



**Ochola v Kengas Energy Limited (Cause E025 of 2021)  
[2024] KEELRC 1252 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1252 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE E025 OF 2021  
MA ONYANGO, J  
MAY 3, 2024**

**BETWEEN**

**NICHOLAS ODUNGA OCHOLA ..... CLAIMANT**

**AND**

**KENGAS ENERGY LIMITED ..... RESPONDENT**

**RULING**

1. The application dated 20<sup>th</sup> November 2023 and filed in court on 21<sup>st</sup> November 2023 has been brought by the Respondent who seeks for the following orders: -
  - i. Spent
  - ii. Spent
  - iii. That the time within which to file and serve a Notice of Appeal be extended to a period to be set by this court.
  - iv. That the Notice of Appeal lodged out of time be deemed to have been lodged and served on time.
  - v. That an order for stay of execution pending appeal be granted.
  - vi. That the costs of this Application be provided for.
2. The application is supported by the sworn affidavit of Pauline Ng'ang'a, the Respondent's Human Resource Manager dated 16<sup>th</sup> November 2023.
3. The grounds upon which the application is made are contained at the foot of the application. Briefly, they are that:- the court rendered its judgment in this matter on 17<sup>th</sup> October 2023 in favour of the Claimant as against the Respondent; that upon the delivery of the judgment and the oral application of the Respondent's advocates, thirty (30) days stay of execution pending appeal was granted which



period was set to expire on 19<sup>th</sup> November 2023; that the Respondent is aggrieved by the judgment and orders of the Court and wishes to appeal against the decision of the court; that the Respondent was required to set off the appeal process by lodging a Notice of Appeal within 14 days from the date of delivery of the judgment; that the reasons for the delay in filing the Notice of Appeal are inadvertent and are excusable for reasons that the previous counsel for the Respondent failed to file a Notice of Appeal despite being given instructions; that the application has been brought without unreasonable delay and lastly, that the intended appeal is merited and raises arguable grounds.

1. In reply to the application, the Claimant filed a Replying Affidavit sworn on 28<sup>th</sup> November 2023. In that affidavit the Claimant avers that judgment was entered on 19<sup>th</sup> October 2023 in the presence of counsel for the Respondent who applied for 30 days stay of execution which was duly granted by the court. The Claimant contends that the reasons given by counsel for the Respondent on the 19<sup>th</sup> October 2023 while seeking stay of execution for the 30 days was to allow the Respondent put his house in order and effect payment of the judgment sum. That the firm of Thiongo & Partners have not sworn an affidavit or made a statement on the allegations that it had instructions from the Respondent to pursue the appeal and inadvertently chose not to act on the same. The Claimant further contends that the instant application does not meet the requirements that must be complied with by a person seeking orders of stay being that substantial loss may result to the Applicant unless the orders are granted; that the Applicant has an arguable case to warrant admission; that the application has been made by the Applicant without unreasonable delay and that the applicant has furnished court with sufficient security for costs for due performance of the decree and judgment of the court as may ultimately be binding on the Applicant. The deponent describes the delay in bringing the application as inordinately long and unreasonable.
2. In a rejoinder, the Respondent filed a supplementary affidavit on 31<sup>st</sup> January 2024 in which it maintained that there was a serious flaw of communication between the management of the Respondent and the previous advocates thus the delay in filing the appeal. It is further deposed that the Respondent is not going to suffer any prejudice if the orders sought are granted and that the Applicant is willing to deposit the decretal sum in court as security pending determination of the intended appeal.
3. As directed by the court, the application was canvassed by way of written submissions. The Respondent/Applicant's submissions were filed on 31<sup>st</sup> January, 2024 while the Claimant's submissions were filed on 5<sup>th</sup> February 2024.

### **Determination**

7. I have examined the application and the response as well as the submissions of the parties.
8. The power of the court to grant an order of extension of time although discretionary, must be confined to the rules of reason and justice. A party seeking an order for extension must demonstrate good and substantial reasons for the delay, and also, that the other party will not be prejudiced.
9. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR laid down the principles that govern the exercise of discretion in applications for extension of time as follows:-
  - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;



2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
10. In the instant case, the Respondent has attributed the delay in filing the Notice of Appeal to failure of its previous counsel to file the same despite it giving counsel instructions to appeal against the decision of this court in time. It is on record that the Respondent has instructed new counsel, the firm of Khadija Mohammed & Associates to represent it in the instant application. There was no evidence adduced to prove that instructions were given to the Respondent’s erstwhile advocates to file appeal and the said advocates failed to do so as alleged by the Respondent.
11. On the question of delay, judgment herein was read on 19<sup>th</sup> October 2023. The instant application was lodged on 21<sup>st</sup> November 2023. In the case of *Utalii Transport Company Ltd & 3 Others v NIC Bank Ltd & Another* 2014 eKLR the Court had this to say on the issue of inordinate delay: -
- “Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth.
- Nevertheless inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable, conclusion that it is inordinate and therefore caution is advised for courts not to take the word “inordinate” in its dictionary measuring but in the sense of excessive as compared to normality”.
12. The delay in this case was about 31 days. Considering the explanation given by the Respondent that the previous counsel on record failed to file a Notice of Appeal on time and that it was necessary to have consultation between the counsel now on record and the Respondent in view of the fact that there was a change of advocates before the application was filed, I do find that the delay was not inordinate and the same has been sufficiently explained.
13. The next issue is whether there will be any prejudice suffered by either of the parties should the court grant or fail to grant the orders sought. The Claimant has submitted that the Respondent has not demonstrated any prejudice it will suffer if the application is not granted.
14. The Respondent has however stated that should it pay the Claimant the decretal sum it is likely to suffer should the appeal succeed as the Claimant has no known source of income and may not be able to refund the decretal sum. I am satisfied that this is sufficient justification on grounds of prejudice likely to be suffered by the Respondent should the orders sought not be granted.



15. The Respondent has further offered security for costs as may be ordered by the court.
16. In the end, I allow the application dated 20<sup>th</sup> November 2023 on condition that the Notice of Appeal is filed and served within 7 days from the date of the delivery of this ruling.
17. Stay of execution pending appeal is granted on condition that the Respondent will deposit the entire decretal sum in court within 30 days as security.
18. The costs of this application shall in any event be borne by the Respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON**

**THIS 3RD DAY OF MAY, 2024**

**MAUREEN ONYANGO**

**JUDGE**

