



**East African Portland Cement PLC v Guma (Civil Application
E403 of 2020) [2024] KECA 273 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 273 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E403 OF 2020
S OLE KANTAI, JA
MARCH 8, 2024**

BETWEEN

EAST AFRICAN PORTLAND CEMENT PLC APPLICANT

AND

JACOB OMONDI GUMA RESPONDENT

(Being an application for review/rescission of the Ruling/Orders of the Court on 7th May, 2021 (Karanja, Okwengu & Warsame, JJ.A.) granting stay of execution of the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (M. Onyango, J.) on 13th November, 2020 in ELRC Petition No. 216 of 2019)

RULING

1. On 24th March, 2022 a motion was placed before me on the question of urgency. I considered the same and I declined to certify it as urgent and I directed that the same be listed for hearing by the Court registry in the usual way.
2. By a letter dated the same day 24th March, 2022 M/S T.O. K'opere & Company Advocates, acting for the applicant Jacob Omondi Guma requested the registry of this Court to place the matter before a single Judge for an inter-parte hearing under rule 47(5) Court of Appeal Rules, (today rule 49(5) [Court of Appeal Rules, 2022](#)) on the question of urgency. The matter was placed before me in the cause list today 4th March, 2024, nearly 2 years after my said order. I am not sure whether the orders of Employment and Labour Relations Court (ELRC) given in the judgment of 13th November, 2020 are still executable.
3. The applicant states in written submissions that ELRC had in the said judgment ordered for reinstatement of the applicant to the position of Production Manager on a 3 year fixed term contract from 24th September, 2019 to 25th September, 2022; that ELRC had issued an order of injunction on 18th November, 2019 restraining the respondent East Africa Portland Cement PLC from employing



anybody to the substantive position of Production Manager pending the hearing and determination of the petition then pending before ELRC; that the respondent defied those orders and appointed a Production Manager which led to an application for contempt of court. The respondent's Managing Director was convicted and fined Kshs.200,000 in default to serve 1 month imprisonment and purge contempt; there was an appeal but the petition in ELRC was then concluded leading to the orders of reinstatement, the respondent filed an application for stay of execution pending appeal which application was granted by this Court in a ruling delivered on 7th May, 2021. According to the applicant the respondent did not thereafter file an appeal despite reminders to do so and that is what led to the motion by the applicant which I declined to certify as urgent. It is stated at paragraph 10, 11 and 12 of the applicant's written submissions:

10. We have since written seven (7) letters culminating into the Letter dated 15/02/24 and a Personal Intervention with the president of the Court by the Applicant's Advocate leading to the email and Directions dated 21/02/24 setting this matter for Hearing on the Issue of Urgency before a Single Judge on 05/03/24 (Two (2) years after the filing of this application. What an Injustice to a Litigant who has been denied enjoyment of the fruits of his judgment dated 13/11/20 for over three (3) years by the Orders of Stay granted on 07/05/21 without any Appeal being filed).
 11. The Urgency of the Application dated 23/03/22 was to the effect that whereas he Respondent filed a Notice of Appeal dated 13/11/20 against the Judgment of the Superior Court dated 13/11/20 and filed an Application before this Court for stay of Execution on 14/12/20 and obtained Orders for Stay on 07/05/21. The Respondent never filed any Appeal and the Three (3) year fixed term contract of the Applicant (Jacob Omondi Guma) which the Superior Court ordered him to be reinstated and serve without any loss of benefits was running from 24/09/19 to 25/09/22 (now past).
 12. That period has now lapsed and this Court through a full bench must make a determination on the Notice of Motion dated 23/3/22 to Review /Rescind and vacate the stay orders granted on 07/05/21 and deem the notice of Appeal dated 12/11/20 pursuant to which the Orders of 07/05/21 were granted to have withdrawn, lapsed or become of no consequence as No Appeal was ever filed by the Respondent under Rule 83 of the Court of Appeal Rules.”
4. Case law such as *Evans Achimba v Stitch Masters Limited* [2019] eKLR is cited to support the proposition that an appeal should be deemed as withdrawn under the old rule 83 (now rule 85) if that party does not take steps to file or prosecute an appeal within reasonable time.
 6. It is submitted for the respondent (East Africa Portland Cement PLC) that an applicant must demonstrate that he is faced with actual or imminent peril or harm or damage if an application is not certified urgent. The case of *Equip Agencies Limited v Akber Abdullah Kassam Esmail & 4 others* [2015] eKLR is cited in support of that proposition. It is submitted that the applicant has faced no such scenario.
 7. When I considered the certificate of urgency, the motion, the affidavit in support on 24th March, 2022 I noted the history of the matter and all the processes that the matter had undergone at ELRC and in this Court. I was not satisfied that the motion qualified for certification of urgency under rule 49 *Court of Appeal Rules, 2022*. I consider the whole process of certification to be in the nature of queued up heavy traffic which is moving slowly in a controlled organized manner. In such a scenario traffic



laws allow ambulances, fire engines and the like to use a service lane or overtake to speed across to reach the desired destination without delay because of urgent circumstances that arise in such a situation. Our registry is organized in such a manner that files are received, are allocated a case number and are then queued up to be heard on first-in-first out basis. Rule 49 envisages a situation where an applicant cannot queue and requests to be allowed to overtake traffic, to jump to be at the head of that traffic for urgent hearing. As correctly stated by the respondent there must be actual or imminent peril or harm facing an applicant for his application to be certified urgent. I did not see such urgency in the motion which prayed that a ruling and orders made be reviewed or rescinded or vacated.

8. The application that came before me on 24th March, 2022 did not qualify for certification as urgent. I still hold that view. Let the same be listed for hearing in the usual manner.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

