



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR REALTIONS COURT

AT MOMBASA

CAUSE NO. E003 OF 2021

MODERN COAST BUILDERS & CONTRACTORS LTD...CLAIMANT

VERSUS

MARTIN WANGILA WANYAMARESPONDENT

R U L I N G

1. The application before me is the Appellant's Notice of Motion dated 10th August 2021, and I will first set out the background facts as can be gathered from the documents before me in order to put the application into proper perspective.
2. The Appellant/Applicant herein was the defendant in Mombasa Chief Magistrate's Court ELR Cause No. 507 of 2018, whereas the Respondent herein was the Plaintiff. On 6th March 2020, the said Court (hereinafter referred to as the trial court) delivered, according to the Appellant/Applicant, an ex-parte judgment in favour of the Respondent. This Court has not been furnished with a copy of the said judgment.
3. The Appellant/Applicant filed before the trial Court an application dated 19th June 2020, seeking review and setting aside of the said ex-parte judgment, which application the trial court is said to have dismissed on 25th January 2021. Aggrieved by the said Ruling, the Appellant/Applicant filed the appeal herein, vide a memorandum of appeal dated 28th January 2021 and filed in this Court on 19th February 2021. The Applicant is, however, yet to file a Record of Appeal pursuant to Rule 8(4) of the Employment and Labour Relations Court (Procedure) Rules 2016.
4. Subsequently, the Appellant filed another application before the trial Court, dated 28th January 2021 seeking stay of execution pending appeal. On 6th April 2021, the trial Court allowed the application on condition that the Appellant/Applicant herein deposited the decretal sum (kshs.833,627) in Court within thirty (30) days from the said date.
5. The Appellant/Applicant filed yet another application before the trial Court, dated 19th April 2021, seeking, *inter alia*, a review of the condition attached to the order of stay of execution pending appeal, and to substitute the requirement for depositing of the decretal sum in Court with an insurance bond, and for extension of the time to comply from thirty to sixty days.
6. When the application came up for hearing on 20th May 2021, the trial Court refused to extend the orders of stay of execution pending hearing of the application, upon which the Appellant/Applicant filed a similar application before this Court, dated 21st May 2021 and filed on 27th May 2021. This was done before determination by the trial court of the application for review dated 19th April 2021.
7. On 7th July 2021, this court (Ndolo J), made a finding that an appellant could not, under the provisions Order 42 Rule 6, run two similar applications in different Courts (this court and the trial court) at the same time. The Court found the application dated 21st May 2021 to be an abuse of this Court's process, and accordingly struck it out.
8. On the other hand, on 5th August 2021, the trial Court delivered a Ruling on the application before it (dated 19th April 2021) and dismissed the same.
9. On 12th August 2021, the Appellant/Applicant filed the Notice of Motion dated 10th August 2021, which is basically similar to the application struck off by this Court on 7th July 2021. The Notice of Motion/Application was filed under Vacation Rules. This is the application before me, and orders sought therein are as follows:-

a. that the application be certified as urgent and be heard ex-parte at the first instance.

b. that the Honourable Court be pleased to issue a stay of execution against the Respondent from attaching the Appellant's property pending the interpartes hearing of the application.

c. that the Court be pleased to issue a stay of execution against the Respondent from attaching the Appellant's property pending the inter-partes hearing of the appeal.

d. that the Honourable Court be pleased to review the order dated 6th April 2021 by substituting the condition requiring the Appellant herein to deposit the decretal amount of Kenya shillings eight hundred and thirty three thousand, six hundred and twenty seven (kshs.833,627) and to replace it with an order requiring the Appellant to deposit an insurance bond of the same value.

e. that costs of the application be paid to the Appellant.

10. The application was placed before the Court's Vacation Duty Judge at Nairobi on 13th August 2021, who made the following orders:-

a. That the application be and is hereby certified urgent.

b. That the Applicant is granted stay of execution subject to the Applicant depositing an Insurance Bond in Court with a copy to the Respondent within 14 days.

c. That these orders automatically lapse on 30th August 2021 should the Applicant fail to comply.

d. That hearing of application on 21st September 2021 before Judge sitting in Mombasa Employment and Labour Relations Court.

11. Record shows that the Respondent filed a Replying Affidavit on 10th September 2021.

12. When the matter came up before me on 21st September 2021 for hearing of the said Notice of Motion dated 10th August 2021, Counsel for the Appellant/Applicant informed the Court that the Applicant/Appellant had deposited in Court an Insurance Bond as ordered on 13th August 2021, with a copy to Counsel for the Respondent. I fixed the matter for mention on 30th September 2021 for purposes of taking directions on the Notice of Motion dated 10th August 2021 (the application herein).

13. On 30th September 2021, the Appellant/Applicant sought, and was granted leave to file a further affidavit, which it eventually filed on 5th November 2021. Parties were directed to file written submissions on the application, which they eventually did, and which I have considered.

14. In view of the orders dated 13th August 2021 which, as correctly deponed in the Respondent's Replying Affidavit referred to in paragraph 11 of this Ruling, are substantive and in effect allowed the substantive prayers in the Notice of Motion dated 10th August 2021, there is nothing left for me to determine on the application.

15. The only question that this Court can ask itself is whether an Insurance Bond was deposited in Court with a copy to the Respondent as ordered by the Duty Court on 13th August 2021.

16. In his Replying Affidavit, the Respondent admits having been served with an Insurance Bond, though he has not indicated **when** he was served. I have seen on record an original copy of Insurance Bond Ref No. BD47024 dated 31st August 2021 and issued by GA Insurance. The said original copy of the Insurance Bond is shown to have been received in this Court's Registry on 14th September 2021. The Respondent, who has not stated when the Insurance Bond was served on him, has not raised any issue with the date of filing/depositing of the Insurance Bond in Court. **The same is hereby deemed as having been duly filed/deposited in Court as a condition for a stay of execution pending hearing and determination of the appeal herein.** There shall, therefore, be a stay of execution of the Lower Court's decree pending hearing and determination of the appeal herein.

17. In the interest of justice, the appeal must be fast-tracked, heard and determined on its merits. Consequently, I make the following orders:-

a. the Appellant/Applicant shall compile, file and serve a Record of Appeal pursuant to Rule 8(4) of the Employment and Labour Relations Court (Procedure) Rules, 2016, within fourty five (45) days from the date of this Ruling.

b. the appeal shall be mentioned in Court on 22nd March 2022 for fixing a date for hearing of the appeal or for further directions.

18. Costs of the application shall be in the cause.

19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JANUARY, 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Koeh for Agwara for Appellant/Applicant

Wachenje for Mokaya for Respondent