



**Keino (Suing thro' her attorney Stephen Mbogo Nyaga) v Board of Trustees Teleposta Pension Scheme (Civil Appeal 587 of 2017) [2023] KEHC 19159 (KLR) (Civ) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19159 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 587 OF 2017**

**CW MEOLI, J**

**JUNE 12, 2023**

**BETWEEN**

**EMMY KEINO (SUING THRO' HER ATTORNEY STEPHEN MBOGO NYAGA) ..... APPELLANT**

**AND**

**BOARD OF TRUSTEES TELEPOSTA PENSION SCHEME ..... RESPONDENT**

**RULING**

1. The present appeal was filed on 31<sup>st</sup> October 2017 by Emmy Keino (Suing thro' her attorney Stephen Mbogo Nyaga (hereafter the Applicant) to challenge the judgment delivered on 19<sup>th</sup> October 2017 in Milimani CMCC No. 6745 of 2014 in favour of the Board of Trustees Teleposta Pension Scheme (hereafter the Respondent). Subsequently, the Applicant filed the application dated 20<sup>th</sup> December 2017 seeking to stay execution of the aforesaid judgment, which application was dismissed by the High Court vide the ruling delivered on 18<sup>th</sup> January 2018. The appeal lay dormant for four years before the Applicant filed the record of appeal on 17<sup>th</sup> February 2022.
2. During the hiatus of four years before the filing of the record of appeal, the Deputy Registrar had issued a Notice to Show Cause (NTSC) dated 17<sup>th</sup> January 2022 pursuant to Order 42Rule 35(2) of the *Civil Procedure Act*. Indeed, the filing of the record of appeal must have been prompted by the service of the NTSC upon the Applicant. The NTSC came up for hearing on 17.03.2022. Both parties were present, and the Court, having heard the parties directed the Appellant to serve the record of appeal upon the Respondent and set down the matter for directions on 4.05.2022. On that date, only the Respondent was in attendance. The court proceeded firstly, to admit the appeal to hearing, and secondly directed that the appeal be prosecuted within 90 days from that date, failing which the appeal would stand dismissed for want of prosecution.



3. Following non-compliance by the Applicant with the above direction, the appeal stood dismissed for want of prosecution on 6<sup>th</sup> August 2022, as captured in the memorandum of the Deputy Registrar dated 8.09.2022 formalizing the dismissal. The dismissal order triggered the Notice of Motion dated 15<sup>th</sup> September, 2022 (hereafter the Motion) brought by the Applicant and which is the subject of this ruling, and by which the Applicant seeks the review and/or setting aside of the order issued on 4<sup>th</sup> May, 2022 and that the said order be substituted with an order granting the Applicant extension of time within which to prosecute the appeal.
4. The Motion is supported by the grounds set out on its body and the affidavit sworn by the Appellant's/ Applicant's advocate, Peter Odhiambo, stating that the directions made on 4<sup>th</sup> May, 2022 were not served upon the Applicant. Further that, initially, the matter had been fixed for mention on 3<sup>rd</sup> May, 2022 which was then declared a public holiday and that no notice of the rescheduled date was issued. Pausing here, that deposition is incorrect as the Court proceedings of 17.03.2022 clearly indicate that the date scheduled for directions was 4<sup>th</sup> May 2022, and not 3<sup>rd</sup> May 2022. The advocate further stated that the Applicant was keen on prosecuting the appeal and that it would only be in the interest of justice for the Motion to be allowed.
5. By way of the replying affidavit sworn by Purity K. Mbabu advocate for Board of Trustees Teleposta Pension Scheme (hereafter the Respondent) swore that the Motion is fatally defective on the grounds of failure by the Applicant to annex the order sought to be reviewed. It was also asserted that the conditions for review have not been satisfied by the Applicant and that there has been an unreasonable delay in the filing of the Motion, which she viewed as devoid of merit and deserving dismissal.
6. Directions were given for the parties to dispense with the Motion through written submissions. The Applicant opted to rely on his affidavit material and not to file submissions. The Respondent duly filed its submissions. The Respondent through its counsel cited *Belgo Holdings Limited v Robert Kotch Otachi & another* [2009] eKLR; *Julius Mukami Kanyoko & 2 Others v Samuel Mukua Kamere & Another* [2014] eKLR; and *Suleiman Murunga v Nilestar Holdings Limited & another* [2015] eKLR to support the position that owing to the failure by the Applicant to annex the order sought to be reviewed, the Motion was fatally defective and unsustainable.
7. It was also submitted by counsel for the Respondent that none of the conditions for review set out under Order 45, Rule 1 of the *Civil Procedure Rules* (CPR) had been satisfied by the Applicant to warrant granting of the order sought. To the Respondent, the Applicant is not keen on prosecuting the appeal and the Motion was not timeously filed. To buttress its arguments, the Respondent relied on the case of *Executive Committee Chelimo Plot Owners Welfare Group & 288 others v Langat Joel & 4 others (sued as the Management Committee of Chelimo Squatters Group)* [2018] eKLR. The court was therefore urged to dismiss the Motion, with costs.
8. The Court has considered the rival affidavit material and submissions made in respect of the Motion. Before delving into the substance of the Motion the court will address the issue which was raised by the Respondent regarding the consequences of the Applicant's failure to annex the order which is the subject of the review Motion fatally.
9. Motion is one for review. The court has so far not come across any legal provision, and none has been cited by the Respondent, which expressly requires that an applicant seeking review of an order must annex a copy of such order to his application for review. In several older decisions, including those cited in the submissions by the Respondent, the High Court had almost unanimously held the position that failure to annex or extract the order/decreed sought to be reviewed would be fatal to an application for review.



10. However, the Court of Appeal has departed from this finding, essentially holding that the omission would not necessarily render an application for review fatally defective. This position is seen in the recent case of *Peter Kirika Githaiga & another v Betty Rashid* [2016] eKLR in which the Court of Appeal rendered itself thus:

“On the question whether failure to extract and annex the order or decree sought to be reviewed in an application for review, save for the case of *Sadrudin Kurji & Another v Shalimar Limited & 2 Others* [2008] eKLR, where this Court held that such an omission is not fatal, the Court of Appeal does not appear to have had much occasion to voice itself on the matter.

But from the various decisions rendered by the High Court, the resolution on their part seems unanimous, that an application for review is fatally defective if the order sought to be reviewed is not attached. While no provision of the law makes this a requirement, some of the reasons advanced by the High Court are that inclusion of the order is mandatory so as: to enable the court to determine the impugned point (per Visram, J. as he then was) in *Wilson Saina v Joshua Cherutich t/a Chirutich Company Ltd* [2003] eKLR; and for there to be clarity as to what “aggrieves the applicant”, (Lesiit, J. in *Belgo Holdings Limited v Robert Kotich Otach & Another* [2009] eKLR). Similar sentiments are expressed in various other cases such as by Mutungi, J. in *Suleiman Murunga v Nilestar Holdings Limited & Another* [2015] eKLR. However, in the case of *Rose Njeri Muiruri v James Kiiru Chege & Another* [2009] eKLR; Kasango, J. veered off the High Court path and held that failure to attach the order is not fatal at all.

In our view, the position espoused by this Court and by Kasango J., represents the correct position, as they allow for recognition of the fact that while the law does not expressly demand that the order/ decree be attached, it is at times necessary that the same be extracted for purposes of enabling the court have clarity as to the orders complained about.

Of course an order or decree is the formal expression of the decision of the court. An order emanates from a ruling whereas a judgment gives rise to a decree and should ordinarily be extracted. As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court’s attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective.” (Emphasis added).

11. This court is bound by and adopts the position adopted by the Court of Appeal that while it may be necessary for the order/decree in question to be annexed to an application seeking review, this is not a mandatory requirement. And that failure to do so by a party would not automatically render the application for review fatally defective. The court will therefore proceed to consider the merits of the Motion.
12. Given the entire substance of the orders made on 4<sup>th</sup> May 2022, the Applicant’s motion must be taken as essentially seeking review of the said orders, rather than setting aside of the same. The primary provision concerning review is Section 80 of the Civil Procedure Act Cap. 21 Laws of Kenya which is almost in similar terms as Order 45 Rule 1 of the Civil Procedure Rules which provides that:-

“Any person considering himself aggrieved—



- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

13. From the foregoing provision, the grounds upon which a court can review a decree or order are:

- a) the discovery of new and important matter or evidence, or
- b) some mistake or error apparent on the face of the record, or
- c) any other sufficient reason.

14. Reviewing the Motion before it, the court cannot tell which of the above grounds the Motion was premised on. As earlier observed, a NTSC had been issued to the parties on 18<sup>th</sup> January 2022 requiring them to attend court on 17<sup>th</sup> March, 2022 to show cause as to why the appeal ought not to be dismissed for want of prosecution, since the last step in the matter was on 18<sup>th</sup> January, 2018. The court also noted that contrary to the averments made in the Motion and supporting affidavit, both parties were represented in court on 17<sup>th</sup> March 2022 when the court gave directions for the Applicant to serve the record of appeal upon the Respondent and further directed the parties to attend court on 4<sup>th</sup> May, 2022 for directions on the appeal.

15. Therefore, the Applicant was at all material times aware of the next scheduled date. The Applicant has not given any or reasonable explanation for failure to attend the court on the 4<sup>th</sup> May, 2022. Even so, the court on that date had given the Applicant a reasonable timeline of 90 days within which to prosecute the appeal but no step was taken in that regard. The history of this appeal, which was 5 years old at the date of dismissal, demonstrates indolence and a lack of interest on the part of the Appellant. By his application, the Appellant has not attempted to justify his prayer for enlargement of time for the prosecution of the appeal, despite this history. Besides, there was no prayer in the motion seeking the reinstatement of the dismissed appeal.

16. The court associates itself with the words of the Court of Appeal in *Peter Kipkurui Chemoiwo v Richard Chepsergon* [2021] eKLR in:

“From our own assessment of the matter, the learned Judge did not err. The appellant filed his memorandum of appeal on 15th September, 2012, filed an application for stay of execution on 2nd October, 2012, obtained interim orders maintaining status quo on 3rd October, 2012 pending hearing and determination of the application and filed the record of appeal on 5th July, 2013. Thereafter, the appellant made no effort to prosecute his appeal and was only roused from slumber when the respondent filed his application to dismiss the appeal for want for prosecution.

...



In the end, we find that there is nothing on record to show that the appellant offered any cogent explanation for the delay in prosecuting his appeal. In our view, the respondent who has been denied the fruits of his judgment for so many years is bound to suffer more prejudice than the appellant in the circumstances. The ends of justice will not be served in keeping the appeal alive when the appellant has not been interested in taking any action since filing his record of appeal on 5th July, 2013 until he was prompted by the respondent's application."

17. In view of all the foregoing, the court is of the view that the Applicant has not demonstrated any grounds or sufficient reason to bring the application within the purview of Order 45 Rule 1 of the Civil Procedure Rules to warrant the review order sought. Consequently, the Notice of Motion dated 15<sup>th</sup> September 2022 is found to be without merit and is hereby dismissed with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12TH DAY OF JUNE 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

**For the Applicant: Mr. Maingi h/b for Mr. Odhiambo**

**For the Respondent: Mr. Muuo h/b for Mrs. Mbaabu**

**C/A: Carol**

