



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Maina v Sos Children Villages Kenya (Cause 53 of 2020)
[2022] KEELRC 1221 (KLR) (26 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1221 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 53 OF 2020
NZIOKI WA MAKAU, J
APRIL 26, 2022**

BETWEEN

GABRIEL MAINA APPLICANT

AND

SOS CHILDREN VILLAGES KENYA RESPONDENT

RULING

1. The Application before this Court is the one dated October 27, 2021 filed under Certificate of Urgency seeking the following orders;
 - a. Spent.
 - b. That the Honourable Court be pleased to stay execution of the Court Ruling dated 28th September 2021 pending the hearing and dispensation of the Respondent's Appeal;
 - c. That the Claimant whether by themselves, agents, servants, auctioneers or otherwise howsoever be temporarily prohibited and restrained from unlawfully, proclaiming and/or attaching the Respondent's goods, evicting and unlawfully interfering with the Respondent's use and occupation of the premises, pending the hearing and determination of the application;
 - d. That the Claimant whether by themselves, agents, servants, auctioneers or otherwise howsoever be temporarily prohibited and restrained from unlawfully, proclaiming and/or attaching the Respondent's goods, evicting and unlawfully, interfering with the Respondent's use and occupation of the premises, pending the hearing and determination of the Applicant's Appeal;
 - e. That costs of the Application be provided for.
2. The application is supported by the affidavit of George Masese sworn on October 27, 2021 as well as the grounds on the face of the motion. The Respondent/Applicant submits that it has availed to this Court



an explanation in the Supporting Affidavit by Rebecca Kiganane and George Masese sworn on October 27, 2021 to the effect that the failure to enter appearance and file pleadings was occasioned by lack of valid service to the Applicant or the Applicant's Advocates. It further also went to the technical misshap when the Applicant's Advocate logged into the virtual court on the alleged hearing date court session on July 16, 2021, but the call was dropped. It is the Applicant's submission that the explanations availed in the Supporting Affidavit are enough to amount to a reasonable explanation of the events leading up to the failure to enter appearance and file pleadings and would therefore warrant the use of this Courts discretion in favour of the Applicant. The Respondent submits on the plethora of authorities permitting the re-opening of a case for hearing and determination on the merits it is in order for the Court herein to exercise its wide discretion to permit the Respondent to have the case stayed pending the intended appeal.

3. The application is opposed and the Claimant filed a Replying Affidavit sworn on November 17, 2021. The Claimant avers that granting any of the orders as sought would be tantamount to reviving the dismissed application contrary to the intent of Rules. The Claimant notes that the present Application's intention is to effectively stay an order dismissal before the Employment and Labour Relations Court which is in the nature of a negative order and incapable of being stayed. The Claimant further avers that the Application is premised on quicksand as the Respondent claims that they will suffer great loss if the Application for stay is not granted as the Claimant will not be in a position to refund the decretal amount if the Applicant's Appeal is successful.
4. The Claimant submits that the issue for determination is whether the Application before the Court is competent. The Claimant submits that the order granted by the court was not a positive order. It was a negative order. The Claimant submits that the Applicant's application hence seeks to stay a dismissal order. The Claimant submits that the jurisprudence on stay of execution pending appeal is clear that for an order of stay of execution to lie, there must be positive requirements therein which would or could be affected or tampered by the stay. He cites the case of Western College of Arts and Applied Sciences v Oranga & Others (1976-80) 1 KLR, where the Court of Appeal for East Africa stated in respect of stay of execution, stated as follows:

“ But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson v Church the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court Judgment for this Court, in and application for stay, it is so ordered”
5. The Claimant submits that a negative order is one that is incapable of execution, and thus, incapable of being stayed. The Claimant submits that in the application, there is nothing which the Court has ordered to be done or to refrain from being done. All it has done is to dismiss an application dated July 21, 2021 resulting in the lifting of a temporary stay that had been granted pending that outcome. Indeed, that stay became automatically discharged by the dismissal of the application. The Claimant submits on the basis of precedent, where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order. He submits that in this case the Applicant seeks to appeal against the order dismissing his application and this is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise.



6. In the matter before the Court, the Respondent did not appear at the hearing and upon the case being heard in their absence, various orders issued including the payment of a decree. The Respondent moved the Court in prior applications seeking to re-open the case and the Court in a Ruling given on 28th September 2021 the Court declined to allow the Respondent's application of 21st July 2021. The denial of the motion resulted in a negative order not one that is capable of stay. As such, the present application lacks merit and cannot lie since there can be no stay of a negative order as is the case before me. As such, the notice of motion application dated October 27, 2021 being devoid of merit is dismissed with costs to the Claimant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2022

NZIOKI WA MAKAU

JUDGE

