



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO E003 OF 2020

AUTO CONTINENTAL LIMITED.....APPELLANT

VERSUS

FRANKLINE NGALA CHOME.....RESPONDENT

(Appeal from the ruling of Hon Lesootia Saitabu, PM delivered on 16th July 2020 in Mombasa CMELRC No. 722 of 2019)

RULING

1. The Respondent, Frankline Ngala Chome filed *Employment Cause No 722 of 2019* against the Appellant, Auto Continental Limited, at the Chief Magistrate's Court at Mombasa.
2. From the record, it is evident that the Appellant did not file its response to the Respondent's claim, within the prescribed time. It would however appear that the Appellant participated in the proceedings before the trial court, with the Appellant's Counsel being allowed to cross examine the Respondent and thereafter to file written submissions.
3. The Appellant did not file submissions but instead filed a Notice of Motion dated 21st May 2020, seeking orders to set aside the antecedent proceedings. This motion was dismissed by the trial court on 16th July 2020.
4. The Appellant then filed another motion dated 24th July 2020 seeking the following reliefs:
 - a) An order setting aside the proceedings, pending the hearing and determination of an intended appeal to this Court;
 - b) Leave to file an appeal against the orders made on 16th July 2020, in respect of the application dated 21st May 2020.
5. By a ruling delivered on 8th October 2020, the trial court granted the Appellant leave to file an appeal against the orders made on 16th July 2020 but declined to stay the proceedings.
6. The Appellant's motion to this Court, which is the subject of this ruling, is dated 21st October 2020. By this motion, the Appellant seeks stay of proceedings before the trial court in *CMELRC No. 722 of 2012*, pending the hearing and determination of the Appellant's appeal.
7. The application is supported by an affidavit sworn by the Appellant's Director, Arif Pasta and is based on the following grounds:
 - a) That on 16th July 2020, **Hon. Lesootia Saitabu, PM** dismissed with costs, the Appellant's motion dated 21st May 2020, in *Mombasa CMELRC No. 722 of 2019*;
 - b) That amongst other orders, the Appellant was in the motion dated 16th July 2020, seeking leave to file its defence out of time;
 - c) That the ruling on 16th July 2020, was delivered in the absence of the parties and was sent to them via email. Consequently, the Appellant's Advocate on record did not have the opportunity to make an oral application for leave to file an appeal against the orders of the trial court, dismissing the motion dated 21st May 2020 and/or for stay of proceedings, after the delivery of the ruling;
 - d) That being aggrieved by the said ruling, the Appellant, vide a motion dated 24th July 2020, did amongst other orders, seek leave of the trial court to appeal against the ruling delivered on 16th July 2020;
 - e) That in its ruling on the motion dated 24th July 2020, the trial court did, on 8th October 2020, grant the Appellant leave to appeal

against the ruling delivered on 16th July 2020 but declined to stay proceedings in the primary suit, pending the hearing and determination of the intended appeal as sought in the motion dated 25th July 2020;

f) That whereas the Appellant, pursuant to leave granted on 8th October 2020, has filed an appeal against the ruling dated 16th July 2020, the Respondent fixed a date for the primary suit and the said suit was scheduled to come up for mention on 26th October 2020, for purposes of confirming filing of written submissions by the Appellant and for directions on when judgment in the suit would be delivered;

g) That the appeal herein stands to be rendered academic and of no relevance, if the primary suit proceeds and judgment is delivered before the appeal is heard and determined;

h) That the appeal is arguable and as such, the Appellant stands to be irreparably prejudiced if the orders sought in the application herein are not granted;

i) That it is in the interest of justice that the orders the Appellant is seeking are granted.

8. In response to the Appellant's application, the Respondent filed a replying affidavit sworn on 30th October 2020.

9. The Respondent states that the claim in the trial court was filed on 31st July 2019 and Summons to Enter Appearance were served upon the Appellant on 21st August 2019.

10. The Respondent further states that the Appellant entered appearance on 30th August 2019 and served the Respondent's Advocates with a Memorandum of Appearance on 6th September 2019.

11. The Respondent goes on to state that pre-trial directions were issued in the primary matter on 15th September 2019, by which date the Appellant had not filed any defence and no leave for extension of time was sought; rather, a hearing date was fixed by consent.

12. The Respondent adds that the primary matter was set down for hearing on 5th March 2020, when it proceeded in the presence of Counsel for the Appellant, who cross examined the Respondent.

13. The Respondent states that directions for submissions were issued and the Appellant was given an opportunity to file their submissions but had not seized the opportunity. Rather, in a new turn of events, the Appellant had changed Advocates on 21st May 2020 and filed an application to file defence out of time.

14. The Respondent maintains that the Appellant had failed to file defence without cogent reasons, though they had fully participated in the primary proceedings.

15. The Respondent points out that the Appellant made its application in the primary suit to file defence out of time nine (9) months after entering appearance.

16. The single issue for determination in this motion is whether the Appellant has made out a case for stay of proceedings in *C MELRC No 722 of 2019*.

17. In declining to grant a similar order, the trial court, in its ruling delivered on 16th July 2020 recognised that the order for stay of proceedings sought by the Appellant fell within the province of judicial discretion. Referring to the decision in *CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR*, the learned trial Magistrate reiterated that the exercise of discretion in this regard is intended to avoid injustice or hardship arising from an accident, inadvertence or excusable mistake.

18. In further reference to the decision in *Shah v Mbogo [1967] EA* the trial court asserted that in an application for stay of proceedings, the court will not aid a party who deliberately seeks to evade, delay or otherwise subvert the cause of justice.

19. Having been served with the Respondent's claim together with Summons to Enter Appearance, the Appellant filed a Memorandum of Appearance, through the firm of Lewa & Associates on 3rd September 2019. The Appellant did not take any further steps towards filing a response.

20. From the record, it is evident that the trial court allowed the Appellant ample time to file its response but the Appellant took no action. The Appellant blames its inaction on what it terms as a breakdown of communication between it and its former Advocates. As observed by the learned trial Magistrate, the exact nature of the communication breakdown has not been disclosed.

21. It is also on record that the Appellant's former Advocates had written to the Appellant seeking instructions to facilitate filing of a response. It was disclosed to the trial court that the Appellant not only failed to respond to its Advocates' letter but also did not pay a deposit on professional fees.

22. What emerges is not a breakdown of communication between the Appellant and its erstwhile Advocates but rather, a disinterested party who dumbed its case at the Advocates' office and went to sleep. The Court has no business aiding such a party, who overtly set out to derail the cause of justice.

23. Considering the Appellant's general conduct in this case, the time lapse between the proceedings of 4th March 2020 and the filing of the motion seeking stay of the proceedings before the lower court, as well as the hardship already occasioned to the Respondent, I decline to grant an order for stay of proceedings as sought by the Appellant.

24. The Appellant's motion dated 21st October 2020 is therefore dismissed with costs to the Respondent.

25. The interim orders granted on 23rd October 2020 are vacated.

26. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 15TH DAY OF APRIL 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in 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.

LINNET NDOLO

JUDGE

Appearance:

Mr. Jumbale for the Appellant

Mr. Mokaya the Respondent