



**East African Portland Cement Company v Kenya Chemical &  
Allied Workers Union & 3 others (Civil Appeal (Application)  
E527 of 2023) [2024] KECA 1314 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KECA 1314 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E527 OF 2023  
JW LESSIT, JA  
SEPTEMBER 27, 2024**

**BETWEEN**

**EAST AFRICAN PORTLAND CEMENT COMPANY ..... APPLICANT**

**AND**

**KENYA CHEMICAL & ALLIED WORKERS UNION ..... 1<sup>ST</sup> RESPONDENT**

**JULIET CHEPCHUMBA TUWOT & 227 OTHERS ..... 2<sup>ND</sup> RESPONDENT**

**JOSEPH KARITHI MITHIKA & 219 OTHERS ..... 3<sup>RD</sup> RESPONDENT**

**MORRIS MUTETI KAWINZI ..... 4<sup>TH</sup> RESPONDENT**

*(An application for extension of time for filing and serving of the Record of Appeal out of time in an appeal against the whole Ruling and Orders the Employment and Labour Relations Court at Nairobi (Anna Ngibuini Mwaure, J.) delivered on 7th July 2023 in E.L.R.C Cause No. 2119 of 2014)*

**RULING**

1. East African Portland Cement Company, hereinafter the applicant, in this Notice of Motion dated 10<sup>th</sup> November 2023 brought pursuant to sections 3A and 3B of the *Appellate Jurisdiction Act* and rule 4 of the Court of Appeal Rules, 2022 (hereinafter the Rules]) and all other enabling provisions of the law seeks, inter alia, orders that:
  - i. That this honourable Court be pleased to grant the applicant extension of time to file and serve its record of appeal out of time against the ruling and orders of the Employment and Labour Relations Court at Nairobi (A. Mwaure, J.) delivered on 7<sup>th</sup> July 2023 in ELRC Cause No. 2119 of 2014;



- ii. That the record of appeal lodged on 18<sup>th</sup> September 2023 be deemed duly filed and this Court's registry be directed to issue a case number for the appeal;
  - iii. That upon number 2 above, the record of appeal be served upon the respondents within seven (7) days from the orders issued for filing;
  - iv. That, in the alternative to ii and iii above, the applicant do relodge and file its record of appeal and the same be deemed to be duly filed;
  - v. That flowing from order iii and iv above, the record of appeal be served upon the respondents within 7 days of the order issued under prayer iv.
2. The application is supported by grounds on the face of the application and the supporting affidavits sworn by Simon Peter, legal counsel at the applicant's company and Victor Mungai; an advocate in conduct of the applicant's case respectively both dated 10<sup>th</sup> November 2023. The applicant avers that it filed its notice of appeal in time but attributes the delay in filing its record of appeal to the encountered technical challenges with the e-filing system. The applicant states that whereas the record of appeal was uploaded on the e-filing portal on 18<sup>th</sup> September 2023 which was the last day for filing its records of appeal, at 8.09 a.m. and invoices automatically generated for Kshs.3,100/- in respect of the record of appeal and Kshs.6,000/- in respect of security deposit, the e-filing system nevertheless declined to accept payment of the invoices due to an internal technical failure of the system. Further, that upon re-uploading the documents as advised by the e-filing technical team so as to generate a new and fresh invoice which would now allow receipt of the applicant's payment, the payment reflected a different date and time from when it initially lodged the record of appeal.
  3. The applicant avers that the resultant delay was inadvertent and unintended and was not attributable to commission and/or omission of the applicant. It also avers that its appeal is not frivolous as it raises substantial issues of both law and fact with high chance of success as demonstrated in their memorandum of appeal dated 18<sup>th</sup> September 2023 and which this Court needs to adjudicate on; and lastly, that the applicant stands to suffer irreparable prejudice and/or substantial loss if the orders sought are to be denied.
  4. In its written submissions dated 8<sup>th</sup> March 2024, the applicant urged that it filed the record of appeal less than two months from the date it was required to file its record of appeal. It relied on the case of Andrew Kiplagat Chemaringio vs. Paul Kipkorir [2018] eKLR for the proposition the law does not set a minimum or maximum period of delay but only requires that a plausible and satisfactory explanation be given as the key that unlocks the flow of the court's favour.
  5. On the possibility of the appeal succeeding, the applicant relied on the ten grounds of appeal in its memorandum of appeal and, citing Athuman Nusura vs. Afwa Mohamed Ramadhan [2015] eKLR urged that at this stage, the Court was not required to determine the merit or otherwise of the appeal. It was urged that the delay was reasonable and not inordinate and urged the Court to allow its application.
  6. The 1<sup>st</sup> respondent has replied through a replying affidavit sworn on 12<sup>th</sup> March 2024 by Peter Ouko Onyango, the National General Secretary of the 1<sup>st</sup> respondent. He states that the applicant's application is frivolous and does not raise any substantial issues of law and is an abuse of the court process. Further, it is argued that the orders against which the applicant seeks extension of time to lodge an appeal against are orders that have been overtaken by events as the garnishees already availed their statements of funds they hold in their respective organizations on behalf of the applicant and therefore the application is one of an academic value and is only meant to confuse the issues.



7. The 1<sup>st</sup> respondent avers that although the applicant states that the delay in filing the record of appeal was occasioned by technical challenges with the e-filing system it nevertheless failed to explain why it waited until the last day to file its record. The 1<sup>st</sup> respondent further contends that considering the fact that the record of appeal was lodged on 18<sup>th</sup> September 2023 at 2126 hours, and the payment SMS attached to show failed transactions are at 2.34 p.m. and 3.25 p.m., it is clear that the record of appeal was lodged on 18<sup>th</sup> September 2023 and payments not attempted on the day but on the following day as is evident from the time indications on the payment responses. It is argued that the excuse by the applicant is false and ought not to be entertained by this Court. Further, that the delay was intentional and will prejudice the respondents' rights to enjoy the fruit of the court's judgment and ruling considering that the decree was done way back on 6<sup>th</sup> July 2015 and has remained unsatisfied to date.
8. Lastly, the 1<sup>st</sup> respondent states that the extension of time to file an appeal being equitable remedy is not available to the applicant based on its past conduct of not fulfilling the previous conditional orders of this Court issued on 14<sup>th</sup> September 2018 and also the consent order entered between the parties on 13<sup>th</sup> January 2020 for settlement of the decretal sum. The 1<sup>st</sup> respondent thus prays that the application be dismissed.
9. In response by the 3<sup>rd</sup> respondent, one Dakota Wario has filed a replying affidavit sworn on 12<sup>th</sup> March 2023 on behalf of the 3<sup>rd</sup> respondent. The date of the affidavit must be an error on the year as it is sworn in regards to a ruling delivered in July 2023; the same ought to have read 2024. The deponent avers that the impugned ruling of 7<sup>th</sup> July 2023 was interim in nature and the same could not be appealed against without leave of the court. It is contended that the applicant is trying to delay the payment of Kshs.1,401,565,364.0/- being salary and houses allowance arrears due as at 31<sup>st</sup> December 2017 excluding overtime, leave travelling allowance and shift allowance as awarded by the trial court by a decree dated 6<sup>th</sup> July 2015 and amended on 2<sup>nd</sup> August 2018 which, it is contended must be executed within twelve (12) years and its now the 8<sup>th</sup> year.
10. It is contended that litigation must come to an end and that it is for this Court to intervene on their behalf if this is not so, then the judgment entered on 6<sup>th</sup> July 2015 will be converted to a mere paper judgment not capable of being executed. Lastly, it is stated that no proper reasons have been presented before this Court to warrant the issuance of the orders sought and therefore in that regard, the application be dismissed.
11. The 3<sup>rd</sup> respondent have filed grounds of opposition raising six (6) grounds. In their written submissions, relying on the case of Imperial Bank Limited (In Receivership) & Another vs. Alnashir Popat & 18 Others [2018] eKLR, and Jimcab Services Limited vs. Bartholomew Benard Osodo & Another [2018] eKLR, the 3<sup>rd</sup> respondent submitted that the applicant has not demonstrated due diligence in the observance of timelines set in law for filing of appellate processes and is therefore disentitled to the relief sought. The 3<sup>rd</sup> Respondents contend that leave ought to have been obtained prior to the appeal being instituted, the same was never done and therefore the appeal was irregular, incurably defective and procedurally flawed and we submit that without such leave this appellate court lacked jurisdiction to hear and determine the appeal. The reason being the Appeal emanates from Garnishee proceedings where garnishee orders absolute were issued against five garnishees that are not present before this Court.
12. They urge that Garnishee proceedings clearly lie outside the ambit of the orders set out in Order 43 rule 1(1); and that upon perusal of the court record it does not reflect any leave to appeal being sought or obtained by the appellant before it filed the instant appeal. The 3<sup>rd</sup> respondent submitted that



the applicable law is section 75 of the *Civil Procedure Act* (Act) and Order 43 rule 1(1) of the Civil Procedure Rules. They relied on the Court of Appeal decision of Nyutu Agrovet vs Airtel Networks Ltd [2015] eKLR; wherein a five (5) judge bench held that where there was no automatic right to appeal as stipulated under section 75 of the *Civil Procedure Act* and Order 43 of the Civil Procedure Rules then the appellate court had no jurisdiction to hear or determine an appeal unless such leave was first sought and obtained. Reliance was made on the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR; and also Owners of Motor Vessel ‘Lilian S’ vs Caltex Oil (K) Ltd (1989) KLR, for the proposition that where the court is without jurisdiction this court or any other court can do nothing more than down its tools.

13. I have considered the application, the affidavits sworn for and against the application as well as the submissions of the parties. The application has been brought under rule 4 of the Court of Appeal Rules and seeks extension of time to file and serve its record of appeal, which rule invokes my mandate to intervene. It provides:

“(4) The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

14. The principles that guide the court in the exercise of its mandate under the said rule are set out in the case law that the applicant has relied upon in support of his application already highlighted above, among numerous others, have now been crystallized by the Supreme Court of Kenya decision in Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013] eKLR. In summary, these principles are firstly, the length of the delay. Secondly, reason for the delay. Thirdly, “possibly” arguability of the intended appeal and fourthly, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
15. In order to understand the length of the delay, it is important I state that the impugned judgment was delivered on the 7<sup>th</sup> July 2023. The applicant filed its notice of appeal on the 19<sup>th</sup> July 2023, which was the last day of filing the notice. Going by that date, as prescribed under rule of the Rules, the record of appeal should have been filed by 18<sup>th</sup> September 2023. Indeed, the applicants has annexed the e-filing ticket showing that the record of appeal was uploaded on the 18<sup>th</sup>, the last day for filing of the same. The payment was not done the same day, as evidenced by the annexed receipts which show payment was made the next day.
16. The applicant has explained the reason for the one day delay in filing, as a technical hitch in the court’s e-filing system. The delay involved in this application is one day.
17. On the arguability of the intended appeal, the applicants have annexed a draft memorandum of appeal indicating the issues they intend to take up on appeal. I have glanced at the memorandum and noted some of the grounds raised include the challenge that the trial Judge was influenced by extraneous matters, that the basis for the ruling was sympathy of the Grievants rather on the issues raised by the applicants and the complaint that the applicant was condemned unheard. As the case cited by the applicant cautioned, in Athuman Nusura Juma vs. Afwa Nohamed, (supra) it is not the duty of the Court to determine the merit or otherwise of the grounds raised. Considering them, I am satisfied that the grounds raised do warrant a consideration by this Court. They are not idle. See Sammy Mwangi Kiriethe & 2 Others vs. Kenya Commercial Bank [2020] eKLR.



18. As to the prejudice the parties stand to suffer. On the part of the applicant, the right to be heard on the already initiated appellate process which in law is to be weighed against the prejudice the respondents stand to suffer should the relief sought by applicants be granted. According to the current jurisprudential trend the right to appellant justice is now constitutionally entrenched. The parameters for according this right to a deserving party have also been crystallized by case law. See Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR.
19. The respondents also have a right to enjoy the fruits of their judgment. They have also argued that the matter has taken long to be finalized. Important as this is, the applicant still has a right to be heard on issues raised, especially considering the astronomical amounts involved and the complexities in the execution process.
20. I noted that the 3<sup>rd</sup> respondent raised an issue of jurisdiction. The point is, there is no application for striking out the appeal or anything to that end. The application before me, as I have stated severally, is for extension of time to file the record of appeal. The jurisdictional issue, even if it was to be heard is not a matter for a single judge.
21. I have come to the conclusion that the application is merited. Accordingly I make the following orders:
  - i. The application dated 10<sup>th</sup> November 2023 is allowed;
  - ii. That the time to file and serve the applicant's record of appeal out of time against the ruling and orders of the Employment and Labour Relations Court at Nairobi (A. Mwaure, J.) delivered on 7<sup>th</sup> July 2023 in ELRC Cause No. 2119 of 2014 be and is hereby extended;
  - iii. That the record of appeal lodged on 18<sup>th</sup> September 2023 be deemed to be duly filed;
  - iv. That the record of appeal be served upon the respondents within twenty one (21) days from the date hereof;
  - v. That the costs of this application be in the appeal.

**DATED AND DELIVERED AT NAKURU THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

*I certify that this is a true copy of the original*

*Signed Deputy Registrar*

**J. LESIIT**

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**JUDGE OF APPEAL**

