director from office and its connection with the failure to adhere to the Court's order, has been brought out in the replying affidavit in a least impressive manner. One wonders why it hasn't been stated whether being out of office meant being out of the Country or not, whether or not, notwithstanding the fact, the Director couldn't be reached to effect the payment, when the Director commence his absence from office and when he resumed duty. This



default which a consider deliberate, only speaks to one thing, the Appellant isn't candid on the reason for the failure.

25. In the upshot, I find the Applicant's application wanting in merit. It is hereby dismissed with costs.

26. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 16TH DAY OF JANUARY, 2025.

OCHARO KEBIRA

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

4

