



Technical University of Mombasa v Masabos (Miscellaneous Application E071 of 2022) [2022] KEELRC 13516 (KLR) (13 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13516 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E071 OF 2022**

AK NZEI, J

DECEMBER 13, 2022

BETWEEN

TECHNICAL UNIVERSITY OF MOMBASA APPLICANT

AND

EMMANUEL MWANYALO MASABOS RESPONDENT

(Arising from the judgement in Chief Magistrate's Court at Mombasa, CMCC 1930 of 2017 Emmanuel Mwanyalo Masabo v Technical University of Mombasa & another, dated June 16, 2022.)

RULING

1. The application before me is a notice of motion dated October 27, 2022. The applicant seeks orders:-
 - a. That pending hearing and determination of the intended appeal, the court be pleased to issue stay of execution of the judgment of the trial court in Mombasa CMCC No 1930 of 2017 (Emmanuel Mwanyalo Masabo v Technical University of Mombasa & another) delivered on June 16, 2022, the decree thereto and all consequential orders as long as the applicant deposits in court the decretal sum of Kshs 200,000.
 - b. That the appellant be granted leave to appeal out of time against the trial court's judgment dated June 16, 2022 in Mombasa CMCC 1930 of 2017 (Emmanuel Mwanyalo Masabo v Technical University of Mombasa & another), and upon that leave being granted, the annexed memorandum of appeal be deemed as duly filed and served upon payment of the requisite court fees.
 - c. That costs of this application be provided for.
2. It is stated, both in the application and in the applicant's affidavit sworn on October 27, 2022 in support thereof:-



- a. That the respondent was the 1st applicant's employee until sometimes in 2016 when he was injured while he was exiting the 1st applicant's campus gate, on being "squeezed" at the side gate by the 1st applicant's motor vehicle registration number KBT 400N, resulting to multiple injuries.
 - b. That despite being compensated KShs 314,092 under WIBA, the respondent filed Mombasa CMCCC No 1930 of 2017 (Emmanuel Mwanyalo Masabov Technical University of Mombasa & another), claiming damages for injuries sustained as aforesaid.
 - c. That on June 16, 2022, the court (Chief Magistrate's Court at Mombasa) delivered judgment and awarded the respondent Kshs 200,000 in damages, costs and interest.
 - d. That subsequently, execution issued, and the applicant's motor vehicle registration number KBS 251D was proclaimed by auctioneers.
 - e. That the learned magistrate never addressed herself to the very fundamental question that having been compensated under WIBA, the respondent was not entitled to any compensation under the law, as the same would amount to double compensation.
 - f. That in view of the Supreme Court's judgment delivered on December 3, 2019 in the case of Law Society of Kenya v Attorney General & another [2019] eKLR, only claims lodged prior to enactment of the WIBA should be heard and determined in respective courts.
3. The application is opposed by the respondent *vide* a replying affidavit sworn by him on November 14, 2022 and filed in this court on November 15, 2022. It is deponed in the said affidavit:-
- a. That there has been inordinate delay in preferring the application for leave to appeal out of time, judgment having been rendered on June 16, 2022 and a stay of 30 days issued *suo moto* by the court.
 - b. That the applicant has, *vide* a notice of motion dated October 25, 2022 and filed in the lower court, sought review, varying and setting aside of the judgment delivered by the said court.
 - c. That the applicant has not exhausted the option that he elected to pursue, and that an appeal can only arise once the review application has been dispensed with.
 - d. That the applicants have obtained stay of execution in the lower court.
4. The respondent annexed to his replying affidavit a copy of an amended notice of motion dated October 25, 2022, and filed in the lower court, whereby one of the prayers sought is:-
- “that this honourable court be pleased to review, vary and/or set aside its judgment delivered on the June 16, 2022 or in the alternative order set off in account of Kshs 233,000 paid to the plaintiff by the 1st defendant/applicant insurer under WIBA.”
5. Also annexed to the respondent's said replying affidavit is a copy of the lower court's order dated October 25, 2022, staying execution of the said court's judgment delivered on June 16, 2022 pending *inter-partes* hearing of the application which, according to the respondent, has not been finalized.
 6. The applicants have not refuted and/or disputed the matters deponed to in the respondent's replying affidavit, either by way of a further affidavit or at all.
 7. As rightly pointed out by the respondent herein, review and appeal processes cannot be pursued simultaneously. A party who opts to seek review of a Court's decree or order cannot at the same time



seek to appeal against the same decree or order sought to be reviewed. It is either an application for review or an appeal. It cannot be both. That is the creed of rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.

8. The application is without merit, and is hereby dismissed with no order as to costs.

9. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF DECEMBER 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:

N/A for applicant

N/A respondent

