



Sitienei & another v Lang'at t/a Kaloto Auctioneers (Miscellaneous Application E018 of 2022) [2023] KEELRC 1211 (KLR) (18 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1211 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E018 OF 2022
DN NDERITU, J
MAY 18, 2023**

BETWEEN

HOSEA SITIENEI 1ST APPLICANT

EZEKIEL K KIPROP 2ND APPLICANT

AND

ISAAC KIPYEGON LANG'AT T/A KALOTO AUCTIONEERS RESPONDENT

RULING

Introduction

1. In a chamber summons dated July 23, 2022 the Applicants pray for-
 1. That the matter be certified urgent and be heard *exparte* in the first instance.
 2. That this Honourable court be pleased to review, vary and/or set aside the taxing officer's decision of November 30, 2021 and certificate of costs issued in the Nakuru ELRC Misc Application No E016 of 2021.
 3. That the costs of this Appeal be awarded to the Appellants.
2. Alongside the above application the Applicants filed another chamber summons application (the application) of even date under certificate of urgency seeking the following orders –
 1. That the application be certified urgent and heard in the first instance *ex parte*.
 2. That this Honourable Court be pleased to stay the execution of the Taxing Officer's decision of November 30, 2021 and consequential orders pending hearing and determination of this Application.



3. That this Honourable Court be pleased to stay the execution of the Taxing Officer's decision of November 30, 2021 and consequential orders pending hearing and determination of the appeal and or intended appeal.
 4. That the Applicant be granted leave to appeal out of time against the Taxing Officer's ruling and consequential orders of the 30th day of December, 2021.
 5. That the Memorandum of appeal filed herein be deemed as properly filed.
 6. That cost of the application be provided for.
3. The application is expressed to be brought under Rule 55(5) of the *Auctioneers Rules (1997)*, Articles 50 and 159 of the *Constitution of Kenya*, and all other enabling provisions of the law.
 4. The application is based on the grounds on the face of the application and supported by the affidavit of Hosea Sitienei on his own behalf and on behalf of his co-Applicant sworn on July 23, 2022 with several annexures thereto.
 5. In opposition to the application, the Respondent filed a replying affidavit sworn by himself on September 22, 2022 with several annexures thereto.
 6. When the application came up in court for ex parte hearing on July 25, 2022 this court issued an order for stay of execution pending the hearing and determination of the application inter partes.
 7. By consent, it was agreed that the application be heard by way of written submissions. Gordon Ogola, Kipkoech & Co Advocates for the Applicants filed their written submissions on October 6, 2022 while Njuguna Kamanga & Co Advocates for the Respondent filed on November 7, 2022.

II. Background

8. As far as this court can gather, the Applicants herein were the Petitioners in Kericho ELRC Petition No 11 of 2016, wherein they were claiming, *inter alia*, compensation from the University of Eldoret (the University) for unlawful termination. The court at Kericho (Marete J) delivered a judgment on November 14, 2016 which judgment was challenged by way of an appeal to the Court of Appeal. On October 18, 2018 the Court of Appeal allowed the appeal and set aside the judgment of the Learned Judge and directed that the awardable compensation be assessed by a different judge of the ELRC, other than Marete J.
9. Following the orders of the Court of Appeal the compensation awardable to the Applicants herein was assessed at Kshs 14,729,122/= and Kshs 24,173,994.60 respectively on July 9, 2019. An application for stay of execution was made before the court upon delivery of this judgment but the same was rejected.
10. As it turns out, the University was dissatisfied with the judgment of the Court of Appeal issued on October 18, 2018 and appealed to the Supreme Court vide Appeal No 33 of 2019. The Supreme Court allowed stay of execution which was granted on November 1, 2019.
11. As far as the court can infer from the pleadings and the submissions filed, and the court is frustrated with the very scanty information given by the parties and Counsel on the factual background of this application, the compensation between the University and the Applicants was settled or paid at some point. It is not clear if the same was as a result of execution by the Respondent or through an amicable settlement.
12. Before the settlement, again this can only be inferred, it would appear that the Applicants had purportedly instructed the Respondent to execute against the University in pursuit of the sums



awarded to them in compensation. Again, for lack of proper information from the parties herein, the court can only infer that upon the settlement of the compensation as between the Applicants and the University the Applicants failed and or refused to settle the fees that was purportedly due and payable to the Respondent.

13. In pursuit of his fees the Respondent filed a bill of costs dated June 26, 2020 in Nakuru ELRC No 5 of 2020. In a ruling delivered on June 15, 2021 the court (Wasilwa J) the bill of costs was struck out as the same was found to be in contravention of an order of stay of execution that had been issued by the Supreme Court as stated above.
14. It is the Applicants' position that since the warrants of attachment stated above were issued against an order of stay of execution by the Supreme Court, the said warrants of attachment and any other or further orders or proceedings based thereon were null and void.
15. Subsequently, the Respondent filed another bill of costs in Nakuru ELRC Misc Application No E016 of 2021 for assessment of his costs in the execution of the aforesaid warrants of attachment which had been declared null and void. The said bill of costs dated July 29, 2021 was taxed at Kshs 1,220,387/= by the Deputy Registrar (DR) of this court and a certificate of costs issued on November 30, 2021.
16. The Applicants were dissatisfied with the said taxation and filed an application for review and or setting aside of the taxation in Nakuru ELRC Misc Application No 16 of 2021. In a ruling of July 21, 2022, the court (Wasilwa J) opined that the Applicants ought to have filed an appeal and not a reference and as such the said application was thus struck out for being irregular.
17. The Applicants have now come back to court with the instant application filed in court on July 25, 2022 seeking the orders as stated in the introductory part of this ruling.

III. Issues For Determination

18. Flowing from the foregoing analysis read alongside the pleadings and submissions filed from both sides, the issues for determination by this court flow from the prayers in the application –
 - a. Should this court stay the execution of taxing officer's decision of November 30, 2021 pending the hearing and determination of the intended appeal?
 - b. Should the Applicants be granted leave to appeal out of time against the award of the taxing officer made on November 30, 2021?
 - c. Should the appeal filed herein be deemed as properly filed? And,
 - d. Who should meet the costs of this application?
19. On issues (a), (b), and (c) above, the Applicants allege that they did not instruct the Respondent to execute the warrants of attachment and that the said warrants were issued in error as there was a stay of execution order from the Supreme Court. The Applicants, therefore, argue that the warrants of attachment and any other or further action based thereon were null and void. These are serious allegations because if it turns out to be so it means that the Respondent acted on a nullity that cannot be rewarded or compensated. Of necessity, this would mean that the taxation that followed was based on a nullity and the same is as such null and void as well.
20. This court has struggled to understand the context and circumstances relating to this matter. For example, did the Respondent execute the warrants of attachment? Under what circumstances was the main cause settled between the Applicants and the University? If the Respondent only received the warrants of attachment that are now purported to be null and void by the Applicants, what fees



is payable to him? Can the Respondent be paid any fees if the warrants were null and void? These rhetorical questions, inter alia, need to find answers for this court to arrive at a fair and just conclusion of this matter.

21. The amount awarded to the Respondent in the sum of Kshs 1,220,387/= is not a small amount of money or pocket change. If the Respondent is paid this amount it would mean that he would have to refund the same if the intended appeal succeeds.
22. After the taxation on November 30, 2021, the Applicants moved to court to set aside or review the award on June 15, 2022. The delay of over six months has not been explained. But once that application was dismissed the Applicants filed the instant application and the intended appeal on July 25, 2022. While the Applicants have not offered any explanation in the delay in challenging the taxation of November 30, 2021, this court is of the view that the issues raised in the appeal and this application demand a deeper and better interrogation by way of a full hearing of the appeal. The delay may be compensated by way of award of interest on the amount awarded and attendant costs.
23. For all the foregoing, this court opines that the best way of disposing this matter is to allow the chamber summons application dated July 23, 2022 in the following terms –
 - a. That an order of stay of execution be and is hereby issued against the award of the taxing officer as contained in the certificate of costs dated November 30, 2021 pending the hearing and determination of the intended appeal.
 - b. That the Applicants be and are hereby granted leave to file an appeal out of time and the appeal filed by the Applicants as contained in the chamber summons application dated November 23, 2022 be and is hereby deemed as duly filed and served.
 - c. That to facilitate an expeditious disposal of the appeal, the Respondent shall file his responses to the appeal within 14 days of this ruling, and the Applicants are hereby granted leave to file any response thereto within 14 days of service.
 - d. That the appeal shall be disposed of by way of written submissions and the Applicants shall file and serve their submissions within 14 days of (c) above and the Respondent shall file his submissions within 14 days of service.
 - e. That the Applicants shall deposit a sum of Kshs 1,000,000/= in court within 30 days of this ruling as security failure of which the orders above shall expire and lapse automatically.
 - f. That the costs of this application shall abide with the outcome of the appeal.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 18TH DAY OF MAY 2023

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DAVID NDERITU

JUDGE

