



Mukundi & 3 others v South Cape Investment Limited & 2 others (Employment and Labour Relations Cause 1266 of 2017) [2024] KEELRC 900 (KLR) (4 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 900 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1266 OF 2017**

MN NDUMA, J

APRIL 4, 2024

BETWEEN

**JOYCE MUKUNDI 1ST CLAIMANT
PURITY NJERU 2ND CLAIMANT
ELIZABETH CHEGE 3RD CLAIMANT
IRENE OGOL 4TH CLAIMANT**

AND

**SOUTH CAPE INVESTMENT LIMITED 1ST RESPONDENT
ADVANCED INNOVATIONS LIMITED 2ND RESPONDENT
ACES PALACE LIMITED 3RD RESPONDENT**

RULING

1. The claimant filed notice of motion application dated 6/12/2023 seeking to have the court review its judgment delivered on 27/7/2023 limited to the matter of costs and that the court be pleased to mark party and party bill of costs dated 23/10/2023 as withdrawn and execution process to continue.
2. The application is opposed by the respondent vide replying affidavit of the Director of 1st, 2nd and 3rd respondent, Katya Vasihela Tosheva, in which the respondent supports the review of the entire judgment but not matter of costs only. That the respondent is not opposed to the applicants' withdrawing the party and party bill of costs dated 23rd October 2023.
3. The court notes that a party who has filed pleadings is at liberty to withdraw the same. Once the notice of withdrawal has been filed, the notice becomes effective and does not require adoption by the court to become effective.



4. In respect of withdrawal of a party and party bill of costs, that is a matter exclusively before the taxing master and an application for withdrawal, if at all, ought to be before the taxing master and not the judge. Having said that, the court deems the bill of costs as withdrawn and is marked as such. There is no reason advanced by the claimant/applicant to warrant review of the court's judgment on costs. The application is dismissed in that respect with no order as to costs.

Application dated 7th December 2023

5. With regard to the notice of motion application dated 7th December, 2023, the respondent/applicant prays the court to issue an order for stay of execution of the judgment of the court delivered on 27th July 2023 pending the hearing and determination of the application for review of the judgment and proceedings emanating therefrom and do have the matter heard denovo.
6. The application is based on grounds set out on the face of the application and in the supporting affidavit of Raymond Otieno which grounds maybe summarized that the court delivered judgment in favour of the claimants on 27/7/2023 and that the applicant has since discovered new and compelling evidence which could not be produced and or availed during the pendency of the case and, before judgment was delivered.
7. That the evidence constitutes a CCTV footage depicting the claimants having been involved in theft. That the footage could not be procured even after the exercise of due diligence since it had been lost and was only retrieved in November 2023.
8. That substantial loss will be suffered by the applicants if stay of execution is not granted and the suit re-opened afresh to take the new evidence.
9. The application is opposed vide replying affidavit of the claimants' sworn to by Joyce Njeri Mukundi who deposes that there are no pending proceedings before this court for the respondents firstly to appoint a new firm of advocates since no appeal has been filed and secondly there is no discovery of new evidence which was not within the knowledge of the respondents during the pendency of the suit.
10. That introduction of a CCTV footage after judgment is a deliberate scheme to baby sit execution process and to delay justice for the claimants.
11. That the judgment of the court is based on sound evidence tendered before court and no evidence has been tendered to show that the CCTV footage was unavailable during the trial and if it was, it would have changed the outcome of the suit.
12. The parties filed written submissions which the court has carefully considered together with the depositions by the parties.
13. In the case of *Alpha Fine Food Limited versus Horera Kenya Limited and 4 others* [2021] eKLR, the court held;

"Ordinarily, the expression discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced by him at the time when the order was made would refer only to a discovery made since the order sought to be reviewed was passed it must be demonstrated that the applicant was prevented by circumstances beyond his control from tendering the evidence to the court at the time when the judgment sought to be reviewed was delivered against him."
14. The Directors of the 1st, 2nd and 3rd respondents stated that the CCTV footage sought to be produced after judgment could not be found because it was already lost through the constant maintenance of



systems. The applicant in the supporting affidavit of the ICT manager of the 2nd respondent Mr. Raymond Otieno deposes that upon delivery of the judgment of the court in favour of the claimants on 27/7/2023, on 16/9/2023 the 2nd respondent wrote to Kaloyen Petov, the ICT manager based at Fortunna Limited, the parent company of the respondents herein based in Bulgaria requesting to be supplied with the CCTV footage for the 14/3/2017 in which the claimants herein were caught on camera stealing cash and chips from the casino. That the CCTV footage captured in the applicants' cameras are automatically deleted within 15 days. Thereafter the footage is stored in the 2nd applicant's servers in Bulgaria, hence the email request to be supplied with the same.

15. From the admissions made by the applicants herein, it was always in the knowledge of the applicants that the said CCTV footage was in the 2nd applicant's servers in Bulgaria.
16. This suit was filed on 6/7/2017. The proceedings of the court were concluded and the judgment of the court delivered on 27/7/2023 six (6) years after. There was no attempt to retrieve any CCTV footage relevant to this suit all this time.
17. The present application was also not filed until 7th December 2023 five (5) months after the judgment of the court and only after the claimant had started the execution process of the judgment of the court having filed a party and party bill of costs on 23/10/2023.
18. The applicants have dismally failed to prove that it had discovered new, relevant evidence which could not be discovered after exercise of due diligence by the applicants for a period of about six (6) years when this suit was pending. Indeed this application is a gross abuse of the court process and a deliberate attempt to delay the execution of the judgment of the court.
19. The applicants filed no appeal against the judgment and are bound to honour it and allow the claimants to enjoy the fruits of their judgment.
20. Accordingly, this application lacks merit and is dismissed with costs.

DATED AT NAIROBI THIS 4TH DAY OF APRIL, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Macharia for applicants

Mr. Mukundi for claimants/respondents

Mr. Kemboi Court Assistant

