



**Ngunjiri v Middle East Bank Kenya Limited (Cause 97 of 2019)
[2023] KEELRC 2355 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2355 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 97 OF 2019
AK NZEI, J
SEPTEMBER 29, 2023**

BETWEEN

GABRIEL MURAYA NGUNJIRI CLAIMANT

AND

MIDDLE EAST BANK KENYA LIMITED RESPONDENT

RULING

1. *Vide* a Ruling delivered on 8th December 2022, I allowed the Claimant's Notice of Motion dated 8th March 2022 seeking the setting aside of this Court's order dated the same date (8th March 2022) dismissing the suit herein for non-attendance. Dissatisfied with this Court's said Ruling, the Respondent herein filed a Notice of Appeal on 13th December 2022.
2. On 16th February 2023, the Respondent filed an evenly dated Notice of Motion seeking stay of proceedings herein pending hearing and determination of Mombasa Appeal No. E019 of 2023 filed by the Respondent against this Court's said order dated 8th December 2022. That is the application before me, and the same is premised on the supporting affidavit of Mr. Felix Ng'ang'a Karanja Advocate sworn on 16th February 2023. It is deponed in the said supporting affidavit that the Respondent/Applicant's appeal, which has already been instituted in the Court of Appeal, will be rendered nugatory if the application is not allowed and the proceedings herein stayed.
3. The application is opposed by the Claimant/Respondent vide his replying affidavit sworn on 6th March 2023, wherein it is deponed, inter-alia; that the intended appeal has zero chances of success as this Court dismissed the Claimant's suit on its own motion and subsequently reinstated it upon hearing both parties. That this Court reinstated the suit in exercise of its discretion.
4. On 23rd February 2023, I directed that the application be heard orally, and fixed it for hearing on 17th April 2023. The Respondent/Applicant however, went against those directions and filed written



submissions on 12th April 2023, and relied on the same when the application came up for hearing as scheduled, only responding to submissions by Counsel for the Claimant/Respondent.

5. The Respondent/Applicant submitted, inter-alia, that this Court has no jurisdiction to set aside a regularly entered judgment, and that is an important issue that is central to the functions and powers of this Court. It is to be noted that what this Court set aside on 8th December 2022 was an order made on 8th March 2022 dismissing the suit herein for non-attendance. The dismissal order was made in the absence of both parties, and pursuant to Rule 22(2) of the *Employment and Labour Relations Court (Procedure) Rules* 2016, which provides as follows:-

“subject to paragraph (1), where a party fails to attend Court on the day fixed for hearing, the Court may dismiss the suit except for good reason to be recorded.”

6. The application before me is expressed to be brought under the provisions of Order 22 rule 18 of the *Civil Procedure Rules* (2010) and Rule 32 of the *Employment and Labour Relations Court (Procedure) Rules* 2016. Order 22 Rule 18 of the *Civil Procedure Rules* provides for issuance of notice to show cause against execution in certain cases while Rule 32 of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides for execution/enforcement of this Court’s decrees and orders in accordance with the *Civil Procedure Rules*.
7. The suit herein is yet to be heard. No decree has been passed as yet. The application herein seeks a stay of proceedings pending hearing and determination of an interlocutory appeal. There is no order herein that is capable of being executed as contemplated in Rule 32 of this Court’s Rules. The Rules are, indeed, silent on stay of proceedings in this Court pending hearing and determination of an appeal.
8. In my view, Order 42 Rule 6(1) of the *Civil Procedure Rules* cannot also be called in aid in the present case as it clearly relates to stay of execution or proceedings under a decree or order appealed from. It provides as follows:-

“(1) no appeal or second appeal shall operate as a stay of execution of proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the Court from whose decision the appeal if preferred may apply to the appellate Court to have such order set aside.”

9. As already stated in this Ruling, this Court set aside a dismissal order on 8th December 2022 and reinstated the Claimant’s suit herein, which the Court had earlier dismissed for non attendance. This the Court did in exercise of its discretion; and upon taking cognizance of Section 12(3)(viii) of the *Employment and Labour Relations Court Act* which empowers this Court to make appropriate orders/reliefs as the Court may deem fit to grant.
10. The Respondent/Applicant has deponed that it has preferred an appeal against this Court’s order setting aside the said dismissal order. This fact has not been controverted by the Claimant who deponed and submitted that the Respondent/Applicant will not in any way be prejudiced if the application herein is disallowed as it will have an opportunity to be heard at the trial. I do agree with the Claimant on this issue as the suit herein is defended.



11. Although the Respondent/Applicant has demonstrated that it filed a Notice of Appeal within time and has since lodged an appeal in the Court of Appeal, it has not demonstrated what prejudice it will suffer if the orders sought herein are not granted. As to whether or not the appeal is frivolous, it is for the appellate Court to say as this cannot sit on appeal over its own orders. Suffice it to say that I find no merit in the Notice of Motion dated 16th February 2022. The same is hereby dismissed with costs.
12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH SEPTEMBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform.

A signed copy will be availed to each party upon payment of the applicable Respondent fees.

AGNES KITIKU NZEI

JUDGE

