



REPUBLIC OF KENYA



KENYA LAW
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**Patriotic Group of Companies Limited v Sewe & 15 others (Appeal
E020 of 2024) [2024] KEELRC 13237 (KLR) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13237 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E020 OF 2024
JK GAKERI, J
NOVEMBER 27, 2024**

BETWEEN

PATRIOTIC GROUP OF COMPANIES LIMITED APPLICANT

AND

JOHN OGANGO SEWE 1ST RESPONDENT
JOHN OCHIENG 2ND RESPONDENT
ALLAN MAJWA 3RD RESPONDENT
CAROLINE AUMA 4TH RESPONDENT
CARSTONE ODHIAMBO 5TH RESPONDENT
GEORGE OJOWO 6TH RESPONDENT
ALICE AKOTH 7TH RESPONDENT
JOHN OKELLO 8TH RESPONDENT
WILLICE ONYANGO 9TH RESPONDENT
NICHOLAS OKARA 10TH RESPONDENT
JACKLINE ATIENO 11TH RESPONDENT
CHARLES RAY ONYANGO 12TH RESPONDENT
JOHN ORIEDA 13TH RESPONDENT
DAVID ODHIAMBO 14TH RESPONDENT
CHRISTOPHER WAKHUNGU 15TH RESPONDENT
GEORGE OUMA OUNDO 16TH RESPONDENT



RULING

1. Before the Court for determination are two Notices of Motion by the Appellant dated 9th July, 2024 and 9th September, 2024 respectively under certificate of urgency seeking various orders.
2. The Notice of Motion dated 9th September, 2024 sought a stay of execution of the Judgment and decree made on 9th November, 2023 by Glorlah Nasimiyu Barasa (SRM) in Kisumu MCELRC E147 OF 2021 pending the hearing and determination of this application and the application dated 9th July, 2024, and when the matter came up on 11th September, 2024 temporary order of stay of execution was granted, which substantively rendered the Notice of Motion spent save for costs which the Court's not inclined to award as the same orders had been sought earlier, a fact Counsel for the applicant did not disclose to the Court.
3. The application is thus spent.
4. The only substantive Notice of Motion before the Court is the one dated 9th July, 2024 which sought orders that:
 1. Spent.
 2. Spent.
 3. Pending hearing and determination of the appeal there be stay of execution of the Judgment and Decree made on 9th November, 2023 by Hon. Glorlah Nasimiyu Barasa (SRM) in Kisumu MCELRC/4147 of 2021.
 4. The Court be pleased to grant interim orders of injunction restraining the Respondents their agents auctioneers or any person acting on their behalf from auctioning, attaching arresting, selling, transferring or interfering with the applicants properties whatsoever.
 5. Pending hearing and determination of the Appeal the Respondents, their agents, Auctioneers or any person acting on their behalf be restrained in terms of prayer (4) above.
 6. Costs of this Application be provided for.
5. The Notice of Motion is expressed under Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 10 Rule 10, Order 22 Rule 22 and Order 40 Rule 1 and 2 of the *Civil Procedure Rules* and is based on the grounds set out on its face and the Supporting Affidavit of Jennifer Koech sworn on 9th July, 2024 who deposes that the Applicant is dissatisfied with the Ruling of Hon. Glorlah Nasimiyu Barasa (SRM) dated 6th June, 2024 dismissing the application to set aside the ex parte judgment and the appealed against the Ruling and the appeal has overwhelming chances of success.
6. The affiant deposes that the applicant has appealed against the Judgment of Hon. Glorlah Nasimiyu Barasa delivered on 9th November, 2023, which appeal has overwhelming chances of success.
7. That it was not until 18th January, 2024 that the Applicant discovered that the Respondents had obtained an ex parte judgment on 23rd November, 2023 and the last communication from the Respondent was on 6th November, 2023.
8. The affiant deposes that there is no contract of employment between the applicant and the Respondents as they were casual employees, which ended by effluxion of time and the Respondents



conduct with Alicia Bakery in Usenge were untenable and formed part of the reasons for not renewing the contract to offer security services, the basis of the claim.

9. That the statement of defence filed raises triable issues and the Applicant should not be condemned unheard.
10. That the defence was filed after the trial Court set aside the interlocutory judgment subject to payment of throw away costs of Kshs.10,000.00.

Respondent's Response

11. John Ogango Sewe deposes that the Memorandum of Appeal dated 11th June 2024 relates to the ruling delivered on 6th June, 2024 and any purported appeal against the judgment dated 5th November, 2023 is statute barred.
12. That the Memorandum of Appeal dated 11th June, 2024 and filed on even date is also time barred.
13. That the matter was scheduled for directions on 6th November, 2023 to confirm compliance with the Court's directions made on 20th April, 2023 and the amount was not paid.
14. The affiant further deposes that the Claimants/Respondents were not casual labourers and the Appellant was granted numerous opportunities to be heard by the trial Court as evidenced by affidavit of service and setting aside of the ex parte judgment dated 14th September, 2021.
15. That the matter was heard on 30th September, 2022 fixed for submissions on 4th November, 2022 when the Appellant/Applicant did not attend Court and a judgment notice was served on 21st November, and judgment in default was delivered on 9th November, 2023.

Applicant/Appellant's Submissions

16. As to whether the Appellant has established a prima facie case, Counsel urges that under Order 10 rule 11 gives the Court has unfettered discretion to set aside an *ex parte* judgment on such terms as it may deem fit and cites *K-Rep Bank Ltd V Segment Distributors Ltd* [2017] eKLR as well as *Fidelity Commercial Bank Ltd V Owen Amos Ndungu & Another* HCC No. 241 of 1998 (UR) and *James Kanyitta Nderitu & another V Marios Philotas Ghikas & Another* [2016] eKLR on the difference between regular and irregular judgments and the factors to be considered in determining whether to set aside the judgment, to urge the Court to set the default judgment aside.
17. Other decisions cited to reinforce the submissions are *Shah V Mbogo* [1974] EA, *CMC Holdings Ltd V Nzioki* [2004] KLR 173.
18. On the merits of the defense, Counsel relies on the decisions in *Job Kilach V Nation Media Group Ltd; Salaba Agencies Ltd & Michael Rono* [2015] eKLR and *Lalji t/a Vakkep Building Contractors Casousel Ltd* [1989] KLR on the presence of a triable issue.
19. As to whether there was a contract of employment between the Respondents and the Applicant/Appellant, counsel submitted that there was no contract of employment on record as the Respondents were casuals and the contracts lapsed by effluxion of time.
20. That the Applicant/Appellant was condemned unheard, yet it had a defence that raised triable issues and cites the sentiments in *Phillip Chemowolo & Another V Augustine Kubede* [1982-88] KAR 103 at 1040 on blunders by parties.



Respondent's Submissions

21. The Respondent's Counsel identified and addressed a multiplicity of issues touching on various aspects, such as arguability of the appeal, rendering the appeal nugatory, abuse of due process competence of the application, clean hands, bonafides, prejudice to the Respondents and costs.
22. On arguability of the appeal, Counsel relies on the sentiments of the Court in *Shah V Mbogo* [1968] EAI as well as *Purity Nyawira V David Angwenyi* Nyakundi HCCCA E033 of 2022 on the requirements of a stay of execution to argue that the Applicant was grant several opportunities to be heard in the trial Court but ignored them by failing to attend Court.
23. Counsel urges that if the pending appeal is against the judgment, the Memorandum of Appeal dated 11th June, 2024 filed on even date was filed out of time and raises no arguable issue on the judgment dated 9th November, 2023.
24. Counsel contends that the Applicant has failed to demonstrate whether it will suffer substantial loss as required by law.
25. On competency of the applications both cite Order 40 rule (1) and (2) as the basis yet an application for stay is provided for by Order 42 Rule 6 and Rule 28 of the *Employment and Labour Relations Court (Procedure) Rules 2024*. Thus the applications are fatally defective.
26. Counsel urges that the judgment entered on 9th November, 2023 was regular and the Applicant was aware of it.
27. That the Application was filed after inordinate delay.
28. Counsel urges that records reveal that the Applicant has not attended many Court sessions and has therefore come to Court with unclean hands and is not acting in good faith having filed an earlier application which it did not disclose when it filed the subsequent application.
29. That the inordinate delay in concluding the suit is prejudice to the Respondents/Claimants and thus unconscionable and the application ought to be dismissed with costs.

Analysis and determination

30. Stripped off the side issues and in particular merits or demerits of appeal, the application before the Court is exclusively for stay of execution pending appeal by the Applicant/Appellant.
31. Needless to underscore, the prayer for injunctive Orders is subsumed in the prayer for stay of execution of the judgment and decree and may not require a separate determination.
32. From the documents provided by the parties and the Respondents/Claimants in particular, it is discernible that the claim was file before the Magistrates Court Employment and Labour Relations in 2021 and owing to the Applicant/Appellants failure or neglect to respond to the claim an interlocutory judgment was entered.
33. However, by consent dated 8th November, 2021 the Applicant/Appellants Notice of Motion dated 27th September was granted on terms that the Applicant/Appellant would pay thrown away costs of Kshs.10,000.00 within 14 days failing which interlocutory judgment would be reinstated and the matter would proceed to formal proof. It is unclear as to when the amount was paid though the Respondents avers that it was paid after the 14 days, but the consent order set aside the ex parte judgment thereby enabling the Applicant/Respondent to file its defence to the claim.



34. According to the Respondents, the suit was scheduled for hearing on 7th July, 2022 but the Applicant/Appellants Counsel did not attend service of hearing date notwithstanding and hearing was adjourned to 30th September, 2022 and service was effected and hearing took place and directions on submissions given and service effected for a mention on 4th November, 2022 to confirm filing of submissions but the Applicant's Counsel did not attend.
35. A judgment notice was later served on 21st November, 2022 but judgment was deferred pending determination of the Applicants application dated 10th January, 2023 and a Ruling was delivered on 20th April, 2023. The trial Court ordered the Applicant to serve the statement of Defense within 21 days, comply with Order 11 within 21 days and pay thrown away costs of Kshs.60,000.00 within a similar duration and copies of cheques dated April and May 2021 of different amounts are attached.
36. Also attached are two cheques of Kshs.30,000.00 each dated 12th May, 2023 and 19th May, 2023 in satisfaction of the Court orders dated 8th May, 2023.
37. From the documents on record, it is unclear as to what transpired after the orders of the Court dated 8th May, 2023. What however, is not in dispute is that judgment was delivered on 9th November, 2023.
38. Strangely, the Applicant appear to have taken a back seat and awaited for updates from the Respondent's Counsel and seldom attended Court sessions service of notices notwithstanding. The record speaks for itself.
39. The Respondents filed copies of affidavits of service to show that service was effected and it was therefore aware of the stage at which the suit was at any one time and was aware of the judgment date.
40. I have considered the Applicant's Notice of Motion dated 9th July, 2024, grounds thereof, Supporting Affidavit and annexures. I have also considered the Replying Affidavit together with the submissions.
41. The singular issue for determination is whether the Applicant has established a case for the grant of stay of execution pending the intended appeal.
42. Puzzlingly, in her Supporting Affidavit sworn on 9th July, 2024, Jennifer Koech, a Director of the Applicant/Appellant deposes that they had appealed against the Ruling of Hon. Gloriah Nasimuyu Barasa dated 6th June, 2024 and the judgment delivered on 9th November, 2023, wrongly indicated as 9th November, 2024 and both appeals have overwhelming chances of success.
43. However, only one Memorandum of Appeal was filed dated sometime in June, 2024. The date is illegible. As the opening paragraph of the Memorandum of Appeal makes reference to the Ruling dated 6th June, 2024 and expressly states that the appeal relates to the Ruling not the judgment.
44. In any event, and as correctly argued by the Respondent's Counsel, a Memorandum of Appeal against the judgment delivered on 9th November, 2023, filed in June, 2024 would be time barred.
45. Intriguingly, the Applicant/Appellant is seeking a stay pending appeal but has grounded the Notice of Motion on Rules other than those relating to stay of execution pending appeal.
46. Unsurprisingly, none of the requirements of Order 42 Rule 6 of the *Civil Procedure Rules* were interrogated to ascertain whether the Applicants Notice of Motion meets the threshold.
47. Order 42 Rule 6 (2) of the *Civil Procedure Rules* provides.
No order for stay of execution shall be made under sub-rule (1) unless;



- a. The Court is satisfied that substantial loss may result to the applicant unless the Order is made and that the application has been made without unreasonable delay;
 - and
 - b. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on his has been given by the applicant.
48. Consistent with the holding in *Butt V Rent Restriction Tribunal* [1982] KLR 417
- Although stay may be granted as a matter of discretion, the discretion must be exercised judiciously and only as circumstances of each case may require”.
49. On substantial loss, one of the leading pronouncements is that of Court of Appeal in *Jamas Wangalwa & Another V Agnes Naliaka Chesoto* [2012] eKLR where the Court stated:
- ...The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.
- The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to prevented by preserving the status quo because the loss would render the appeal nugatory”.
- See also *Equity Bank Ltd V Taiga Adams Co. Ltd* [2006] eKLR.
50. The other enduring authority is the decision in *Kenya Shell Ltd V Kibiru & Another* [1986] KLR 410.
51. The Supporting Affidavit makes no reference to the loss the applicant stands to suffer if stay of execution pending appeal is not granted.
52. The affiant appears to be more concerned with the grounds of the appeal as opposed to the instant application.
53. In a nutshell no substantial loss has been demonstrated.
54. As to whether the Notice of Motion was made without unreasonable delay, it is trite that what is unreasonably delay depends on the circumstances of each case.
55. In *Jaber Mohseen Ali & Another V. Priscillah Boit & Another* [2014] the Court held as follows;
- The question that arises is whether the Application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the Court and any order given thereafter. In the case of Christopher Kendagor V Christopher Korir the Applicant had been given 14 days. The application was denied, the Court holding that the application ought to have come before expiry of the period given to vacate the land.”
56. In the instance case, since the Notice of Motion was filed on 9th July, 2024 to challenge a ruling delivered on 6th June, 2024, the Court is satisfied that it was made without unreasonable delay.
57. Finally, on security, neither the Supporting Affidavit of Jennifer Koech nor the submissions by Counsel alluded to the Applicant’s amenability to provide security.



58. In *Arun C. Sharma V Ashana Raikundalia t/a Raikundalia & Co. Advocates* Gikonyo J. aptly capture the essence of security as follows;

The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or Order as may ultimately be binding on the applicant... I presume the security must be one which can solve that purpose.”

59. In *Focin Motorcylce Co. Ltd V Ann Wambui Wangui & Another* [2018] eKLR the Court observed thus:

Where the Applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent the fruits of judgment. My view is that it is sufficient for the Applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security...”

60. Similarly, and as observed by Mativo J. (as he then was) in *Mutabi Kiranga V Margaret Waweru & Another* [2015] eKLR, the offer for security must come from the applicant as a price for stay.

61. Finally, and as observed in *Equity Bank Ltd V Taiga Adams Co. Ltd* (Supra), security is one of the mandatory tenets under Order 42 Rule 6(2) of the *Civil Procedure Rules*.

62. The reality of the matter is that security is not mentioned anywhere in the applicants Supporting Affidavit or submissions.

63. Clearly, the Applicant/Appellant is seeking a stay of execution pending appeal and is already enjoying temporary stay granted on 11th September, 2024 but is neither ready nor willing to cede anything in return.

64. Having fully considered the facts of this case, submissions by parties and relevant judicial authorities, the Court is not satisfied that the Applicant/Appellant has attained the prescribed threshold for stay pending appeal under Order 42 Rule 6(2) of the *Civil Procedure Rules*.

65. It is the finding of the Court that the Applicant’s Notice of Motion dated 9th July, 2024 is without merit and it is accordingly dismissed.

66. There shall be no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 27TH DAY OF NOVEMBER, 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.

