



Raindrops Limited v County Government of Kilifi (Civil Application E057 of 2021) [2024] KECA 174 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KECA 174 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E057 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
FEBRUARY 23, 2024**

BETWEEN

RAINDROPS LIMITED APPLICANT

AND

COUNTY GOVERNMENT OF KILIFI RESPONDENT

(Being an Application to vary/rescind and or unconditionally discharge Stay Orders of this Court dated 4th of February 2022)

RULING

1. By a Notice of Motion dated 21st August 2023 brought pursuant to sections 1A and 18 of the [Civil Procedure Act](#); sections 3A and 3B of the [Appellate Jurisdiction Act](#) and rule 57 of the [Court of Appeal Rules](#), the applicant, Raindrops Limited, seeks orders to:
 - (i) vary/rescind and or unconditionally discharge orders dated 4th February 2022 given by this Court due to failure by the respondent to comply with the orders; and/or
 - (ii) confirm that the orders of stay of execution lapsed on 22nd of March 2022 due to the respondent's failure to file a complete Record of appeal within 45 days from the date of the ruling of this Court.
2. The motion is brought on the grounds set out on its face, and is supported by the sworn affidavit of Shaib Hamisi Mtuwa, a Director of the applicant, who contended that, upon hearing an application by the respondent dated 25th September 2021, this Court, in its ruling dated 4th February 2022, allowed the application on condition that the respondent files the Record of appeal within 45 days from the date of the ruling; that, on 1st March 2022, the respondent filed an incomplete Record of appeal, which was contrary to the orders of the Court; that the filed Record of appeal in Malindi Civil Appeal No. E007 of 2022 - *County Government of Kilifi v Raindrops Limited* - has come up before the Deputy



Registrar for compliance, but that the appeal cannot be listed for hearing due to non-compliance by the respondent with the orders; that, further, the same appeal has come up for pre-trial directions on different occasions, namely on 13th March 2023, 14th February 2023 and 22nd November 2022 and, again, on, 15th June 2023 where the Court noted that the Record of appeal was incomplete; that the respondent is taking advantage of the stay order by refusing to file a complete Record of appeal, thereby prejudicing the applicant and denying it the enjoyment of the fruits of its judgment in the High Court; that the applicant continues to suffer irreparable harm and damage not capable of compensation in monetary terms on account of the stay orders; that the respondent continues to retain the dues payable to the applicant for service rendered totaling about Kshs. 500,000,000; that, notwithstanding the express orders of the High Court, and the fact that the dispute pertaining to cess and parking fees collection is pending determination before this Court and in the High Court, the respondent has awarded third parties a similar contract; that, in the meantime, the Kenya Revenue Authority continues to demand taxes, penalties and interest on the amounts invoiced to the applicant, and yet those amounts, have not been paid by the respondent; that, additionally, the losses continue to accrue to it as its 5 weighbridges are lying idle; and that the respondent's actions are an abuse of the Court processes.

3. Learned counsel for the applicant, Mr. Odipo, reiterated the applicant's averments and added that, in accordance with rule 90 of the Court's rules, the respondent ought to have complied with the Court's order and filed the record of appeal within the stipulated period.
4. In rebuttal, Mr. Bwire, learned counsel for the respondent, submitted that a record of appeal was filed within the prescribed period, and that the question as to whether or not that record of appeal is complete or incomplete is a question of law that is to be determined in the appeal.
5. The brief facts of the case are that the applicant filed suit against the respondent in High Court at Malindi Civil Case No. 9 of 2015 in which it claimed that the respondent was in breach of an agreement made between them for collection of cess and parking fees revenue in Kilifi County. It was the applicant's case that the respondent had sought to terminate the agreement in a manner that was contrary to the agreed terms. The applicant sought a permanent injunction to restrain the respondent from terminating the agreement and, in addition, sought special and general damages.
6. The respondent denied the claim and averred that it terminated the agreement on account of the applicant's breach of the agreement in failing to fulfil a condition precedent set out in the agreement; and, further, that the agreement violated the provisions of the Constitution and the Public Finance Management Act. The respondent also filed a counterclaim against the applicant for, among other reliefs: an order that the agreement be declared null and void for breach of the Constitution and the law; for the applicant to cease revenue collection within Kilifi County; for access to the applicant's books of accounts; and reimbursement of any surplus monies found to have been paid to it by the respondent.
7. Upon considering the evidence, the trial Judge found that the respondent was in breach of the agreement by seeking to terminate it without following the laid down termination procedure; and, further, that no grounds were demonstrated for holding that the agreement was voidable. The Judge ordered: that the Chief Government Valuer conducts a valuation of the infrastructure developed by the applicant and file a report in court within 30 days; that the Auditor General do review the accounts between the parties,

“...including the monies collected in the joint escrow accounts and any other account where public funds accruing from the collection of cess and parking revenue in Kilifi County have been held...”



and file a report within 30 days; that

“damages for loss of profits and expenses incurred subject to obtaining of the Auditors Report on account of the consideration for services rendered ...”

be enforced at a ratio of 30%:70% underpinned on the net income matrix; that

“... under the fact specific approach exemplary damages awarded at Kshs.2,500,000.00.”;

that as a consequence of repudiation by the respondent ,

“...it shall be liable for monthly salaries and emoluments less any statutory deductions...”

to the applicants; that the applicants

“... to be compensated based on the valuation by the Government Chief Valuer”;

and that

“... further orders of the court to await the filing of the above reports”.

8. Aggrieved, the respondent filed an appeal to this Court and proceeded to file an application seeking to stay those orders. In its ruling, this Court allowed the application in the following terms:

“We allow the application in terms of prayer 3 and order that there will be a stay of execution of the judgment in Malindi High Court Case No.9 of 2015 pending the hearing and determination of the applicant’s intended appeal. This order is conditional upon the applicant filing and serving the substantive appeal, the memorandum and record of appeal, if it has not already done so, within 45 days from the date of delivery of this ruling, failing which the order granted herein will automatically lapse.”

9. It is on the basis of these orders that the applicant has brought this application.

10. In so far as this Court’s rules on the jurisdiction to review or vary its own orders are concerned, the Court has on several occasions held that it has residual powers to review, vary or rescind its decisions in very exceptional circumstances. See *Benjob Amalgamated Ltd & Another v Kenya Commercial Bank* [2014] eKLR (Civil Application No. Sup 16 of 2012); and the Supreme Court decision in *Nyutu Agrovet Limited v Airtel Networks Kenya Ltd & Another* [2019] eKLR.

11. In the case of *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, this Court stated that:

“In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in *Inco Europe Ltd & others (supra)* hold that the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances. Such a finding is in consonance with practises from other jurisdictions and maintains fidelity to the law.”



12. Likewise, in the case of *Ndeti & another v Matei Julius Mulili Ndeti & Nzioki Mulili Ndeti (Administrators of the Estate of Harrison Mulili Ndeti - Deceased) & 4 others* (Civil Application E064 of 2019) [2023] KECA 60 (KLR), this Court observed that:

“Whenever the residual jurisdiction is sought to be invoked, the court must be satisfied that the case falls within the exceptional categories before it can accede to the application and reopen the case. One may without levity ask the question, how exceptional is exceptional? The language used in decided cases is necessarily general: apart from the descriptive phrase “exceptional circumstances”, the requirements are that the probability of a significant (“real”) injustice must be clearly established, and that there be no effective alternative remedy”. (emphasis ours)

13. Requesting us to review this Court’s decision of 4th February 2022, it is the applicant’s contention that the respondent failed to comply with the Court’s conditions for stay of execution as they filed an incomplete Record of appeal which, in their view, was invalid. During the hearing of the application, both parties admitted that the Record of appeal was filed within the period specified by the ruling, save that it was incomplete in the sense that the same did not have a copy of the proceedings in the High Court.

14. In the case of *Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral and Boundaries Commission* [2019] eKLR, the Supreme Court held that:

“the failure to include the ‘record of proceedings of the Court of Appeal’ in the Record of Appeal does not automatically render the appeal filed before this Court fatal. For if the law contemplates that such an omitted document may be filed later, the same law cannot be said to render a Record of Appeal with that omission outrightly fatal”

15. This was reiterated by the Court in the case of *Institute for Social Accountability & another v National Assembly of Kenya & 4 others* [2020] eKLR.

Rule 90 of this Court’s rules provides:

“Where a document referred to in rule 89 (1) and (2) is omitted from the record of appeal, the appellant may, within fifteen days after lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under rule 94 (3) and, thereafter, with leave of the deputy registrar on application.”

16. By virtue of rule 90 of this Court’s rules, failure to include the record of proceedings of the High Court in the Record of appeal does not automatically render the appeal a nullity, as the law contemplates that an omitted document may be filed later. The same rules also provide other courses of action which the applicant is at liberty to pursue, in the event that the respondent persists in delaying the hearing of the appeal on account of the delay in obtaining the High Court proceedings.

17. In the circumstances, we are satisfied that, the respondent having complied with this Court’s order to file the Record of appeal within the stipulated time, we find that the applicant’s application to vary or rescind the orders for stay of execution is without merit and, accordingly, it is hereby dismissed with costs to the respondent.

18. It is so ordered

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.



A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

