



**Musoma v Tuls Cosntruction Limited (Cause E051 of 2021)
[2024] KEELRC 530 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 530 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E051 OF 2021**

**AK NZEI, J
MARCH 7, 2024**

BETWEEN

WYCLIFFE MKOKO MUSOMA CLAIMANT

AND

TULSI COSNTRUCTION LIMITED RESPONDENT

RULING

1. On 31st May 2023, this Court delivered its judgment upon full trial of the suit herein; and ordered the Respondent/Applicant to pay the Claimant a sum of Kshs 1,309,550 being the award assessed by the Mombasa County Occupational Safety and Health Services Officer on 26/10/2020, costs of the suit and interest at Court's rates. The Court delivered its said judgment upon considering the pleadings filed and evidence, both documentary and oral, presented by the parties herein. None of the parties herein appealed against he said judgment.
2. It is worthy noting that the Respondent/Applicant had, prior to commencement of the trial herein, filed an application dated 24/9/2021 seeking review, Variation and/or setting aside of the award made by the Occupational Safety and Health Services Officer on 26/10/2020. A preliminary objection to the said application was raised by the Claimant, who stated that this Court lacked jurisdiction over the said application by virtue of Sections 51 and 52(2) of the *Work Injury Benefits Act*. The Court considered the said Preliminary Objection and delivered its Ruling on 10/2/2022, striking off the said application with no order as to costs, and in so doing rendered itself as follows:-

“ 11. The Respondent/Applicant's grievance over the Director's assessment has not come to this Court by way of an appeal as contemplated in Section 52(2) of the *Work Injury Benefits Act*. The Applicant's grievance/objection ought to have been lodged with the Director, Occupational Safety and Health Services within sixty (60) days of the assessment in issue. This Court lacks primary



jurisdiction over the subject matter in the application, and cannot be called upon to usurp the Director's administrative powers donated by the statute.

12. The Court has no jurisdiction to entertain or to hear the Notice of Motion dated 24th September 2023; and the same is hereby struck off with no order as to costs.”
3. The Respondent/Applicant did not appeal against the said Ruling delivered on 10/2/2022.
4. After delivery of the Court's judgment upon full trial of the suit as stated in paragraph 1 of this Ruling, the Respondent/Applicant filed a Notice of Motion application dated 25/7/2023 seeking the following orders:-
 - a. that the Court be pleased to review its judgment delivered on 31/5/2023 as the same was secured through an unorthodox means of falsified and/or forged documentation which fundamentally and substantially exposed the Respondent/Applicant herein to double jeopardy and violated their equality before the law.
 - b. that there be a stay of execution of the judgment and decree herein pending hearing and determination of the application.
 - c. that the decretal sum and interest awarded be stayed, suspended and/or set aside.
 - d. that the Court be pleased to grant stay, cancel, set aside, recall and lift the warrants of attachment of movable property and warrants of sale dated 10/7/2023 pending the hearing and determination of the application.
5. The application is predicated on the supporting affidavit and supplementary affidavits of Surya Kantbhai B. Patel sworn on 25/7/2023 and 20/9/2023 respectively. It is deponed in the said affidavits:-
 - a. that the 21 days' stay of execution granted by this Court on 31/5/2023 lapsed on 21/6/2023.
 - b. that the Respondent/Applicant filed a Notice of Appeal on 16/6/2023 and on 20/6/2023 filed an urgent application for stay in the Court of Appeal.
 - c. that the Court of Appeal is yet to issue directions on hearing of the application, thus exposing the appellant to the risk of execution.
 - d. that the Applicant has since been served with warrants of attachment of movable property and warrants of sale dated 10/7/23 despite the pending application and intended appeal.
 - e. that proceedings at the Director's Office were never served on the Respondent by the Claimant.
 - f. that documents supporting the claim are marred with falsehoods and forgery, which were demonstrated to the trial Court, but the same were ignored and/or overlooked. That documents presented to the Court are questionable as they do not bear the Respondent's signature and stamp for all received documents.
6. The application was placed before this Court's Vacation duty Judge under a certificate of urgency on 3/8/2023, and reservation of the subject of the suit was ordered pending service of the application, filing of responses thereon and taking of directions on the application before me on a date that the duty Judge gave. The Claimant/Respondent filed a replying affidavit in response to the application on 7/9/2023, sworn by himself on an even date; and, inter-alia, stated:-
 - a. that this Court made pronouncement in the Ruling delivered on 10/2/2022 to the effect that it could not usurp the Director's administrative power as donated by the statute.



- b. that this Court made a finding at paragraph 19 of its judgment that the sum to be paid by the Respondent to the Claimant is as assessed by the Director on 26/10/2020, and that a decree was to issue accordingly; and that interest was to accrue at Court rates from the date of (the Court's) decision. That there is no ambiguity in the Court's judgment, that the judgment needs to be read as a whole and purposely but not in bits.
 - c. that the Respondent/Applicant is on a fishing expedition and is abusing the Court's process, that he needs to elect one process, either an appeal against the judgment or an application for review, but cannot move the Court of Appeal and apply for review of the judgment at the same time as he has done in the case herein.
 - d. that no ground for review has been demonstrated, and that the grounds (advanced) are res-judicata.
 - e. that save for the Notice of Appeal, no application for stay of execution of the decree herein, filed in the Court of Appeal, has been served on the Claimant/Respondent.
 - f. that the Applicant has paid kshs.507,045 in part settlement of the decree, and that the decree has not been fully satisfied and that the Applicant has abused several stay orders.
7. Both parties filed written submissions on the application pursuant to this Court's directions in that regard, which I have considered.
8. Section 16 of the [Employment and Labour Relations Court Act](#) provides as follows:-
- “The Court shall have power to review its judgments awards, orders or decrees in accordance with the Rules”
9. Rule 33(1) of the [Employment and Labour Relations Court \(Procedure\) Rules 2016](#) provides as follows:-
- “ 33.
- (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 judgment 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 judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.”
10. It is unambiguously clear from the foregoing Rule that a party who is aggrieved by a judgment, order, award or decree of this Court can only seek review of the impugned judgment, order, award or decree if no appeal is allowed from such judgment, order, award or decree; and where an appeal is allowed, where no appeal has been preferred. In the present case, the Respondent/Applicant deponed in its supporting affidavit referred to in paragraph 5 of this Ruling that it on 16/6/2023 filed a Notice of



Appeal and subsequently an application for stay of execution of this Court's decree in the Court of Appeal, and that the Court of Appeal is yet to give directions on the said application. I have seen in this Court's record a Notice of Appeal dated 16/6/2023 whereby the Respondent/Applicant states that it intends to appeal against the whole of this Court's judgment herein.

11. Order 42 Rule 6(4) of the *Civil Procedure Rules*, which applies to proceedings in this Court by dint of Section 13 of the *Employment and Labour Relations Court Act*, provides that for purposes of the Rule (Rule 6), an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that Court a notice of Appeal has been given.
12. The situation regarding the suit herein is that there is an appeal filed in the Court of Appeal against this Court's judgment/decree. No order has been placed before this Court indicating that the filed appeal has been withdrawn in accordance with Court of Appeal Rules. To that extent, this Court cannot entertain an application for review of a judgment that has been appealed against to a higher Court. The Court has no jurisdiction to do so, and the prayer for review must fail.
13. Further, the prayer for stay of execution of this court's decree cannot be entertained by this Court. Order 42 Rule 6(1) of the *Civil Procedure Rules*, which is applicable to proceedings in this Court as already stated in this Ruling, does not contemplate a situation whereby a party/judgment debtor pursues stay of execution proceedings in both the Court appealed from and the Court appealed to simultaneously. Order 42 Rule 6(1) provides as follows:-
 - “(1) No appeal or second appeal shall operate as a stay of execution of proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the Court from whose decision the appeal if preferred may apply to the appellate Court to have such order set aside.
14. To the foregoing extent, the prayers for stay of execution of this Court's decree and cancellation/setting aside of the warrants of attachment and warrants of sale issued by the Court cannot be allowed by this Court, in view of a similar application that the deponent of the supporting affidavit sworn on 25/7/2023 depones was filed in the Court of Appeal on 20/6/2023. As stated by the Claimant/Applicant in his replying affidavit filed herein, the Respondent/Applicant has clearly embarked on a fishing expedition by instituting and pursuing applications for similar orders in both this court and the Court of Appeal. This Court, being the Court appealed from, cannot entertain the application.
15. For record purposes, it should be noted that matters and/or allegations that the Respondent/Applicant purports to raise in support of the prayer for review of this Court's judgment were canvassed at the trial whereby each party had an opportunity to testify and to cross-examine the other party on evidence presented by them. In writing its judgment, this court fully interrogated all the issues involved in the matter and analysed and evaluated the evidence presented. The allegation that this court overlooked or ignored evidence or matters presented/raised by the Respondent/Applicant is unfortunate, to say the least. Both the Court's proceedings and judgment are on record, this being a Superior Court of record.
16. Sections 107 and 108 of the *Evidence Act* are clear on the fact that any party asserting/alleging/pleading the existence of any facts must prove the existence of such facts. It behoved the Respondent/Applicant



to prove the forgeries and falsehoods on the part of the Claimant's evidence/documentary evidence. It failed to do so, on a balance of probability.

17. The Respondent/Applicant, who was all along ably represented by Counsel, did not demonstrate that the falsehoods and forgeries that it alluded to existed. Having filed a Notice of Appeal as it was within the Respondent/Applicant's right to do, the legal and prudent thing for the Applicant to do is to pursue lodging and prosecution of its appeal. This Court has fully rendered itself on the suit herein and has nothing to go back to on the same.
18. Having said that, it is my finding that the Notice of Motion dated 25/7/2023 is an abuse of this Court's process, and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH MARCH 2024

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

