



Kreative Concrete Products Limited Kenya v AEE Power S.A Ltd (Commercial Case E387 of 2019) [2024] KEHC 8934 (KLR) (Commercial and Tax) (19 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E387 OF 2019**

MN MWANGI, J

JULY 19, 2024

BETWEEN

KREATIVE CONCRETE PRODUCTS LIMITED KENYA PLAINTIFF

AND

AEE POWER S.A LTD DEFENDANT

RULING

1. The defendant filed a Notice of Motion application dated February 20, 2024 pursuant to the provisions of Sections 1A, 3A, 3B & 63(e) of the *Civil Procedure Act*, Order 50 Rule 3 & Order 51 Rule 1 of the *Civil Procedure Rules, 2010*, and all other enabling provisions of the law, seeking orders that the documents filed by the defendant in support of its defence be admitted into the record as valid, and/or that the orders issued by Honourable Justice Njoki Mwangi on January 19, 2024 be extended to ensure compliance, and the plaintiff be compelled to provide the defendant with its bank account details for the payment of throwaway costs.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Kate Wambui, an Advocate of the High Court of Kenya and the learned Counsel for the defendant. She stated that on July 12, 2023, the Court indicated that the ruling for the defendant's application dated March 21, 2022, which sought to set aside a default judgment, would be delivered on notice. That the ruling was delivered on January 19, 2024 in the absence of the defendant and its Advocates on record. The defendant claimed to have only learned of the ruling on February 19, 2024 and sought to comply by lodging compliance documents and requesting the plaintiff for its account details to pay the throwaway costs, but the plaintiff refused to provide the said account details. Counsel deposed that the thirty (30) days period granted by the Court to the defendant to comply with the orders issued in the ruling delivered on January 19, 2024 elapsed on February 18, 2024, which date



is excluded from computation of time as provided for under Order 50 Rule 3 of the [Civil Procedure Rules, 2010](#).

3. The application was opposed vide a replying affidavit sworn on April 4, 2024 by Ligami Eric, an Advocate of the High Court of Kenya, and the learned Counsel for the plaintiff. He stated that on January 17, 2024, the Court issued a ruling notice via email to all parties, indicating that ruling on the defendant's application would be delivered on January 19, 2024. The email was sent to bikundolaw.associates@gmail.com, the official email provided by the defendant's Counsel for e-filing and official communication. Additionally, an update regarding the Court's directions was made on the e-filing portal (CTS), and the ruling date was available on the CTS calendar. He contended that the said ruling was delivered as scheduled on January 19, 2024 in the absence of the defendant and its Advocates on record.
4. Counsel for the plaintiff averred that in the said ruling, the default judgment in favor of the plaintiff was set aside, subject to certain conditions that the defendant had to fulfill within specified timelines, failing which the default judgment would be reinstated. Mr. Ligami asserted that the defendant did not comply with these conditions, leading to the reinstatement of the default judgment after thirty (30) days. He denied having received any email from the defendant's Counsel requesting for account details or to having any conversations regarding the payment of throwaway costs. He contended that even if the email was sent, it was sent at 5:29 pm after business hours and would be deemed by law to have been sent the following day, after the thirty (30) days' period had already elapsed.
5. In a rejoinder, the defendant filed a further affidavit sworn on April 8, 2024 by Kate Wambui, the learned Counsel for the defendant. She averred that the ruling notice was not received by the defendant because the email address indicated on its pleadings is dchepkemoi@taxwiseconsulting.com, which was not copied as a recipient of the email annexed by the plaintiff as "EL-1". She asserted that the defendant complied with the Court's directions issued in the ruling delivered on January 19, 2024 by filing its defence and accompanying documents on Monday February 19, 2024, within the thirty-day period as directed. She stated that in any event, the Court has the discretion to extend any period fixed or granted for the doing of any act under Section 95 of the [Civil Procedure Act](#).
6. It was stated by Counsel for the defendant that before the email requesting for account details was sent to the plaintiff, the defendant's Counsel contacted the plaintiff's Counsel several times via telephone to request for the account payment details for purposes of compliance. She further stated that the email the plaintiff's Counsel purported not to have received was sent to the email address indicated on the plaintiff's pleadings as info@lilankoech.co.ke, which is the same address the plaintiff's Counsel used to serve the defendant's Counsel with its response to the instant application.
7. The instant application was canvassed by way of oral submissions made on April 8, 2024.
8. Ms. Njue, learned Counsel for the defendant submitted that the notice for delivery of the ruling in respect to the defendant's application seeking to set aside the interlocutory judgment entered in favour of the plaintiff was sent to a different email address not used by the defendant's Counsel. She further submitted that the defendant's Counsel by the name Diana Chepkemoi became aware of the said ruling on February 19, 2024 when looking up a ruling in different case on the Kenya Law Reports website. She then reached out to Counsel for the plaintiff for payment of the throwaway costs, but he did not respond. She then proceeded to file the defendant's statement of defence.
9. Mr. Ligami, learned Counsel for the plaintiff cited Order 5 Rule 2(b) of the [Civil Procedure Rules, 2010](#) which provides for receipt of service by email and argued that they never received the email purportedly sent by the defendant's Counsel requesting for bank account details for paying throwaway costs. He submitted that in any event, the said email was sent after working hours, such that even



if they had provided the bank details, the defendant's Counsel would not have met the payment deadline since banks close at 4:00 pm. Counsel stated that the defendant has been filing pleadings through the law firm of Bikundo & Associates, thus the notice of January 17, 2024 was sent to that law firm. He confirmed having spoken with the defendant's Counsel on February 19, 2024 at 5:04 pm, and informing her that she was late and that he would not accept the payment for throwaway costs. He denied having received any WhatsApp messages from the defendant's Counsel and claimed that although there are screenshots of calls made to him, he never actually received those phone calls.

10. In a rejoinder, Ms. Njue stated that the email registered on the CTS and the one used to lodge documents is that of Bikundo & Associates, but stated that she was not aware when the change of email address took place.

Analysis And Determination.

11. I have considered the instant application, the grounds on the face of the Motion and the affidavits filed in support thereof. I have also considered the replying affidavit by the plaintiff, and the oral submissions by Counsel for the parties, the issue that arises for determination is whether the application herein is merited.

Whether the application herein is merited.

12. This Court delivered a ruling on January 19, 2024 setting aside the interlocutory judgment entered against the defendant in favour of the plaintiff, and granted the defendant leave to file its statement of defence and all compliance documents within thirty (30) days from the date of the ruling. The Court further ordered the defendant to pay the plaintiff throwaway costs of Kshs.30,000/= within 30 days from the date of the said ruling, failure to which the default judgment would remain in force.
13. On July 12, 2023, this Court indicated that the ruling in issue would be delivered on notice. In compliance with the said directions, this Court issued a notice for the delivery of the aforesaid ruling together with other rulings and judgments on January 17, 2024 via email, informing parties that the said ruling would be delivered on January 19, 2024. The defendant's Counsel indicated that neither the defendant nor its Advocates on record received the said email as they were not copied in the correspondence. The plaintiff on the other hand contended that the said email was sent to bikundolaw.associates@gmail.com, the official email provided by the defendant's Counsel for e-filing and official communication. Additionally, that an update regarding the Court's directions was made on the e-filing portal (CTS), and the ruling date was available on the CTS calendar.
14. This Court has perused the pleadings filed by Counsel on behalf for the defendant and I note that they were drawn and filed by the law firm of Diana Chepkemai Advocate whose email addresses are dchepkemai@taxwiseconsulting.com, and dchepkemai47@gmail.com. On perusal of a copy of the email forwarding the ruling notice annexed to the plaintiff's replying affidavit, I note that it was not copied to either of the two email addresses provided by Counsel for the defendant, but was copied to the law firm of Bikundo & Company Advocates. I have gone through the CTS and I agree with Counsel for the plaintiff that some of the pleadings filed by Counsel for the defendant on behalf of the defendant were filed using the CTS account for the law firm of Bikundo & Company Advocates
15. The relationship that exists between the Advocate on record for the defendant, the defendant and the law firm of Bikundo & Company Advocates is not discernible, for this Court to reach a conclusion that service to the law firm of Bikundo & Company Advocates is equivalent to service to the law firm of Diana Chepkemai Advocate, the law firm that is on record for the defendant. It is evident that when sending emails to the Advocates for the parties, the Court sent the notice for delivery of the ruling to bikundolaw.associates@gmail.com. In view of the foregoing, I am persuaded that neither the



defendant nor its Advocates on record were served with a notice for delivery of the ruling delivered by this Court on January 19, 2024. The confusion in service cannot however be entirely blamed on the Commercial & Tax Division Registry because there were documents that had been filed on behalf of the defendant by the law firm of Bikundo & Company Advocates and the email address to which the notice for delivery of the ruling was sent, was obtained from the said documents.

16. As stated above herein, the interlocutory judgment entered in favour of the plaintiff was set aside on condition that the defendant pays the plaintiff throwaway costs of Kshs.30,000/= within 30 days from January 19, 2024. It is not disputed that the 30 days' period elapsed on February 18, 2024 which was on a Sunday. I am however alive to the provisions of Order 50 Rule 3 of the *Civil Procedure Rules, 2010* which states as hereunder -

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.”

17. Accordingly, the time within which the defendant ought to have paid the plaintiff the throwaway costs as directed in the ruling of January 19, 2024 elapsed on February 19, 2024. Counsel for the defendant has demonstrated efforts to reach Counsel for the plaintiff for purposes of compliance by paying the throwaway costs albeit late, since the email sent to Counsel for the plaintiff asking for bank account details was sent on February 19, 2024 at 5.29pm, past official working hours.

18. Under Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules, 2010*, this Court has the discretion to extend time for the defendant to comply with its directions issued in the ruling delivered on February 19, 2024. The said provisions state as follows -

“

“Section Enlargement of time

95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Power to enlarge time [order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

19. As explained hereinbefore, the defendant ought to have complied with this Court's directions issued on January 19, 2024 on or before February 19, 2024. I will however give the defendant's Advocates on record the benefit of the doubt that the Advocates to whom the notice for delivery of the ruling



was sent to never notified them of the same. Noting that the instant application was filed immediately after the elapse of the said period, I am inclined to exercise my discretion under Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, 2010 and extend time within which the defendant can comply with the Court's directions issued in its ruling of January 19, 2024.

20. In the premise, this Court finds that the instant application is merited. I make the following orders –
- i. The documents and/or pleadings filed by the defendant are deemed as being duly filed upon payment of the requisite Court fees;
 - ii. The defendant shall pay the plaintiff throwaway costs as directed in the ruling delivered on January 19, 2024 within seven (7) days from today; and
 - iii. Costs of the application dated February 20, 2024 shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JULY 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Njue h/b for Ms Chepkemai for the Defendant/Applicant

Mr. Willy h/b for Mr. Ligami for the Plaintiff/Respondent

Ms B. Wokabi – Court Assistant.

