



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT MOMBASA**

**MISC. APPLICATION NO. E043 OF 2021**

**COOK 'N' LITE LIMITED.....APPLICANT**

**VERSUS**

**BENSON OLINGA OMUNYIN.....RESPONDENT**

**R U L I N G**

1. The application before me is the applicant's Notice of Motion dated 14<sup>th</sup> September 2021, vide which the applicant seeks the following orders:

**a) that the application be certified urgent and be heard ex-parte at the first instance.**

**b) that the Honourable Court be pleased to grant leave to the applicant to appeal out of time against the ruling by Honourable Lesootia (PM) delivered on 29<sup>th</sup> July 2021 in MOMBASA ELRC CAUSE NO. 48 OF 2020 BENSON OLINGA OMUNYIN –VS- COOK 'N' LITE LIMITED.**

**c) that the Honourable Court be pleased to issue interim orders of stay of proceedings of the matter herein pending the hearing and determination of this application.**

**d) that the Honourable Court be pleased to issue orders of setting aside of the proceedings of 29<sup>th</sup> July 2021 in MOMBASA ELRC CAUSE NO. 48 OF 2020 BENSON OLINGA OMUNYIN –VS- COOK 'N' LITE LIMITED pending the hearing and determination of the applicant's appeal.**

**e) that the costs of the application be provided for.**

2. The application, which is brought as a Miscellaneous Cause/Application, is based on a supporting affidavit and a supplementary affidavit sworn by Cynthia Orenge Advocate on 14<sup>th</sup> September 2021 and 14<sup>th</sup> October 2021 respectively and filed herein.

3. It is deponed in the said two affidavits as follows:

**a) that when the lower court suit came up for hearing on 29<sup>th</sup> July 2021 and was first called out virtually, counsel for the applicant (the defendant in the lower court suit) confirmed that she was ready to proceed with the hearing.**

**b) that while preparing to attend the hearing in open court, counsel for the applicant realized that they had not filed the applicant's list of witnesses and witness statements; and that her oral application for adjournment of the case and leave to file the applicant's list of witnesses and witness statements was dismissed by the court on the same date.**

**c) that hearing proceeded whereby the Claimant's case was heard and closed and subsequently the applicant's case, whereby the applicant's documents were adopted without calling a witness to legally produce the same and to prove their veracity.**

**d) that both parties closed their (respective) cases on 29<sup>th</sup> July 2021, and the court fixed the matter for mention on 7<sup>th</sup> September 2021 to confirm filing of submissions by both parties.**

**e) that when the matter came up for mention on 7<sup>th</sup> September 2021, counsel for the applicant orally sought leave to appeal against the said Court's Ruling dated 29<sup>th</sup> July 2021 out of time, which application the Court dismissed and fixed the suit for**

*judgment.*

4. The Respondent opposed the application and filed a replying affidavit sworn by himself on 24<sup>th</sup> September 2021. The Respondent deponed, *inter-alia*;-

a) that the matter was mentioned in court on 24<sup>th</sup> May 2021 for compliance (pre-trial directions) and counsel for the applicant confirmed that she had fully complied, (upon) which the matter was set down for hearing on 29<sup>th</sup> July 2021.

b) that on the said hearing date (29<sup>th</sup> July 2021), counsel for the applicant confirmed to the Court that she was ready to proceed with the hearing of the matter, and that she would close the applicant's case, only to change her mind when the matter was called out for hearing in the open court, and to apply for an adjournment.

c) that the application for adjournment was dismissed vide a Ruling delivered on the same date, and hearing proceeded with counsel for the applicant closing her case; and neither appealed against the said Ruling nor sought a stay of the proceedings.

d) that the applicant did not file submissions in the lower court on 7<sup>th</sup> September 2021 as ordered, but instead orally applied for stay of proceedings, which application the court dismissed and fixed the suit for judgment on 30<sup>th</sup> September 2021.

5. It is against the foregoing background that the application before me has been filed. The Ruling said to be dated 29<sup>th</sup> July 2021 has not been placed before this Court, and I have not seen it. I, Cannot therefore, make any orders based on a Ruling that I have neither seen nor perused. It is not enough for parties and/or their advocates to swear affidavits alluding to the alleged Ruling. This Court has not been told why a copy of the lower court's said Ruling has not been filed with the documents filed by the parties herein.

6. Further although both parties herein have deponed that the lower court suit was on 7<sup>th</sup> September 2021 fixed for judgment on 30<sup>th</sup> September 2021, this Court has not been told whether or not the judgment was delivered, this despite the fact that the applicant filed a supplementary affidavit and its written submissions on 14<sup>th</sup> October 2021, while the Respondent's written submissions were filed on 28<sup>th</sup> October 2021; long after the date set for delivery of the lower Court's judgment.

7. The impugned Ruling is said to have been delivered pursuant to an application for adjournment of the lower court case and for leave by the applicant to file a list of witnesses and witness statements. Hearing of the case proceeded with both parties participating in the hearing, upon which the court called for written submissions and subsequently fixed the suit for judgment.

8. This Court on 16<sup>th</sup> September 2021 declined to either certify the application as urgent or to issue any interim orders.

9. The applicant is, at this stage, asking the Court to grant it leave to appeal out of time against the lower Court's Ruling said to be dated 29<sup>th</sup> July 2021 and to issue orders setting aside the proceedings of 29<sup>th</sup> July 2021 in MOMBASA ELRC CAUSE NO. 48 OF 2020 BENSON OLINGA OMUNYIN -VS- COOK 'N' LITE LIMITED.

10. It is not clear how the applicant intends to file a list of witnesses and witness statements in a suit wherein trial has already been conducted and suit set down for judgment, or even judgment delivered. Granting the orders sought would be an act in futility.

11. Further, this court cannot be called upon to set aside proceedings or orders of a Subordinate Court except on appeal. There is no appeal before me.

12. In view of the foregoing, and having considered submissions filed by counsel, I find no merit in the applicant's application, and the same is hereby dismissed. Each party to bear its own costs of the application.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF DECEMBER 2021**

**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:**

Miss Orege for Applicant

Me. Omburo Respondent