



**Valley Confectionary Limited v Ototo (Civil Application
E107 of 2023) [2025] KECA 133 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 133 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E107 OF 2023
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
FEBRUARY 7, 2025**

BETWEEN

VALLEY CONFECTIONARY LIMITED APPLICANT

AND

BONFACE MACHOKA OTOTO RESPONDENT

(Being an application to vary the Orders of the Court dated 27th February 2024 and reinstate the Notice of Appeal dated 8th February 2018 against Judgment of the Employment and Labour Relations Court at Nakuru (S. Radido, J.) dated 19th January 2018 in ELRC Case No. 127 OF 2015)

RULING

1. The applicant, Valley Confectionary Limited, has brought the instant application under Rule 3B (a) of the *Appellate Jurisdiction Act*, Rule 5 of the *Court of Appeal Rules 2022* and Order 45 Rule 1 of the *Civil Procedure Rules* seeking orders *inter alia* that:
 3. The Honourable Court be pleased to vacate, set aside and /or review orders issued on 27th February 2024.
 4. The Honourable Court be pleased to reinstate the Notice of Appeal in Nakuru ELRC No. 127 of 2015
 5. The Honourable Court be pleased to issue directions in regards to Nakuru Civil Appeal No. E023 of 2020
2. The grounds of the application have been set out briefly in the application and the affidavit in support of the application sworn by its Advocate on record, Peter Chege and briefly are that:



- a. The Respondent, filed an application dated 21st November 2023, seeking to strike out/ deemed as withdrawn the applicant's Notice of Appeal dated 8th February 2018 filed in Nakuru ELRC No. 127 of 2015 which was in violation of Rule 84 of this Court's Rules
 - b. The applicant was not served with the respondent's application nor the hearing notice, hence the matter proceeded undefended and the application allowed on 27th February 2024
 - c. The respondent deliberately failed to inform the Court of the existence of Civil Appeal No E023 of 2020 whose memorandum and record of appeal had been dully filed and served, and had been placed before the Deputy Registrar for directions on 15th March 2024.
 - d. The applicant only discovered the existence of the respondent's application and the consequent withdrawal of the notice of appeal on record when the matter came up before the Deputy Registrar.
 - e. The applicant is desirous of prosecuting its appeal which has high chances of success and is in danger of being executed in accordance with the impugned judgment in Nakuru ELRC No. 127 of 2015
 - f. The applicant will suffer great prejudice and loss if the orders sought are not granted.
3. The respondent opposed the application vide a relying affidavit dated 6th June 2024. He swears that his advocates served the applicant with the application dated 21st November 2023, that case management notice and directions were dully served by the court via email to both parties, that his advocates filed and served the requisite submissions on the applicant's advocates through two of his email addresses which have not been disputed and that the applicant was well aware of the proceedings of the application but blatantly failed to file a response.
 4. The respondent contended that it was only after his advocates served the applicant with the bill of costs and the draft decree, that it woke up from slumber and hurriedly filed the instant application in a bid to frustrate the respondent from enjoying the fruits of his judgment. The respondent lamented that the applicant had not come before the court with clean hands since it had caused the appeal serialized as Civil Appeal No. Nak E023 of 2020 to be fixed for mention on 15th March 2024 after a delay of about three years and upon realizing that the notice of appeal had been withdrawn. Lastly, it was asserted that the application is an abuse of the court process and urged us to dismiss it in its entirety.
 5. When the matter came up for hearing before us, Mr. Mwangangi held brief for Mr. Chege for the applicant while Ms. Kirui held brief for Mr. Mboga for the respondent. Mr. Mwangangi maintained that his instructions were that the applicant had not been served with the application that led to the dismissal of their notice of appeal or any document regarding the proceedings for that matter. When he was probed by the court regarding the emails sent to the applicant's advocate that were on record, he stood his ground and emphasized that his instructions were that the applicant was in the process of prosecuting its appeal and that it is only just that the court reviews its orders on the premise that the application was never served upon the applicant.
 6. In rebuttal, counsel for the respondent, submitted that the applicant's application was misconceived, an abuse of the court process and a tactic to delay execution of the decree issued by the trial court. Counsel urged that no reason had been given to warrant exercise of discretion in support of the application and thus the application should be dismissed with costs.
 7. The applicant has invoked the residual jurisdiction of this Court to review its own decisions. It is now settled that this jurisdiction must only be exercised in



exceptional cases to correct or avert injustices and to promote public confidence in the administration of justice and, where such circumstances outweigh the principle of finality in litigation. in *Benjob Amalgamated Ltd vs. Kenya Commercial Bank Limited* [2014] eKLR, the court held as follows:

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice.”

8. The question before us, is whether the applicant has met the high threshold for invoking the Court’s residual jurisdiction. It is evidently clear from the record that, in making the orders of 27th February 2024, the learned Judges of this Court (Tuiyott, Ochieng & Korir JJA) were not oblivious to the glaring emails sent to the applicant’s advocate with regards to the application and its subsequent hearing; specifically:
 - a. The email sent by the respondent’s advocate to Munene.chege@yahoo.com on 8th January 2024 serving the Notice of Motion Application dated 21st November 2023;
 - b. The email sent by the respondent’s advocate to Munene.chege@yahoo.com on 24th January 2024 serving the Notice of Motion Application yet again and the corresponding affidavit of service sworn on 24th January 2024 by Peter Kiprono, a clerk in the employ of Mboga G & Co Advocates(advocates for the respondent)
 - c. The case management Notice in Civil Application E107 of 2023 from the Court sent on Monday, 29th January 2024 at 1.00 p.m to the respondent’s counsel and the applicant’s counsel at Munene.chegeadv@gmail.com and Munene.chege@yahoo.com
 - d. The email from the Deputy registrar sent on Tuesday, January 23rd 2024 to Munene.chegeadv@gmail.com and Munene.chege@yahoo.com informing counsel that Civil Application E107 of 2023 will be coming up for case management on Wednesday 24th January,2024
9. The applicant in his supporting affidavit states he only realized that the respondent had filed an application when his own appeal came up for directions before the Deputy Registrar on 15th March 2024.
10. Interestingly, the applicant’s Advocate seems to have received the email from the court sent to Munene.chegeadv@gmail.com and Munene.chege@yahoo.com informing him that the applicant’s appeal, Civil Appeal No Nak E023 of 2020 will be coming up for case management on Friday 15th March 2024 at 9.00 a.m (which is attached to the respondent’s replying affidavit)
11. Even though the applicant’s advocate neglected to state how he came to know of the mention or how he received the link to attend the said mention, the fact that the applicant’s advocate attended the said mention is a clear indication that the emails Munene.chegeadv@gmail.com and Munene.chege@yahoo.com are in active service. Perhaps this is a case of selective receipt or sighting of emails?



12. Whatever the case, the applicant's assertion that he was not served with the application dated 21st November 2023, seeking to strike out/ deemed as withdrawn the Notice of Appeal dated 8th February 2018 cannot stand. Consequently, its request beseeching us to vary that decision has no merit. The applicant cannot escape the damning evidence tendered before us, showing that he was properly and correctly served. We cannot exercise our power on a party who is not diligent in his dealings with the court and his colleagues.
13. We think we have said enough to demonstrate that the application is devoid of merit. That being our position on the matter, the application is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF FEBRUARY, 2025.

M. WARSAME

.....

JUDGE OF APPEAL

J.MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA CIARB., FCIARB

.....

JUDGE OF APPEAL

I certify that this a true copy of the original.

Signed

DEPUTY REGISTRAR

