



**John Albersten t/a Skyhook Bar and Restaurant v Muluma & another (Miscellaneous Cause E097 of 2022) [2023] KEELRC 1642 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1642 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS CAUSE E097 OF 2022**

**AN MWAURE, J**

**JULY 7, 2023**

**BETWEEN**

**JOHN ALBERSTEN T/A SKYHOOK BAR AND RESTAURANT ..... CLAIMANT**

**AND**

**NAOMI ASMIN MULUMA ..... 1<sup>ST</sup> RESPONDENT**

**MORAN AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Application dated June 27, 2022 the applicant is seeking the following orders.
  - i. That this application be certified as urgent and be heard on a priority basis and service be dispensed with in the 1<sup>st</sup> instance.
  - ii. That the firm of IRB Mbuya to take over this conduct of matter in place of the firm of M/s Eric Mose & Company advocates.
  - iii. That the honourable court grant the applicant leave to file appeal out of time.
  - iv. That the honourable court be pleased to grant orders of stay of execution of the judgment/decree delivered in Ngong (CMCC No E001 of 2021) on the February 3, 2022 pending the hearing and determination of the application.
  - v. That the honourable court be pleased to grant orders of stay of execution of the judgment/decree delivered in Ngong (CMCC No E001 of 2021) on the February 2, 2022 pending the hearing and determination of the intended appeal.
  - vi. That the honourable court do issue a temporary injunction against Moran Auctioneers, their agents assigns and/or servants acting through them barring them from removing the



proclaimed property from the applicants premises for purposes of auctioning, selling or otherwise pending the hearing and determination of this application

- vii. That upon prayer 3 being granted the filled memorandum of appeal be deemed duly filed.
- viii. That the costs for application be provided for.
2. The Hon Magistrate Hon Achieng delivered a judgment and appellant has appealed the same. He says the intended appeal has high chance of success. He says that he is ready to abide by the terms of stay of execution should it be granted.
3. He also says there is a judgment of Kshs 969,833.05 and costs and if stay is not granted there will be substantial loss to the appellant.
4. He says the delay in filing appeal is occasioned by delay in the e-filing. The application is supported by the sworn affidavit of John Albersten the proprietor/respondent and applicant and is dated June 29, 2022. The respondent Naomi Asumii filed her replying affidavit dated July 20, 2022.

### **Respondent's response**

5. The respondent retaliates that on February 3, 2021 judgment was delivered by Senior Principal Magistrate in cause No. E001 of 2021 and 30 days stay of execution was granted. Decree was issued on March 7, 2022. The same was served on the respondents advocates applicants/ respondents failed to settle the decretal sum.
6. Notice to show cause was served on March 28, 2022 and respondent initiated a process to dispose his assets and return to his country of origin.
7. He depones he commissioned Moran Auctioneers to attach applicants assets and proclaimed their movable assets by June 23, 2022.
8. The applicant then served the respondent with an interim stay on July 1, 2022.
9. The respondent avers there is an inordinate delay of three months to file intended appeal.
10. Respondent says the applicant has not produced certificate of delay or proof of attempts made to follow up the proceedings.
11. The respondent states the application was filed as an afterthought after applicant's goods were proclaimed. Respondent urges the court to consider if obliged to allow the application to order of security of costs to be deposited in a joint account with signatures of both advocates to safeguard interest of the 1<sup>st</sup> respondent.
12. She says that the affidavit dated July 20, 2022 is in opposition of the applicant's application.

### **Determination**

13. The court is seized of the fact that the parties entered a consent on November 17, 2022 and the said consent was to the effect that the application dated June 27, 2022 be marked settled after the applicant deposited the decretal sum in a joint account of the advocates of the parties.
14. The court on the same day ordered the applicant to file a record of appeal within 30 days and serve. On January 31, 2023 the applicant requested for more time to get the certificate of delay from Ngong registry and the court ordered them to file their record of appeal and submissions within 21 days and respondent to file theirs within 14 days of service. On March 8, 2023 the applicant had not served the record of appeal. He claimed he had been unwell. He did not produce medical records but



nevertheless court graciously ordered he filed the same within 14 days. Respondent equally was to put his submissions within 7 days. By April 8, 2023 the applicant was not even in court as directed and had not filed the record of appeal. The court had noted if no record of appeal was filed by that date the case could be dismissed. To date there is no record of appeal on record and no submissions from the applicant.

15. Going by that history the court has narrated it seems evident the applicant is not diligent in filing the record of appeal. The only conclusion the court can draw is that it is no longer interested in pursuing the appeal.
16. The court finds as there is no record of appeal there is no case for court's consideration. The court finds that there being no pleadings in the file there is no case and the only thing left is to order that entire decretal sum in the joint account of the respective advocates account be released to the respondent and file be marked as closed and those are the orders of the court.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 7<sup>TH</sup> DAY OF JULY, 2023.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**

