



**Amiani v Diani Reef Beach Resort & Spa (Employment and Labour Relations
Petition 1 of 2020) [2023] KEELRC 2211 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2211 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION 1 OF 2020
AN MWAURE, J
SEPTEMBER 22, 2023**

BETWEEN

ROBERT MUDAKI AMIANI APPLICANT

AND

DIANI REEF BEACH RESORT & SPA RESPONDENT

RULING

1. The Applicant filed a notice of motion dated January 18, 2023.
2. 3 seeking orders That: -
 - a. Spent
 - b. This Honourable Court to issue stay of execution for the intended taxation of the bill of costs and hearing of the taxation of the matter since the matter has not been heard or determined.
 - c. This Honourable Court do stay aside the orders dismissing the matter for citing the wrong Judge so that the ends of justice are met.
 - d. This Honourable Court be invited to make such further orders as it deems fit in the circumstances.

Applicant's Case

3. The Applicant's application was supported by an affidavit sworn by his advocate, Catherine Shumila Mudanyi who averred that the instant suit was dismissed by Hon Lady Justice Monica Mbaru on May 13, 2022 for citing the wrong judge on the reinstatement application which was excusable mistake because counsel thought they appeared before Justice Rika.



4. That on October 17, 2022, Hon Lady Justice Maureen Onyango struck out the Applicant's reinstatement application on the same grounds as above.
5. That on December 16, 2022, the Applicant was served by the Respondent with a notice of taxation and the Applicant's Advocate has attempted to reach out to the Respondent's advocates in an effort to get the parties consent on throw away costs as the Applicant has never been heard instead of taxation but this has been futile.
6. The Applicant avers it is in the interest of justice that this court grants stay of execution against the taxation as the matter is yet to be determined and further the same should not be entertained when the notice of appeal has been properly filed in court.

Respondent's Case

7. The Respondent filed a Replying Affidavit dated February 14, 2023 and a further replying affidavit dated April 4, 2023 sworn by its legal officer, Quinter Oginga.
8. The Respondent aver that the Applicant's application is *res judicata* as the issues raised are similar to those in the following applications which have been struck out by different judges on various dates: -
 - a. The Petitioner's application dated July 5, 2021 struck out by Hon Justice Nzioki Wa Makau on July 13, 2021.
 - b. The Petitioner's application dated July 13, 2021 struck out by Hon Lady Justice Maureen Onyango on July 19, 2021.
 - c. The Petitioner's application dated December 3, 2021 was equally not allowed.
 - d. The Petitioner's application dated January 28, 2022 struck out by Hon. Justice Nzioki Wa Makau on February 8, 2022
 - e. The Petitioner's application dated July 29, 2022 struck out by Hon Lady Justice Maureen Onyango on October 17, 2022.
9. That the Petitioner's main suit was dismissed on May 13, 2021 and subsequent applications for reinstatement were either struck out or dismissed as listed above.
10. That the Respondent aver that the Applicant had 1 year 9 months to appeal or apply for review of the order dismissing their suit on May 13, 2021 and the Applicant/ Petitioner never sought leave to appeal or review the decision since the dismissal.
11. That the Applicant/ Petitioner's notice of appeal dated January 18, 2023 is not properly on record and further it has been filed without leave of court and contrary to Rule 75 of the [Court of Appeal Rules, 2010](#).
12. The Respondent avers that the bill of costs will not condemn the Applicant unheard as he has already filed his response and submissions on the same. Further, taxation proceedings are designed to determine quantum of costs which is independent and not subject of appeal, the Applicant has failed to demonstrate what substantial loss or irreparable harm that will be occasioned if the bill of cost is taxed.
13. That the supporting and further affidavits dated January 18, 2023 and February 13, 2023 respectively are fatally defective and incurably defective as they were illegally commissioned by Kiriba & Co Advocates, a juridical person not authorised to commission oaths.



Applicant's Submissions

14. It was submitted for the Applicant that the main suit was dismissed unheard and his intention is for the suit to be heard on merit, further, the bill of costs has been filed prematurely since the claim has not been determined and it meets the criteria set out under order 42 rule 6 of the [Civil Procedure Rules](#).
15. It was submitted for the Applicant that he has an arguable appeal and that Respondent will not suffer any prejudice if the stay orders are granted as there is no judgment entered.
16. The Applicant submitted there is no sound judgment entered against the Applicant for the bill of cost to be taxed and relied on [Samvir Trustee Limited v Guardian Bank Limited](#) [2007] eKLR which stated:-

“.....the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement, hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant.”
17. The Applicant submitted that he stands to suffer irreparable harm unless stay of execution is granted on grounds that he approached this court with legitimate expectation that he will be heard on merit however the suit was erroneously dismissed due to poor internet services.
18. The Applicant submitted that the Respondent should not hide in technicalities and the Respondent cannot claim to be prejudiced as it has not proved the same.

Respondent's Submissions

19. The Respondent submitted that there is no appeal filed properly before the Court of Appeal as the annexed draft Memorandum of Appeal has no case number, not signed or confirmed by the Registrar and to date the Applicant has not bothered to have it signed therefore it remains a draft.
20. The Respondent further submitted that the Applicant was indolent for over 1 year 9 months as the suit was dismissed on May 13, 2021.
21. It was submitted for the Respondent that the application is *res judicata* and that the instant application was not only filed out of time without leave but was an afterthought reacting to the Respondent's bill of costs.

Analysis and Determination

22. Order 42, Rule 6 of the [Civil Procedure Rules](#), 2010 states as follows in respect to the stay in case of an appeal:-
 - “(1) No appeal or second appeal shall operate as a stay of execution or 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 seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

- (2) No order for stay of execution shall be made under subrule (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 him has been given by the applicant.”

23. The Applicant’s main argument is that the main suit was dismissed unheard due to internet issues. This court takes note that before dismissal of the initial suit on November 26, 2020 and December 3, 2020 both parties were not present in court and on the latter date the court directed parties get a date at the registry which was done by the Applicant’s advocate on March 22, 2021 and parties were to appear before the court on May 13, 2021 whereupon both parties were absent prompting the court to dismiss the suit. In view of the foregoing, it can be adduced the suit was dismissed on grounds that the parties were uninterested in pursuing the matter which can be seen by their constant absenteeism in court.

24. Further the Applicant has failed to prove he will suffer substantial loss if stay is not granted as it can be seen from the facts before this court the Applicant was a party to the bill of costs and even went ahead to file his submissions. Further the memorandum and notice of appeal as submitted by the Respondent are mere drafts as the same has never been filed in the Court of Appeal.

25. In *Margaret Warui t/a Wanken Distributors & another v Board of Management Aberdare Teachers Training College* [2021] eKLR the court held: -

“Moreover, I associate with the words of Warsame J (as he was then) as highlighted by the Respondent, in *Samvir Trustee Limited Vs Guardian Bank Limited* (2007) eKLR, that:

“...It is my humble view that for the applicant to obtain a stay of execution, it must satisfy this court that substantial loss would result if no stay is granted. It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss.”

24. With the above in mind, the court must then determine whether the Applicants in this case have established that they will suffer substantial loss and or have presented special circumstances that will warrant the Court to exercise its discretion and grant stay.”

26. The court is not convinced the applicant has given sufficient grounds to justify a stay of the execution of the bill of costs and as earlier observed the applicant even filed submissions in opposition to the bill of costs.

27. The application is not seeking to review any of the ruling of Hon Justice Nzioki wa Makau. The grounds for review of a courts judgment or order are quite clear and the same are not raised in this



case. There are therefore no grounds to set aside the bill of costs or the orders dismissing the suit for citing he wrong judge.

28. In respect to orders sought to set aside orders dismissing the matter for citing the wrong judge this court is guided by Rule 33 (1) of *Employment and Labour Relations Court (Procedure) Rules*, 2016 which states: -

- “(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
- (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.”

29. Indeed, the applicant seems uncertain on what orders he is seeking from the court and as already observed by the court the applicant did not satisfy the requirements of section 33 of *employment and labour relations court (procedure) rules* 2016). The application dated January 18, 2023 is therefore dismissed.

30. The court orders the mater of throw away costs be pended awaiting the hearing of bill of costs application dated November 2, 2022. Otherwise costs of this application will be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF SEPTEMBER, 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 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.



ANNA NGIBUINI MWAURE
JUDGE

