



REPUBLIC OF KENYA



KENYA LAW
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**Paksa Construction Limited v Molinde (Application
130 of 2021) [2022] KEELRC 77 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 77 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPLICATION 130 OF 2021**

J RIKA, J

MAY 27, 2022

BETWEEN

PAKSA CONSTRUCTION LIMITED APPLICANT

AND

ERASTUS ONEKO MOLINDE RESPONDENT

RULING

1. There is some confusion with regard to the registration of this matter.
2. The matter is titled ‘Leave Application.’
3. In the Respondent’s Submissions, it is indicated, perhaps correctly, as ‘Miscellaneous Application.’
4. The Applicant makes matters hazier in its Submissions, referring to its Application as ‘Employment Appeal [Application] No. E130 of 2021.’
5. It refers to itself throughout, as ‘the Appellant.’
6. There is reference to ‘Appeal No. E130 of 2021.’
7. The Court Registry and Parties, must be clear on the nature of pleadings filed. What will the record show to have been filed on 21st October 2021? How will the Court get over this confusion in capturing its data? The Court must take charge of its filing and registration system, and not allow Parties to style their Pleadings anyhow they wish.
8. The Court shall presume that before it, is a Miscellaneous Application. There is no Appeal filed yet, and there is no Appellant.
9. The Applicant seeks orders of stay of execution and leave to file Appeal out of time. It is sought to have leave operate as a stay of execution.



10. The Application is founded on the Affidavit of Paul Kimani Mwangi, Learned Counsel for the Applicant, sworn on 28th October 2021.
11. The Judgment subject matter of the Application, was delivered on 17th September 2021, by the Hon. Principal Magistrate Miss. E. Wanjala, at Milimani Magistrate's Court Employment and Labour Relations Court Case No. E452 of 2020.
12. Counsel for the Applicant explains that the Appeal ought to have been lodged within 30 days. There was a mistake on his part, in diarizing the date, the Judgment was delivered. He became aware of the Judgment on 22nd October 2021, when a copy was served upon him by his counterpart, with demand for satisfaction of the decree.
13. The Intended Appeal has overwhelming chances of success. The Respondent will suffer no prejudice if the Application is granted.
14. The Trial Court concluded that the Respondent's contract was terminated by the Applicant unfairly, and granted him compensation equivalent of his 6 months' salary; 2 weeks' salary in lieu of notice; 7 days' salary for June 2020; salary for May 2020; and ordered that the Applicant avails to the Respondent his Certificate of Service.
15. The Draft Memorandum of Appeal annexed to the Founding Affidavit, is based on 4 Grounds: that the Trial Court erred in finding that the Respondent was unfairly dismissed; the Trial Court erred in finding that the Respondent was entitled to compensation equivalent of 6 months' salary; the Trial Court erred in failing to consider the circumstances in which the Respondent left employment; and the Trial Court erred in failing to consider the Evidence and Submissions presented by the Respondent.
16. Parties agreed to have the Application considered and determined on the strength of their Affidavits and Submissions on record.

The Court Finds: -

17. The explanation for delay in filing an Appeal, by the Applicant's Counsel, is inadequate. He explains that he failed to diarize the date for Judgment on 17th September 2021. This assertion is not supported by an extract of Counsel's diary. It is also not explained why the Respondent itself, was not available when the Judgment was delivered. Did not the Respondent participate in the proceedings?
18. The Judgment indicates that the Respondent did not tender any Evidence. The Applicant does not dispute in the Founding Affidavit, that it did not adduce Evidence before the Trial Court. If there was no Evidence tendered, the Trial Court cannot be faulted for failure to consider such Evidence. The Trial Court took into account the Pleadings, Documents and Submissions filed by both Parties. It took into account what Evidence was availed before it.
19. An Appeal is not meant to be a second opportunity availed to a Party who has failed to give Evidence at the Trial Court, to present its case.
20. The Draft Memorandum of Appeal does not show that there is an arguable Appeal with strong chance of success. Judgment cannot be faulted on the prayers granted to the Respondent, but perhaps can be faulted on what was denied to the Respondent, such as house allowance. The Court concluded that the item was not provided for in the Parties' contract, yet, the item is part of the minimum terms and conditions of employment, granted by the *Employment Act*, to be read into all contracts of employment. Whereas there could have been a strong Counter-Appeal with probability of success, the Court is not persuaded by the Draft Memorandum of Appeal, that there is a strong Intended Appeal,



with probability of success. The Applicant simply did not justify termination under Section 47[5] of the *Employment Act*, when given the opportunity to do so.

21. The Court is satisfied that there is no sufficient reason shown by the Applicant, to grant stay of execution or leave to appeal the Judgment of the Trial Court. Let the Applicant satisfy the Judgment, in default execution to proceed.

It Is Ordered: -

- a. The Application filed by the Applicant, dated 28th October 2021, is declined.
- b. The Court Assistant Mr. Emmanuel Kirpono, shall bring the matter to the attention of the Deputy Registrar, for rectification of registration of the matter, and for any other remedial measures.
- c. Costs to the Respondent.

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 27th day of May 2022.

James Rika

Judge

