



REPUBLIC OF KENYA



KENYA LAW
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Muliango v Masaka (Cause 989 of 2018) [2024] KEELRC 2146 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2146 (KLR)

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

CAUSE 989 OF 2018

JK GAKERI, J

JULY 30, 2024

BETWEEN

MONICAIMALI MULIANGO CLAIMANT

AND

CATHERINE MASAKA RESPONDENT

RULING

1. Before the Court for determination is the Decree Holder's Notice of Motion dated 3rd April, 2024 filed under Certificate of Urgency seeking Orders That:
 1. Spent.
 2. This Honourable Court be pleased to order for the release of Kshs 309,567.31 to Omongo Gatune & Co. Advocates being part of Kshs 323,138.51 which was deposited as security for Judgment by the firm of J.A Guserwa & Co. Advocates.
 3. The costs of this application be provided for.
2. The Notice of Motion is expressed under Section 12 and 20 of the *Employment and Labour Relations Court*, 2011 and Rule 17(3)(5) and 6 of the *Employment and Labour Relations Court (Procedure) Rule, 2016* and is based on the grounds set out on its face and the Supporting Affidavit of Monica Imali Muliango sworn on 3rd April, 2024.
3. The affiant deposes that on 17th May, 2019, the court directed that the sum of Kshs 323,138.50 be deposited as security for judgment and judgment was entered in favour of the Claimant on 29th May, 2023 in the sum of Kshs 152,692.31 and the Party and Party Bill of Costs was allowed at Kshs 156,875.00 at total of Kshs 309,567.31 and the Claimant's counsel sought the release of the sum vide letter dated 21st March, 2024 and no response has been tendered.
4. That it is six (6) years since the Claimant's employment was terminated.



Response

5. In her Replying Affidavit sworn on 29th April, 2024, counsel for the Respondent deposes that being dissatisfied with the judgment delivered on 29th May, 2023 in the sum of Kshs 152,692.31 in favour of the Claimant/Applicant, the Respondent filed a Notice of Appeal and requested for certified typed proceedings dated 3rd November, 2023 and 2nd November, 2023 respectively.
6. The affiant further deposes that a reference challenging the decision of the taxing officer is pending determination and the Respondent intends to appeal the judgment delivered on 29th May, 2023 and had an arguable appeal.
7. That the sum of Kshs 323,138.50 deposited as security should not be released as the appeal will be rendered nugatory and the applicant will not be prejudiced.
8. The affiant deposes that the instant application lacks merit and should be dismissed with costs.
9. On 6th May 2024, parties to the application agreed that the application be determined on the documentation on record, the application, Supporting Affidavit, annexures and the Respondent's response.
10. The only issue for determination is whether the Applicant's Notice of Motion dated 3rd April, 2024 is merited.
11. It is common ground that on 17th May, 2019, the court granted the Applicant/Claimant's application dated 18th June, 2018 which sought provisions of security by the Respondent and directed that the sum of Kshs 323,138.51 be deposited in court as security for judgment in the event the court entered judgment in favour of the Claimant/Applicant and the sum was deposited.
12. As adverted to elsewhere in this judgment, judgment was entered in favour of the Claimant in the sum of Kshs 152,692.31 and costs were taxed at Kshs 156,875.00, a total sum of Kshs 309,567.31 which the Decree holder seeks to be released in satisfaction of the judgment which the Respondent objects to on the premise that there is a reference pending determination and the Respondent intends to appeal the judgment delivered on 29th May, 2023.
13. As regards the reference dated 26th March, 2024, the court found it unmerited on account of the Applicant's failure to demonstrate the excessiveness of the award or any error or principle.
14. Concerning the intended appeal, it is common ground that the Respondent's counsel filed a Notice of Appeal dated 3rd November, 2023 and requested for typed proceedings vide letter dated 2nd November, 2023.
15. Also on record is undated copy of Draft Memorandum of Appeal.
16. Granted that the Respondent's Replying Affidavit is unambiguous that the Respondent intends to appeal the judgment and had an arguable appeal, there is no appeal pending before the Court of Appeal and there is no application for stay of execution pending the hearing and determination of the intended appeal.
17. Intriguingly, the Respondent has not provided cogent and verifiable reasons why the intended appeal is yet to be filed.
18. It is instructive to note that the Notice of Appeal and the request for typed proceedings are dated 3rd November, 2023 and 2nd November, 2023, more than 5 months after the decision sought to be



appealed against was delivered and immediately after dismissal of the Respondent’s application for review of the judgment on 2nd November, 2023.

19. On the filing of appeal, the Court of Appeal has held that while the Notice of Appeal manifests the person’s desire to appeal, a formal notification of an intended appeal;

“An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry fees paid . . .”

20. See *Yani Haryanto v E.D. & F. Man (Sugar) Ltd*, Civil Appeal No 122 of 1992 and *HA v LB* [2022] eKLR.

21. Arguably, no appeal will be rendered nugatory if the Order sought by the Claimant/Applicant is granted.

22. Finally, as to whether the Respondent could prosecute an appeal against a judgment which was previously the subject matter of a review, there is sufficient judicial authority which the court will not delve into, nor comment on the arguability of the intended appeal.

23. In the upshot, it is the finding of the court that the Applicant’s Notice of Motion dated 3rd April, 2024 is merited and is accordingly granted that the sum of Kshs 309,567.31 be released to Omongo Gatune & Co. Advocates being part of the Kshs 323,138.51 deposited as security for judgment.

24. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF JULY 2024

DR. JACOB GAKERI

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 Civil 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.

DR. JACOB GAKERI

JUDGE

