



**China State Construction Engineering Corporation Kenya Limited v Mwangi & 16 others (Appeal 133 of 2021) [2022] KEELRC 1684 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1684 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 133 OF 2021  
MA ONYANGO, J  
MAY 26, 2022**

**BETWEEN**

**CHINA STATE CONSTRUCTION ENGINEERING CORPORATION KENYA LIMITED ..... APPELLANT**

**AND**

**BEDAN MWANGI ..... 1<sup>ST</sup> RESPONDENT**  
**DANIEL MULI NDOLO ..... 2<sup>ND</sup> RESPONDENT**  
**FRANCIS MBUGUA MWANGI ..... 3<sup>RD</sup> RESPONDENT**  
**FRANCIS NJIHIA KINUTHIA ..... 4<sup>TH</sup> RESPONDENT**  
**GEOFFREY MAINA KAMAU ..... 5<sup>TH</sup> RESPONDENT**  
**GEORGE MACHARIA MUNGAI ..... 6<sup>TH</sup> RESPONDENT**  
**HABIL ANDAYI PETER ..... 7<sup>TH</sup> RESPONDENT**  
**IBRAHIM MAINGU DAVID ..... 8<sup>TH</sup> RESPONDENT**  
**JOHN MUTISO KYALO ..... 9<sup>TH</sup> RESPONDENT**  
**JOSEPH KABACI NJUGUNA ..... 10<sup>TH</sup> RESPONDENT**  
**JOSEPH RUGUTHE WAITHAKA ..... 11<sup>TH</sup> RESPONDENT**  
**LEVI AMON MIDI ..... 12<sup>TH</sup> RESPONDENT**  
**PAUL CHEGE KURIA ..... 13<sup>TH</sup> RESPONDENT**  
**PETERSON KAMAU GICHUKI ..... 14<sup>TH</sup> RESPONDENT**  
**SAMUEL MOENGA KIYONDI ..... 15<sup>TH</sup> RESPONDENT**  
**SHAPIRI ABIUD MUNJARU ..... 16<sup>TH</sup> RESPONDENT**



*(Being an appeal from the judgement and orders of the Hon. E. Wanjala, Principal Magistrate delivered on 2nd July 2021 in the Milimani Chief Magistrates Court at Nairobi in in Magistrate's Court Employment Cause No. 569 of 2019)*

## RULING

1. The application before me for determination is dated July 5, 2021 and is filed by the appellant herein seeking orders that:
  - a. Spent.
  - b. There be a stay of execution of the judgment delivered against the appellant herein on July 2, 2021 pending the hearing of the application or until further orders of the honourable court.
  - c. There be a stay of execution of the judgment delivered herein on July 2, 2021 pending the hearing and determination of Nairobi High Court Civil Appeal No E418 of 2021 of *China State Construction Engineering Corporation Kenya Limited v Bedan Mwangi & 16 Others*.
2. The application is opposed by the respondents through the replying affidavit of John Mutiso Kyalo, the 9<sup>th</sup> respondent who depones that he has the authority of his co-respondents to swear this affidavit on their behalf.
3. The main thrust of the replying affidavit is the objection to the jurisdiction of the High Court where this suit was originally filed, which objections were cured by the transfer of the suit to his court by the High Court.
4. Of relevance, however, is paragraph 10 of the replying affidavit where it is deposed that the appellant/applicant did not defend the suit in the lower court which it seeks to appeal against.
5. The application was disposed of by way of written submissions. Both parties filed submissions.

### Analysis and determination

6. I have considered the application and the grounds in support thereof, the affidavits for and in opposition thereto and the submissions of the parties. The issue for determination is whether the applicant has met the threshold for grant of the orders sought.
7. The legal principles for stay of execution pending appeal are set out in Order 42 rule 6(2) of the [Civil Procedure Rules](#) as follows –
  - (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.
8. The foregoing notwithstanding, I have a problem with the application as filed. Apart from the memorandum of appeal, there is no evidence on the application, that any judgment was delivered or



that a decree has been extracted. In other words, there is no evidence of imminent execution to warrant the grant of orders of stay of execution.

9. The foregoing notwithstanding, Order 42 rule 6(2) requires this court to consider whether the applicant would suffer substantial loss if the orders sought are not granted. Without a copy of the judgment or decree, this court is clueless on the nature of substantial loss, if any, that the applicant is likely to suffer or incur should the orders sought in the application not be granted.
10. The applicant has not stated that it was not able to obtain a copy of the judgment or decree to attach to its application.
11. Again, the applicant has not proved that it has applied for certified copies of proceedings for purposes of appeal. It is stated in the supporting affidavit that this has been done but it is not stated when. There is no evidence that this has been done or that the applicant is following up on the proceedings as is deponed in the supporting affidavit.
12. Finally, for the court to grant orders of stay of execution pending appeal, the rules demand that the Applicant provides such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant.
13. Without a copy of judgment or decree, this court is unable to order adequate security for the performance of the decree. In any event no, offer has been made by the applicant either in the application or the submissions that it is willing and capable of offering any security as may be ordered by the court.
14. I find the application herein to be incompetent and accordingly dismiss the same with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS**

**26TH DAY OF MAY 2022**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the 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.

**MAUREEN ONYANGO**

**JUDGE**

