



Osiche v Dambusters E.A (Dambusters Bar & Restaurant Limited) (Cause 465 of 2016) [2023] KEELRC 1109 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 1109 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 465 OF 2016
K OCHARO, J
APRIL 27, 2023**

BETWEEN

DISMAS MAENDE OSICHE CLAIMANT

AND

DAMBUSTERS E.A (DAMBUSTERS BAR & RESTAURANT LIMITED) RESPONDENT

RULING

1. Before me, for determination is the Respondent/Applicant's Notice of Motion Application dated April 14, 2022. It seeks the following orders that:
 1. Spent.
 2. That leave be granted to the firm of M/s Kithinji Marete & Company Advocates to come on record on behalf of the applicant herein.
 3. That pending the *inter parte's* hearing and determination of this application an injunction do issue directed at the Respondents jointly and severally whether by themselves, their agents and/or employees;
 - a. Restraining them from attaching, possessing, distraining, carting off or in any manner whatsoever levying execution against the applicant's business premises, goods or property.
 - b. Staying the execution of the judgment and decree of March 22, 2022 and all subsequent orders of this court including the certificate of costs issued on March 22, 2022.
 4. That this honourable court be pleased to issue any other order it may deem just in the circumstances of the matter.



2. This Application is premised on the grounds that:
 - i. The applicant received a 7-day proclamation notice served on them on April 11, 2022 and expires on April 18, 2022.
 - ii. The applicant has been in hospitality business which was adversely affected by COVID-19 Pandemic which resulted to its closure.
 - iii. The Auctioneers charges amounting to Kshs 95,200.15 is not usurious and manifests intent to visit unwarranted prejudice upon the applicant.
 - iv. The applicant is intending to appeal the judgment of the court and is willing to deposit the decretal sum in a joint interest earning account.
 - v. If the execution proceeds it shall lose its property and shall suffer irreparable harm.
 - vi. No prejudice shall be suffered by the respondent as the respondent is keen to resolving the matter.
 - vii. Its in the interest of justice that the applicant be accorded a fair chance to salvage its appeal which has high chances of success.
3. The Application is further supported by the Affidavit of Peter Kimani, the manager of the Respondent/Applicant sworn on April 11, 2022 in which he reiterates the grounds as set out on the face of the notice of motion application.
4. The affiant stated that the former Director Chris Kimani now deceased had appointed the firm of Mwangambo & Okonjo Advocates to Act on his behalf. The law firm entered appearance and filed a reply to the statement of claim.
5. That in the month of September 2016 the former director passed on and the other directors could not ascertain whether there was an ongoing case.
6. That upon perusing the Court file, it dawned on him that said firm had filed an application to cease and indeed they did cease, acting for the Respondent. The application was never served on the Respondent. Had the application been served on it, it would have instructed another law firm to represent it in this matter.
7. The Application is filed pursuant to Article 50 and 159 of the *constitution* of Kenya, Sections 1, 1A, 1B and 3A of the *civil procedure Act*, Section 12(3)(i) of the *Employment and Labour Relations Act* and Order 22, Rule 25, Order 40 Rules 1 and 4 and Order 51 of the *civil Procedure Rules* and all enabling provisions of the law.

Claimant/Decree Holder's Response

8. In response to the application, the Claimant/Decree Holder filed a Replying Affidavit sworn on June 14, 2022 by Namada Simoni an Advocate representing the him. He contended that the Application does not meet the threshold for the grant of the Orders sought.
9. It is stated that on October 29, 2018 the Respondent's Advocate's application to cease Acting dated September 4, 2018 was heard and allowed and the Claimant directed to fix a hearing date at the registry.
10. The Claimant did pick a date for the hearing of the matter, September 28, 2021 and issued a hearing notice for the date as had been directed by the Court. The notice was duly received by Mr Mwangi, the Respondent's manager. On the appointed date for hearing, the Respondent didn't attend court. The



matter consequently proceeded its absence notwithstanding, and got slated for judgement for October 28, 2021. The Claimant issued a judgement notice which was too served on the manager.

11. The Claimant stated further that they served Bill of costs and the taxation notice. The Respondent neither opposed the taxation nor appointed an advocate to represent it during the taxation. The application herein is an afterthought. The Respondent has only been jerked into action after the proclamation.
12. The Applicant having willingly ignored the court process, it would be unfair to deny the Claimant/Holder the fruits of his judgment.

Submissions by the Parties

13. At the time the court was retiring to write this ruling none of the parties had filed their submissions.

Analysis and Determination

14. Upon considering the material placed before me by parties, the only question which presents itself for interrogation is whether the Applicant's application herein is one with merit.
15. The Applicant has sought for leave for the firm of M/S Kithinji Marete & Company Advocates to come on record on behalf of the applicant. Order 9 Rule 9 of the [Civil Procedure rules](#) provides "Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court"
16. Having satisfied the requirements of the law I allow the firm of M/s Kithinji Marete & Company Advocates to come on record for the Applicant/Respondent.
17. The Applicant's application is crafted and presented in a manner that it leaves on guessing what the stay sought is for. That being so, this court is unable to enter into the realm of speculation and grant orders that have not been sought. However, assuming I am wrong on this, still I will dismiss the application on the reasons hereunder.
18. Order 42 Rule 6(2) of the [Civil Procedure Rules](#) supplies this Court with the jurisdiction to grant orders of stay pending appeal. It therefore follows that before the court is persuaded to engage the jurisdiction under this provision of the law, it must be demonstrated to it that there is a pending appeal filed against the judgment from which the decree sought to be stayed flowed, or that steps have been taken towards having the appeal filed. The Applicant states nowhere in the material it has placed before me that there is a pending appeal or that steps have been taken to have one filed.
19. The jurisdiction under Order 42 of the Civil Procedure Rules is only exercised upon the Applicant for the orders contemplated therein, establishing specific conditions, thus;
 - a. The Application is brought without inordinate delay.
 - b. The Applicant demonstrates that he will suffer substantial loss unless stay is ordered, and
 - c. The Applicant is willing to give security as the Court may deems fit to order.
20. Judgement in this matter was delivered on October 28, 2021. I am convinced by the Claimant/Decree Holder that a judgment notice was served on the Respondent/ Applicant. So, for purposes of ascertaining whether or not there was inordinate delay in bringing up this matter, the computation starts from this date.



21. The application herein was filed on April 14, 2022, a period of almost five and half months, after the judgement. Considering that the Respondent was kept aware of every step of the proceedings as hereinabove brought out, I consider the delay inordinate. The Applicant is guilty of laches.
22. By reason of the foregoing premises, I find the application herein without merit, it is hereby dismissed.

READ, SIGNED AND DELIVERED THIS 27TH DAY OF APRIL, 2023.

Ocharo Kebira

Judge

Delivered in presence of:

Mr Omamo for Claimant/Respondent.

Waweru for the Respondents.

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

