



**Modern Coast Builders 7 Contractors Ltd v Nzai (Appeal
E005 of 2022) [2024] KEELRC 524 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 524 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E005 OF 2022**

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

**BETWEEN
MODERN COAST BUILDERS 7 CONTRACTORS LTD CLAIMANT
AND
CHARO KATANA NZAI RESPONDENT**

RULING

1. The appeal herein was instituted vide a memorandum of appeal dated 29/10/2020 and shown to have been filed on 30/10/2020, on which it is expressed that the appeal is against the judgment of Hon. Lesootia Saitabau delivered on 28/10/2020 in Mombasa Chief Magistrate’s Court Employment Case No. 115 of 2018. The memorandum of appeal is not shown to have been accompanied by any of the documents referred to in Rule 8(4) of the *Employment and Labour Relations Court (Procedure) Rules* 2016, which provides as follows:-

“(4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.

Provided that where copies of proceedings are not filed with the memorandum of appeal, the Appellant shall file such copies as soon as possible and within a reasonable time.”

2. For a period of over two years, the Appellant did not take any action on the appeal. The Court’s Record shows that on 25/1/2023, this Court’s Deputy Registrar issued a written notice under Rule 16 of the *Employment and Labour Relations Court (procedure) Rules* 2016, calling upon the parties herein



to attend Court on 21/2/2023 and show cause why the appeal could not be dismissed for want of prosecution. The said Rule provides as follows:-

“ 16.

- (1) In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.
- (2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
- (3) Any party to the suit may apply for dismissal as provided in paragraph (1).
- (4) The Court may dismiss the suit for non-compliance with any direction given under....”

3. It is to be noted that by dint of Rule 2 of this Court’s aforementioned *Rules*, the word “suit” means a claim, petition, application for judicial review, appeal or any proceedings before the Court for determination.
4. Counsel for both parties appeared before me on 21/2/2023, and upon hearing submissions by Counsel, I ordered as follows:-
 - a. “the memorandum of appeal herein was filed on 30/10/2020, almost 3 years ago, and there has been no effort by the Appellant to prosecute the same.
 - b. the Appellant is granted 45 days to file and serve a record of appeal, failing which the appeal shall stand dismissed for want of prosecution.
 - c. mention on 10/5/2023 for further orders.”
5. No record of appeal was filed, either within the timelines set by the Court or at all, and the Court was not moved to extend the period ordered before it lapsed, and on 10/5/2023, this Court made the following order:-

“The appeal herein stands dismissed for want of prosecution by dint of this Court’s time bound order dated 21/2/2023.”
6. On 11/5/2023, the Appellant filed a Notice of Motion dated 10/5/2023 seeking the following orders:-
 - a. that the application be certified as urgent and be heard ex-parte in the first instance.
 - b. that the Court be pleased to stay execution of the judgment against the Appellant and all consequential decree, orders and proclamation, attachment and execution process issued in Mombasa CMCC NO. 115/2018 (Charo Katana Nzai v Modern Coast Builders & Contractors Ltd) pending the hearing and determination of the application.
 - c. that the Court be pleased to review its orders issued on 10/5/2023 dismissing the appeal dated 29/10/2020 and issue orders reinstating the appeal.



- d. that upon reinstatement of the appeal herein, the Court be pleased to stay execution of the judgment entered against the Appellant and all consequential decree, orders and proclamation, attachment and execution process issued in Mombasa CMCC No. 115/2018 – Charo Katana Nzai -vs- Modern Coast Builders & Contractors Ltd, pending the hearing and determination of the appeal.
 - e. that costs of the application be awarded to the Appellant/Applicant.
7. The application is expressed to be brought under Article 159 of *the Constitution*, Order 42 rule 6 of the *Civil procedure Rules*, Sections 3A,63 and 95 of the *Civil Procedure Act* and the inherent power of the Court; and is predicated on the supporting affidavit of Christine Mfutu, sworn on 10/5/2023. It is deponed in the said supporting affidavit that failure by the Appellant to file a record of appeal as ordered on 21/2/2023 resulted from failure by the lower Court to furnish the Appellant with the said Court’s proceedings, that the Appellant had deposited a half of the decretal sum in the lower Court as a condition for stay and was serious on prosecuting its appeal, and that it is against the right to fair hearing envisaged in *the Constitution* to condemn the Appellant unheard due to the mistake and bureaucracies of the judiciary on a mistake that cannot be visited upon the Appellant.
 8. Annexed to the said supporting affidavit are copies of two letters by the Appellant’s Counsel, dated 22/2/2023 and 22/3/2023 respectively and addressed to the lower Court requesting for typed proceedings. The Appellant did not give an explanation as to why the appeal had to lie in the Court’s Registry for a period of over two (2) years before the dismissal notice was issued without any action being taken on it; and whether during that period, the Appellant was making efforts to obtain the trial Court’s proceedings. No receipt on payment for the trial Court’s proceedings has been exhibited by the Appellant to firm up the allegation that it has for a while been asking for the said Court’s proceedings without success. Did the Appellant pay the requisite charges for those proceedings, and if so, when?
 9. The application is opposed by the Respondent vide his replying affidavit wherein it is deponed:-
 - a. that the trial Court’s judgment was delivered on 10/5/2020, upon which the Appellant applied to set aside the judgment vide an application dated 10/8/2020, on the basis that it was not given an opportunity to be heard, which application the trial Court dismissed on 28/10/2020.
 - b. that aggrieved by the said Court’s ruling, the Respondent/Applicant filed a memorandum of appeal dated 29/10/2020, but did not request for certified copies of the lower Court’s proceedings.
 - c. that the Appellant/Applicant only requested for certified copies of proceedings after the appeal was listed down for notice to show cause on 21/2/2023 as per the letters exhibited herein by the Appellant/Applicant. That for 2 ½ years, the Appellant made no efforts whatsoever to obtain certified copies of proceedings from the lower Court, and that even assuming that proceedings were not ready, there was no reason why the Appellant failed to file all documentary evidence relied on and a copy of the judgement/ruling from the proceedings of the lower Court as required under the law.
 - d. that the Appellant went into a deep slumber after obtaining a stay of execution pending appeal, and only woke up after the appeal herein was dismissed on 10/5/2023 for want of prosecution.
 - e. that the prolonged delay is prejudicial to the respondent, and that the Appellant has contemptuously refused to comply with the order of 5/7/2023 requiring him to deposit the entire decretal sum in Court as a condition for stay.
 - f. that the Appellant never deposited a half of the decretal sum in the lower Court as alleged.



- g. that contrary to the Appellant’s allegations that it did not participate in trial in the lower Court because it was not aware of the hearing date, the trial Court’s ruling exhibited by the Appellant herein indicates that the Appellant was aware of the hearing date, and was represented by Counsel who cross-examined the Respondent and closed the Appellant’s case.
10. For record purposes, I have looked at the lower Court’s ruling referred to in the foregoing replying affidavit, a copy whereof is annexed thereto, and I have noted that the trial Court stated as follows:-
- “According to the Applicant, it was not served with hearing notices by the Respondent, from the record, the hearing date of 21st January 2020 was served upon the Respondent and indeed on the said date, Mr. Manguro attended Court holding brief for Mr. Angwara, the matter proceeded wherein Counsel for the Respondent Cross-examined the claimant and closed their case without any witness. It is therefore not true that the Respondent was not aware of the hearing date or directions on filing of submissions.”
11. Back to the application before this Court, both parties filed written submissions for and against the application; which I have considered.
12. As already stated in paragraph 6 of this Ruling, the Appellant/Applicant is seeking review and setting aside of this Court’s order dated 10/5/2023 dismissing the appeal, and reinstatement of the appeal. The Appellant/Applicant is also seeking a stay of execution of the trial Court’s decree pending hearing and determination of the appeal once reinstated.
13. It is worthy noting that on 5/7/2023, this Court granted the Appellant/Applicant an interim stay of execution of the trial Court’s decree, on condition that it deposited the entire decretal sum of kshs. 609,722.05 in this Court within 14 days of the said order, and paid the Auctioneer’s charges. That condition is not shown to have been complied with, and the Respondent has deponed that it was not.
14. This Court’s power to review its judgments, awards, orders and decrees is provided for in Section 16 of the *Employment and Labour Relations Court Act*, which provides as follows:-
- “The Court shall have power to review its judgment, awards, orders or decrees in accordance with the Rules.”
15. 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.”

16. In the present case, the Appellant/Applicant has not demonstrated discovery of any new and important matter or evidence which, after exercise of due diligence, was not within its knowledge when the order in issue was made. The Appellant has also not demonstrated the existence of a mistake or error that is apparent on the face of the record, or any need for clarification of this Court’s time bound and self-executing order dated 21/2/2023, and the order dated 10/5/2023 confirming dismissal of the appeal herein by dint of the Court’s time-bound order dated 21/2/2023. Further, the Appellant/Applicant has not demonstrated the existence of any other sufficient reason on the basis of which the said orders can be reviewed. The prayer for review must, therefore, fail. Similarly, the prayer for stay of execution must also fail, as the same cannot be granted on the basis of a dismissed appeal.
17. It is worthy noting, for record purposes, that by dint of Order 42 Rule 6(1) of the Civil Procedure Rules, there cannot be a stay of execution of a decree or order pending appeal unless the order or decree whose execution is sought to be stayed has been appealed against. In the present case, the Appellant/Applicant appealed against the trial Court’s Ruling delivered on 28/10/2020, vide which the said Court declined to set aside its judgment/decree passed/delivered on 10/7/2020. No appeal has been preferred against the trial Court’s decree; and none is pending.
18. I find no merit in the Notice of Motion dated 10/5/2023, and the same 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:

.....Appellant

.....Respondent

