



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 237 OF 2019**

**(Before Hon. Justice Hellen S. Wasilwa on 8<sup>th</sup> October, 2020)**

**CAROLINE MASIKA.....CLAIMANT/APPLICANT**

**VERSUS**

**PARAPET LIMITED SERVICES.....RESPONDENT/APPLICANT**

**RULING**

1. The Respondent/Applicant, Parapet Limited, filed a Notice of Motion application dated 24<sup>th</sup> June 2020 seeking to be heard for orders that:-

**1. Spent.**

**2. Spent.**

**3. The Honourable Court be pleased to grant an Order for stay of execution of the Judgment and Decree delivered on 15<sup>th</sup> April 2020 and any subsequent proceedings in the suit pending the filing, hearing and determination of the Appeal to the Judgment and decree issued on 15<sup>th</sup> April 2020;**

**4. The Honourable Court be pleased to set aside the Judgment and Decree of the Court delivered on 15<sup>th</sup> April 2020 and grant the Applicant leave to file a Statement of Response.**

**5. The Honourable Court be pleased to grant an order that the Suit be reopened and be heard de novo.**

**6. The costs of this application do abide the outcome of the inter parties hearing of this application.**

2. The Application is founded on the grounds that this Honourable Court entered Judgment in favour of the Claimant in the sum of Kshs. 4,298,000.00 plus interest at Court rates among other orders. That the suit proceeded without the Respondent/Applicant's knowledge as it was never served with any notice for Pre-Trial hearing, a hearing date of the suit, a Judgment notice, or a notice of entry of Judgment in the matter. That there is imminent danger of execution by the Respondent as the informal thirty (30) days order for stay of execution of the Judgment and decree granted by this Honourable Court has already lapsed. That notably, on 2<sup>nd</sup> June 2020, the Chief Justice lifted the moratorium issued on 15<sup>th</sup> March 2020 to suspend stay of execution of decrees and orders in the wake of Covid -19 pandemic.

3. Further, that the abovementioned decretal sum is colossal and the Applicant stands to suffer substantial loss and irreparable damage if the Respondent, a man of unknown financial means, is not able to refund the decretal amount if the appeal is successful. That the Applicant's loss will further be aggravated as it will be compelled to file proceedings to recover the decretal amount from the Claimant/Respondent and the Appeal will be rendered nugatory. That it further risks having its operations crippled if the Claimant/Respondent proclaims its tools of trade in satisfaction of the Judgment and decree.

4. The Applicant contends that it has a valid statement of response which raises triable issues to the claim and should not be condemned for the failure and or mistake of Counsel to enter appearance and file a statement of response within the requisite time. That it has a Constitutional right to a fair hearing and is entitled to adduce and challenge the evidence put forth by the Respondent in the suit and that the orders sought are calculated to facilitate the Applicant to enjoy its constitutional right to justice. That the Respondent will not suffer any loss which cannot be compensated by an award of damages if the application is allowed and that the application has been brought without unreasonable delay and in good faith. That it is in the interest of justice that the reliefs sought in the application are granted.

5. The Application is supported by the Affidavit sworn by the Applicant's Group Head, Human Resource & Shared Services, Dominic Otieno who avers that the Applicant desires to file an Appeal to the entire Judgement of this Honourable Court and has filed and served a Notice of Appeal upon the Claimant/Respondent. He also avers the Respondent's failure to inform the Applicant of this suit's proceedings was malicious and calculated to obstruct justice for the Applicant. That due to the negative impact of Covid-19 pandemic on businesses, the Applicant is ready and willing to deposit thirty (30%) percent of the decretal amount in this Court or in a joint interest-earning account opened by parties Advocates and or abide by any such conditions that may be imposed by this Honourable Court as a condition for stay of execution.

6. He further avers that the failure to file any pleadings was occasioned by the Applicant's counsel who inadvertently forgot to instruct an Associate at the firm to take over the conduct of the matter and file the necessary pleadings. He produced exhibit "DO-1".

7. The Claimant/Respondent filed a Replying Affidavit sworn on 6<sup>th</sup> July 2020 averring that there was correspondence between her Advocates on record and the Applicant and its Advocates on record prior to this suit being instituted. That the Respondent/Applicant was served with the Memorandum of Claim and Summons to Enter Appearance on 12<sup>th</sup> April, 2019 but did not respond to her claim.

8. That the Respondent/Applicant's representative further declined to stamp or sign the Mention Notices dated 11<sup>th</sup> June, 2019 and 19<sup>th</sup> July 2019 served upon the Respondent as evidenced by the affidavits of Francis M. Maina sworn on 10<sup>th</sup> July, 2019 and 24<sup>th</sup> September 2019. That it is therefore wrong for the Applicant to argue that no service was effected upon it when its representative declined to acknowledge receipt and that there was no need to serve the Respondent with any other notices as it had failed to enter appearance and file its Response.

9. She further submits that the Applicant cannot purport to appeal against the whole judgment of the court as per the annexed Notice of Appeal and that in any event, no draft Memorandum of Appeal has been annexed. She notes that in *paragraph 12 of the affidavit by Mr. Dominic Otieno* where the Applicant proposes to pay 30% of the decretal amount contradicts *ground X in the Notice of Motion Application* and that this depicts bad faith on the part of the Respondent/Applicant. That the Applicant has also not annexed financial and or bank statements to demonstrate it is not able to pay and or deposit the decretal amount, which it describes as 'colossal'.

10. She contends that she is currently employed as the Senior Operations Manager by KK Security Company Limited and the Applicant is thus not likely to suffer any substantial loss and further, suffer any loss that cannot be compensated by an award of damages as the claim herein is purely monetary. She believes that the Respondent/Applicant should pay the decretal amount and not deposit the same in court or in a joint interest earning account and that the application herein has been brought after an unreasonable delay since the Applicant has been aware of the judgment.

11. The Claimant/Respondent further avers that the Respondent/Applicant cannot prosecute its case in two forums by purporting to file an appeal while at the same time seeking leave to file its Statement of Response. That having filed a Notice of Appeal, the only issue this court should determine is whether stay of execution should be granted and if so, on what terms. That in any event, there is no evidence that the Notice of Appeal has been filed and when it was filed and she denies being served with a Notice of Appeal.

12. She avers that the draft Memorandum of Response raises no triable issues and that allowing the Respondent to file the same would delay the final determination of this matter. That there is no evidence of the pleadings served upon her having been transmitted to any firm of Advocates for action and that the purported blame on counsel can only be false. Further, that the averments by Mr. Tom O. Onyango in the affidavit sworn on 24/06/2020 that pleadings herein were emailed to him on 2<sup>nd</sup> May, 2019 attaches no evidence of such email having been received.

13. She avers that the Applicant's right to be heard is not absolute and that since it chose not to exercise that right, it cannot turn around and seek to be heard when it is too late. That the said Judgment in this matter was delivered in the presence of a Ms. Cynthia, described as an Employee Relation Officer of the Respondent/Applicant and the allegation that no service of entry of judgment was served is thus false. That the said Cynthia sought a 30-day stay of execution which was granted to them and the Respondent/Applicant ought to have therefore moved court within a reasonable time and not after the lapse of 30 days since courts have been operating despite the covid-19 pandemic. She contends that the application is an afterthought and meant to ensure she does not enjoy the fruits of the said judgment and that even after the application was filed, the Applicant deliberately took 7 days to serve the same.

### **Respondent/Applicant's Submissions**

14. The Applicant relies on the legal proposition in the case of **Rhoda Mukuma vs John Abuoga (1988) eKLR** where the court stated that:-

**"...Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being - (a) whether substantial loss may result unless the stay is granted, and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory. Therefore, it is necessary to preserve the status quo..."**

15. It urges this Court to be guided by the above proposition and Order 42 Rule 6(2) of the Civil Procedure Rules to exercise its discretion to grant an order for stay of execution.

16. The Applicant further submits that it has demonstrated particulars of the loss it is likely to suffer and how the same will arise at *paragraph 8 and 9 of the Supporting Affidavit*. That the Claimant/Respondent on her part has failed to provide an affidavit of means or evidence to demonstrate that she will be able or is in a position to refund the entire decretal sum if the appeal is successful.

17. That the letter dated 7th July 2020 produced by the Claimant/Respondent only confirms she does not have sufficient means to refund the decretal amount if it is paid to her and the Appeal is successful and that it does not constitute evidence of liquidity. That in the case of **Edward Kamau & another v Hannah Mukui Gichuki & another 120157 eKLR** the Court observed that:-

*"...I agree with the applicants that **in the absence of an affidavit of means, it may be construed that the respondent is not possessed sufficient means and therefore not in a position to reimburse decretal money should the appeal succeed.** I am enjoined by the holding of the Court of Appeal in the case of **National Industrial Credit Bank Ltd vs Aquinas Francis Wasike Court of Appeal Civil Application No. 238/2005, the Court of Appeal held:-***

*“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegations that an appeal would be rendered nugatory because the respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the Respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”*

18. It is thus the Applicant’s submission that the Intended Appeal will be rendered nugatory and it cites the case of **G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR** where the Court observed that a party will suffer substantial loss if it will have to go through the hardship of instituting proceedings to recover the decretal amount paid to the Respondent.

19. On filing the application without unreasonable delay, the Applicant submits that there was no imminent threat of execution as the CJ had suspended execution in the wake of Covid-19 pandemic and that the present application was filed three weeks after the said suspension was lifted on 02/06/2020. It submits that the delay is thus not inordinate or unreasonable and was timely made and that the decree is yet to be extracted. It relies on the case of **HCCC 518 of 2010, Brigadier Okoki Ndingi vs. Standard Group Limited (Unreported)** where the court observed that the court will determine if an application is filed within a reasonable time by establishing the time taken to file the same after the decree is issued.

20. It is submitted by the Applicant that it aligns itself with the decision of Gikonyo J in the case of **Arun C Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates** who observed that an applicant proposing to provide security for due performance of the decree is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. The Court in the **Arun C Sharma case** further stated that:-

*“My view is that it is enough for the applicant to state that he is ready to provide security or to propose the kind of security, but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”*

21. The Applicant submits that the prayer to set aside the Judgment and for the suit to be heard de novo is founded on the premise that:-

- a) the rules of natural justice require that a party should not be condemned unheard;*
- b) the Applicant has a Constitutional right of access to justice guaranteed under Article 48 of the Constitution of Kenya; and*
- c) the Applicant has right to adduce and challenge evidence put forth by the Respondent in the trial as guaranteed under Article 50(k) of the Constitution.*

22. That the factors the Court should consider in exercising its discretion to set aside a regular judgment were considered in the case of **Ceneast Airlines Ltd vs Kenya Shell Ltd [2000] 2EA** and include:-

- a) The reason for failure of the Applicant to file his memorandum of appearance or defence;*
- b) Whether justice will be done;*
- c) Whether there is a defence on merits;*
- d) Whether the delay can be compensated by way of costs;*
- e) Length of time lapsed since the default judgment was entered; and*
- f) The respective prejudice each party is likely to suffer.*

23. That the Court of Appeal in **Ceneast Airlines Ltd** further cited with approval the remarks of Duffus P in **Patel vs EA Cargo Handling Services [1974] EA 75** that the main concern of the court it to do justice to the parties and not impose conditions on itself to fetter the wide discretion given to it by the rules.

24. It further submits that being punished and condemned to the Judgment of Court on account of mistake of counsel is a grave injustice which this Court can remedy. That the Respondent has failed to demonstrate to this Court that the Applicant declined to participate in the proceedings and it thus urges the Court to set aside the Judgment. It relies on the holding by the Court of Appeal in **Ceneast Airlines Ltd** that denying a party a hearing on merits should be the last resort of the court and should only be done in the plainest of cases where a party has

been given an opportunity to present its case but has declined to do so.

25. The Applicant also submits that the issues raised in the statement of response raise triable issues which can only be determined if the matter goes for trial and that the court will only set aside a judgment if there is a defence on merits as observed in the case of **Patel versus EA Cargo Handling Services [1974] EA 75**. That a defence on merits means one that raises a triable issue which should go to trial for adjudication. It further submits that if the Judgment is not set aside, it will be condemned unheard and be obliged to pay the decretal sum on account of mistake of Counsel and that the prejudice it will suffer if Judgment is not set aside cannot be compensated by costs. It urges the Court to allow the application as pleaded.

#### **Claimant/Respondent's Submissions**

26. The Claimant submits that the Respondent/Applicant should choose one path to follow, either the appeal route or seeking to be heard in this matter and not to have both ways and that it follows that the subject application is incapable of being allowed. That if this Court were to set aside its judgment and all previous proceedings and allow the Respondent to file its response, then there would be no proceedings for purposes of pursuing an appeal by the Respondent. Further, that the subject Notice of Appeal was filed but never served upon her as required under **Rule 77(1) of the Court of Appeal Rule, 2010**.

27. She cites **Kakamega Civil Appeal No. 137 of 2018 Simba Coach Limited vs Kiriyyu Merchants Auctioneers** where the court dealt with the issue of unreasonable delay and held as follows:-

***"15. The court in Jaber Mohsen Ali & Another vs. Priscillah Boit & Another E&L No. 200 of 2012(2014) eKLR was of the view that unreasonable delay depends on the circumstances of the case. The court stated:-***

***'The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.'***

***16. In the instant suit, the applicant was fully aware of the orders of this court of the 6th November 2018. It was also aware of its financial status as at the same period and ought to have in the circumstances made the application as soon as possible to salvage the situation and not after the lapse of the conditional period. It is my opinion that the application was made late in the day and this imputes that the application was not made in good faith but rather the same was made to delay and avert justice."***

28. The Claimant/Respondent submits that the Applicant's advocate has averred at **paragraph (3) of the affidavit sworn by Mr. Tom O. Onyango** that the Applicant emailed the pleadings to them on 02/05/2019 with instructions for the firm to act in the matter and file necessary documents to protect its interests. That it is therefore admitted that the Respondent was duly served with the summons and pleadings in this matter. That the Respondent ought to have followed with its legal representatives to ensure that its instructions had been acted upon and not wait for more than one year to establish what had transpired in the current suit. That the Respondent only became interested in the matter after judgment was delivered which interest is meant to slow down the wheels of justice.

29. Further, that the Respondent has not sought to cross examine the process server with respect to the contents of the two affidavits which demonstrate that service of mention notices was effected upon the it. She submits that the court should make a finding that the Respondent was all along aware of the proceedings including the date the judgment was delivered but chose to ignore the proceedings. She relies on **ELRC Bungoma Cause No. 96 of 2017 Agapetus Nyongesa Masinde vs Board of Management, Bungoma High School** where the Court declined to set aside the judgment entered citing inordinate delay and dishonesty on the part of the Respondent and held that:-

***"10. The supplementary affidavit filed by the applicant on 15th October 2019 does not contest the fact that the applicant was duly served with the statement of claim and summons and duly acknowledged receipt. There is also no explanation for the inordinate delay in bringing this application on 10th June 2019, about one year and three months from the date judgment was delivered on 2nd March 2018.***

***11. The applicant has an obligation to tell the truth on the issue of service to warrant consideration by the court. The application is based on a falsehood regarding the matter of service. The applicant does not deserve exercise of discretion in his favour whilst not being honest about the matter."***

30. It is submitted by the Claimant that the draft Statement of Response does not raise triable issues and only constitutes numerous admissions by the Respondent which clearly shows that the Claimant was unfairly dismissed from her employment. That allowing the Respondent to file its Statement of Response shall only resort to wasting precious judicial time and that the Respondent has failed to demonstrate it is deserving of any of the orders sought. She urges the Honourable Court to dismiss the Respondent's application with costs to the Claimant.

31. I have examined the averments of the Parties. The main contention by the Applicant is that he was never served with any notices for pre-trial, hearing date of the suit, judgement and notice of entry of judgement. He therefore contends that he cannot be condemned unheard.

32. I have looked at the Court record. This Claim was filed on 10/4/2019. There is evidence that the Respondents were served with the Memorandum of Claim on 12/4/2019 as seen on the stamped copy of the Memorandum of Claim and the Affidavit of Service by the Process Server.

33. On 12/6/2019, the Respondents were again served with a mention notice for a mention scheduled for 11/7/2019. On 11/7/2019 when the matter was brought before Court, the Respondent failed to attend.

34. The Court directed that the matter proceeds for pre-trial before the Judge on 26/9/2019. On this date, the Court ordered the matter to proceed undefended.

35. The contention by the Respondent/Applicant that he was not served with pre-trial notice is not true. The fact that the matter proceeded as a **Formal Proof is also true** and therefore there was no obligation by the Claimant to serve the Respondent. This judgement was delivered on 15/4/2019.

36. The Applicant seeks stay of execution of this judgement and seeks leave to file a defence. They have also filed a Notice of Appeal before Court of Appeal.

37. It is however not clear whether the Applicant seeks the order to allow the case to be re-opened or whether they are dissatisfied with the judgement of the Court hence the appeal. In the circumstances, the Applicant seem to be forum shopping and unaware of what they seek.

38. It would be prudent for the Applicants to pursue an appeal at the Court of Appeal and also seek any further orders before the said superior Court.

39. In view of the fact that the Applicants were served with Pleadings in this case and failed to file any documents or attend Court when served, I find that they were not interested in pursuing this case.

40. They aver that it is their counsel to blame for all the omissions but there is no indication that they instructed any counsel as all Pleadings and Notices were served upon them personally and there is also no indication that they were vigilant enough to preserve their own rights in this case. I find as a whole that this application has no merit. I therefore dismiss it accordingly.

41. Costs to abide the Appeal.

**Dated and delivered in Chambers via zoom this 8<sup>th</sup> day of October, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Elkington for Respondent/Claimant – Present

Muoki for Applicant – Present