



REPUBLIC OF KENYA



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**Hacienda Logistics Limited v Muturi (Appeal 159 of 2021)
[2022] KEELRC 1271 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1271 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 159 OF 2021
MA ONYANGO, J
JULY 20, 2022
(FORMERLY HCCA NO. 2441 OF 2020)**

BETWEEN

HACIENDA LOGISTICS LIMITED APPELLANT

AND

PAUL NGANG'A MUTURI RESPONDENT

(Being an appeal from the judgement and decree of Hon. D. O. Mbeja (Mr.), Senior Resident Magistrate delivered on 29th May of 2020 in the Milimani Chief Magistrates Court at Nairobi in CMELR No. 569 of 2019 between Paul Ng'ang'a Muturi v Hacienda Logistics Limited)

RULING

1. Vide notice of motion dated 31st August 2021, the Respondent seeks the following orders:
 - a) That this Honourable Court be pleased to grant leave to the firm of Magonda Advocates to come on record in the place of O. Jollec & Associates Advocates.
 - b) That this Honourable Court be pleased to uphold the judgement and Decree issued on the 29th/05/2020 by the Chief Magistrate's Court at Nairobi in the Employment and Labour relationship matter CMELR No. 662 of 2018.
 - c) That this Honourable Court be pleased to dismiss the suit for want of prosecution by the Appellant/Respondent.
 - d) That this Honourable Court be pleased to transfer any appeal to the Employment and Labour Court division of the High Court.
 - e) That this Honourable Court vacates the orders for stay of execution granted on 23rd/02/2021.



- f) That cost of this application be provided.
2. The grounds in support of the application as set out on the face of the motion, are as follows:-
- (i) That judgement was entered in this matter by the Honourable Court on the 29th day of May 2020 sitting as employment and labour court.
 - (ii) That being dissatisfied with the Judgment the Appellants/Respondents filed the Memorandum of Appeal dated 22nd June 2020.
 - (iii) That any appeal lies with the High Court employment and labour relations division.
 - (iv) That no record of appeal nor decree has been filed within reasonable time.
 - (v) That the Appellants have failed ignored and/or neglected to compile and serve the Record of Appeal.
 - (vi) That it is over One (1) year since the Memorandum of Appeal was filed and the Appellants have failed ignored and/or neglected to cause the Appeal to be placed before a Judge for directions.
 - (vii) That stay order granted by this Honourable Court was obtained ex-parte and without knowledge of the Respondent/Claimant.
 - (viii) That it is in the interest of justice that this application be allowed.
3. In the supporting affidavit of Paul Ng'ang'a Maturisworn on 23rd August 2021, he states that the appeal herein which was filed at the High Court ought to have been filed in the Employment and Labour Relations Division, that the Appellant has failed to serve the Record of Appeal and that the Appellant obtained stay of execution on 23rd February 2021 ex parte and without knowledge of his Advocates. That it had been one (1) year since the Memorandum of Appeal was filed and the Appellant had failed, ignored and/or neglected to cause the appeal to be placed before the Court for directions.
4. The Appellant opposes the application through the replying affidavit of Evans Wachira, Counsel for the Appellant who states that judgement in the Lower Court was delivered on 29th May 2020 and being dissatisfied with the judgment and decree thereof the Appellant instructed him to lodge an appeal which the affiant did by filing a Memorandum of Appeal dated 22nd June 2020 and filed on 25th June 2020 within the 30 days right of appeal window.
5. That he applied for proceedings from the lower Court by letter dated 22nd June 2020. That due to Covid protocols it was not until 3rd November 2020 that the registration of the appeal reflected in the virtual court portal.
6. That he was not able to access the system due to an error which mixed up the names of the parties. The systems error was rectified on 25th January 2021. He immediately filed the application for stay of execution which was granted temporarily at ex parte stage.
7. That following failure of the Applicant's Counsel to attend Court, the stay was confirmed on 23rd February 2021.
8. That the Applicant's Counsel filed a replying affidavit on 3rd March 2021, long after stay of execution had been confirmed
9. That he continued pursuing proceedings from the lower Court, the last letter in respect thereof having been written to him by the Court on 14th October 2021. The letter advised him that he would be informed once proceedings are ready.



10. That in light of the above circumstances the Respondent's instant application is lacking in merit for the following reasons;
 - a) This Honourable Court can neither uphold nor reverse the Judgment and Decree of the Subordinate Court merely on the basis of an Application before the Hearing of the main Appeal.
 - b) While as the Respondent seeks dismissal of "the suit" (sic) for want of prosecution the Appeal hereof has not yet been considered for admission as to be ripe for dismissal.
 - c) The stay orders issued by the Appellate Court were so issued after the Court considered the facts and circumstances of the matter and found the Appellant's Application meritorious and after the Respondent failed, neglected and/or refused to oppose the said Application and there is presently no justification or good cause to set aside or vacate the said Orders pending the hearing and determination of this Appeal.
 - d) The Appellant is not guilty of any laches or indolence in the conduct of the instant Appeal.
 - e) The Respondent's former Advocates were since January 2021 aware that the Appellate Court had issued stay orders and hence the Application to vacate the stay orders is a mere afterthought and the Respondent is guilty of laches.
11. The Appellant prays that the application be dismissed with costs.
12. The application was disposed of by way of written submissions wherein the parties largely reiterate the averments in the affidavits.

Determination

13. I have considered the pleadings in respect of the application herein. I have also considered the submissions by both parties.
14. The Respondent/Applicant accuses the Appellant of filing the appeal in a Court without jurisdiction or failing to move the High Court to transfer the appeal to this Court. The Applicant further accuses the Appellant of filing a Memorandum of Appeal but failing to make efforts to obtain typed proceedings and further failing to fix the appeal for hearing.
15. The Applicant has in the submissions sought the following reliefs –
 - (i) That the Honourable Court be pleased to grant leave to the firm of Magonda Advocates to come on record in the place of O. Jollec & Associates Advocates.
 - (ii) That the Honourable Court be pleased to uphold the judgement and Decree issued on the 29/05/2020 by the Chief Magistrate's Court at Nairobi in the Employment and Labour relationship matter CMELR No. 662 of 2018.
 - (iii) That the Honourable Court be pleased to dismiss the suit for want of prosecution by the Appellant/Respondent.
 - (iv) That the Honourable Court be pleased to transfer any appeal to the Employment and Labour Court division of the High Court.
 - (v) That the Honourable Court vacates the orders for stay of execution granted on 27/01/2021.
 - (vi) That cost of the application be provided.



16. The Applicant notes that the High Court allowed Magonda Advocates to come on record through Notice of Change of Advocates and also transferred the appeal to his Court. That the issues in the application pending determination are therefore:
 - (i) Whether the Court should uphold the judgment and decrees issued on 29th May 2020 by the Chief Magistrates Court in CMERL No. 662 of 2018;
 - (ii) Whether the Court should dismiss the suit for want of prosecution;
 - (iii) Whether the orders of stay should be vacated and who bears costs.
17. The Applicant accuses the Appellant of forum shopping and filing the appeal in the High Court out of mischief.
18. For the Appellant it is submitted that it wrote to the lower court on 22nd June 2021 requiring for typed proceedings. That due to filing protocols following the break out of COVID 19 pandemic registration of the appeal took a considerably long time, up to 3rd November 2021. That in the meantime, Counsel was unable to proceed as he encountered challenges in e-filing due to apparent system error. That this has been explained by the Appellant's appendix EW6. Appendix EW6 gives the wrong parties to HCCCA 244 of 2020 as Glinis Kigera & Company Advocates v Muhoroni Solar Farm Limited instead of the parties to the instant appeal.
19. It is the submission of the Appellant that the systems error was not corrected until 25th January 2021 and that is when Counsel was able to successfully file the application for stay of execution.
20. It submits that it was only on 25th and 28th July 2021 respectively that Counsel for the Appellant was able to obtain invoices for payment for typed proceedings and order, which it duly settled. That by letter dated 14th October 2021, the Appellant's Counsel inquired from the lower court whether typed proceedings were ready. The correspondence has been annexed to the replying affidavit.
21. The Appellant submits that this Court can neither uphold nor reverse the lower Court's judgment and decree until after hearing the parties on the appeal.
22. That the prayer for dismissal of the appeal for want of prosecution is premature as the Appellant is not guilty of indolence or delay in prosecuting the appeal as a record of appeal can only be filed once typed proceedings have been obtained.
23. Finally, the Appellant submits that stay orders were granted ex parte in the first instance and thereafter confirmed following failure of the Applicant to respond to the application for stay. That there is thus no cause to vacate or set aside the stay orders pending hearing of the appeal.
24. The explanations by the Appellant are in my view valid and sufficient explanation for the delay in prosecuting the appeal.
25. I find no merit in the application herein and dismiss the same with no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF JULY 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 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, 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

