



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**ELRC NO. 68 OF 2015**

(Before Hon. Justice Hellen S. Wasilwa on 16<sup>th</sup> January, 2019)

BARACK OTIENO OMBIMA.....APPLICANT

VERSUS

MR. FAROUK.....1<sup>ST</sup> RESPONDENT

IBRAHIM MAHMOUD.....2<sup>ND</sup> RESPONDENT

EAST WEST AFRICA LIMITED...3<sup>RD</sup> RESPONDENT

**RULING**

1. The Application before this Honourable Court for determination is the one dated 3<sup>rd</sup> July 2018 and filed under the provisions of Articles 41 (1) of the Constitution of Kenya 2010, Section 10 of the Labour Relations Act 2007 and Section 74 of the Labour Relations Act 2007.

2. The Applicant seeks the following orders:-

a) Spent.

b) *THAT the Honourable Court be pleased to vacate (set aside) the stay order granted to the Respondent/Applicant through a Ruling delivered on 22<sup>nd</sup> February 2017.*

c) *THAT hearing and determination of this Application be on priority basis.*

3. The Application is supported by the Claimant's Affidavit and is based on the grounds as set out herein below:-

*1. The Respondent filed the Application dated 28<sup>th</sup> November 2016, seeking an order for stay of execution on a judgment delivered on 14<sup>th</sup> November 2016.*

*2. The sole purpose of the stay sought was to enable the Respondent/Applicant file and serve the intended appeal. However, it has been established that the Respondent misled the Court with malicious intention not to file an appeal but to frustrate the Claimant financially to a surrender never to get the terminal dues awarded in the Judgment.*

*3. The intended appeal as at the date of the Application herein, has never been filed and there are no signs that the appeal will ever be filed. Further, the intention of the appeal has been replaced by the permanent stay and to the Respondent, there is no need of filing an appeal because the stay will last forever and thereby serving his purpose of starving the Claimant financially.*

*4. The stay order cannot stay forever on a presumption that a security has been deposited. The stay having been defeated or misused then it is only fair that it is vacated (set aside).*

4. The Respondents have opposed the Application vide the Replying Affidavit sworn by the 2<sup>nd</sup> Respondent on 11<sup>th</sup> July 2018 and filed on 26<sup>th</sup> July 2018.

5. The Respondent averred that on 22<sup>nd</sup> February 2017, the Honourable Court granted an order for stay of the judgment and decree issued on 14<sup>th</sup> November 2016 on condition that the decretal sum be deposited in a joint interest earning account held by the Claimant and the Counsel on record for the Applicant. The condition was complied with.
6. The Respondent further averred that his Advocates on record had lodged a Notice of Appeal and had requested for certified copies of the judgment and proceedings, which were yet to be supplied. It was the Respondents' position that rule 82 of the Appellate Jurisdiction Act was to the effect that where certified copies of proceedings in the Superior Court has been made, time stops running until the date the proceedings are ready.
7. The Respondents averred that they were still keen and ready to proceed with the appeal, the appeal process was on and that their record of appeal would be filed once the proceedings were ready. It was the Respondents' position that this Honourable Court was functus officio and had no jurisdiction to entertain the Application herein and the same should be dismissed with costs.
8. The Applicant responded to the Respondents' Replying Affidavit by filing a Response to Respondent's Reply dated 31<sup>st</sup> July 2018.
9. It is the Claimant's position that rule 59(1) stipulates filing of Appeal Notice to the Appeal Court within 14 days of the date of the decision. This Honourable Court's decision was delivered on 14<sup>th</sup> November, 2016 translating to 21 months to date. As at the date of this Memorandum, no Notice of Appeal had been filed in the Appeal Court and therefore, the Court of Appeal is not aware of any intended appeal.
10. The Claimant laid emphasis on rule 83 to posit that the intended Appellant has failed to institute an appeal within the appointed time and the Claimant has filed an application so that the Court make vacation/withdrawal Order. The Claimant relies on rule 84 to have the Notice of Appeal struck out.
11. The Claimant avers that the judgment to be appealed against was delivered on 14<sup>th</sup> November, 2016. The letter marked as 1M-1 and relied upon in the Replying Affidavit where the Respondents were seeking to be served with certified copies of proceedings for purposes of filing an appeal, was filed after 12 months and 7 days from the date of delivery of the Judgment to be appealed against. The intended Appellant was acting out of time and has not shown any sign that he made any effort to follow up on the progress.
12. The Claimant drew the attention of this Honourable Court to a similar situation where the intended Appellant having been aggrieved by the decision of the Court delivered on 11<sup>th</sup> July, 2018, filed a Notice of Appeal to both the Employment & Labour Relations Court and Court of Appeal on 16<sup>th</sup> July, 2018. The grievant also filed a letter seeking to be served with certified copies of the Judgment and typed proceedings. This therefore translates to the fact that the Court of Appeal is aware that any time within sixty days an appeal will be instituted.

### **Submissions**

13. The Applicant in his written submissions dated 8<sup>th</sup> October 2018 submits that he has left the matter in the competent hands of this Honourable Court to determine the matter as it deems fit.
14. The Respondents in their written submissions dated 22<sup>nd</sup> October 2018 submit that it is inconceivable for the Applicant to allege that the condition for depositing the decretal sum was not met yet it was met on 17<sup>th</sup> March 2017. Further, when such a condition has been met, the Court cannot be invited to set aside its orders which have been complied with.
15. The Respondents submit that the proviso to rule 82 (1) of the Court of Appeal Rules 2010, provides for exclusion of time within which the appeal is to be instituted where an application for a copy of the proceedings has been made.
16. It is also the Respondents' submissions that this Honourable Court is functus officio as a Notice of Appeal has already been lodged. The Respondents relied on the case of *Mary Wanjiku v Allan Kimani* [2018] eKLR, where the Court cited with approval the decisions in *Telkom Kenya Limited v John Ochanda* (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR and the Supreme Court in *Raila Odinga & 2 Others V Independent Electoral And Boundaries Commission & 3 Others* [2013] eKLR as regards the principle of functus officio:-  
  
"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19<sup>th</sup> Century... ***The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.***"
17. It is also submitted that the application herein was made on 3<sup>rd</sup> July, 2018 whereas judgment and decree had been issued on 14<sup>th</sup> November 2016. An order granting for stay of execution pending appeal was issued on 22<sup>nd</sup> February, 2017. There was finality as to the proceedings, merits and decision in the matter. The High Court became functus officio so the issues currently raised which are matters of grievance which can only be dealt with by the Appellate Court.
18. It is also submitted that if the Applicant is aggrieved by the orders given by this Honourable Court, then his recourse is in the Appellate Court which has jurisdiction in this matter and he should move the appropriate Court.

19. I have examined the averments of both parties. From the proceedings in Court, I note that this case proceeded before this Court and Judgement was rendered on 14.11.2016.

20. The Respondents avers that they filed a Notice of Appeal. I note that the alleged Notice of Appeal is purportedly signed by the DR – ELRC Nyeri which is an unlikely situation as this case was handled in Nairobi. The Notice does not also bear this Court’s stamp or any Court stamp from ELRC Nyeri though addressed to ELCR Nairobi.

21. The Respondents did not even exhibit a payment receipt to show the Notice was filed and paid for.

22. It is therefore apparent that no proper Notice of Appeal has ever been filed before this Court and no appeal is pending before the Court of Appeal. An Appeal should have been filed within 15 days.

23. The Respondent have not demonstrated that they have actually filed any such appeal. The orders sought are therefore valid and I allow the Application before me and direct that execution should proceed.

**Dated and delivered in open Court this 16<sup>th</sup> day of January, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of**

Claimant – Present

Respondent – Absent