



**Kenya Plantations & Agricultural Workers Union v Cargill Kenya Limited & another
(Civil Application 067 of 2022) [2023] KECA 920 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 920 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION 067 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

**KENYA PLANTATIONS & AGRICULTURAL WORKERS
UNION APPLICANT**

AND

**CARGILL KENYA LIMITED 1ST RESPONDENT
INSIGHT MANAGEMENT CONSULTANTS LIMITED 2ND RESPONDENT**

(Being an application for striking out the 2nd respondent's Notice of Appeal dated March 26, 2020 from the Ruling and Order of Employment & Labour Relations Court of Kenya at Mombasa (Rika J.) dated March 13, 2020)

RULING

1. Kenya Plantations & Agricultural Workers Union, the Applicant herein, filed Miscellaneous Application No.13 of 2019 at the Employment and Labour Relations Court (ELRC) at Mombasa on April 12, 2019 seeking transfer of a suit filed at the Chief Magistrate's Court Mombasa, being ELRC Cause No. 85 of 2018 to the ELRC. The said application was objected to by Insight Management Consultants Limited, the 2nd respondent herein. On March 13, 2020, Rika J. ordered that Mombasa CM ELRC Cause No. 85 of 2018 be transferred to the ELRC Mombasa for hearing and determination, whereupon the parties moved to the ELRC for pre-trial conferencing, upon the arrival of the file from the Chief Magistrate's Court. Aggrieved by that decision, the 2nd respondent filed a Notice of Appeal in this court dated March 26, 2020 and an application being Civil Application No. E001 of 2021 seeking stay of execution of the ruling, and stay of further proceedings in Mombasa ELRC No. 37 of 2020 pending the hearing and determination of the intended appeal. On June 4, 2021 this court (Musinga, Karanja & Kairu JJA.) allowed the 2nd respondent's application and granted stay of execution orders.



2. The applicant has now filed another application in this court by way of a Notice of Motion dated October 13, 2022 seeking to strike out the Notice of Appeal dated March 26, 2020 or in the alternative that the Notice of Appeal be deemed as withdrawn. The main grounds for the application as set out in the supporting affidavit sworn on the same date by Dalphine Muunde, the applicant's Branch Secretary, and the applicant's submissions dated March 13, 2023, was that the 2nd respondent is taking advantage of the stay orders and is in the process of altering the records at the company with the aim of rendering the pending suit before the ELRC Mombasa incapable of being prosecuted and defeating justice, and that no Record of Appeal has been

prepared, filed and served since the date of the Notice of Appeal. According to the applicant 60 days prescribed by the Court of Appeal Rules have not been adhered to as the delay is approximately 2 years and 6 months.

3. In opposition to the application, the 2nd respondent's Managing Director, David Malago in a replying affidavit dated October 24, 2022, averred that the application is premised on gross misrepresentation and non-disclosure of material facts, since the substantive appeal was filed concurrently with the application seeking stay of execution as exhibited by the filing receipts marked as DM-1 and DM-2, which were served upon the applicant and 1st respondent via e-mails dated March 26, 2020, May 11, 2020, October 9, 2020 and April 24, 2021 marked as DM-3. He avers that the allegations of changes in the company's record are not supported with cogent evidence as the 2nd respondent's registration Number C.123373 is different entity from Insight Management Consultants Limited Registration Number C.112809.

4. The respondent in its written submissions dated March 15, 2023 reiterated that the Notice of Appeal was filed on May 12, 2020 as result of the disruption by Covid 19 pandemic to court operations and was served upon the Applicant and the 1st respondent on May 11, 2020 via email once it was formally lodged at the registry. It was further submitted that the Record of Appeal was filed before this court on October 14, 2022 and served on October 9, 2020. In addition, that the motion seeking to strike out the Notice

of Appeal was filed more than 2 years after the service of the impugned Record of Appeal, which was beyond the 30 days stipulated under Rule 86 of the *Court of Appeal Rules*, 2022. Further that leave was not sought to file the application. Lastly, it was submitted that the allegations of changes in the company's record are not supported with cogent evidence, as the 2nd respondent's registration Number C.123373 is different from that of the entity known as Insight Management Consultants Limited complained about which is registration number C.112809.

5. We heard the application on the court's virtual platform on March 20, 2023, and learned counsel Mr. Nyange appeared for the applicant, learned counsel Mr. Mutua appeared for the 1st respondent, while learned counsel Mr. Mudao appeared for the 2nd respondent. Mr. Mutua informed the court that the 1st respondent had not filed any response to the application, as it was primarily against the 2nd respondent, but that he was supporting the 2nd respondent's position.

6. It is not disputed that under the then applicable Rule 82 of the *Court of Appeal Rules* of 2010, an appeal was instituted by lodging a Memorandum of Appeal and Record of Appeal in the appropriate registry, within sixty (60) days of the date when the Notice of Appeal was lodged. The proviso to Rule 82 (1) excluded such time as may be certified by the Registrar of the superior court as having been required for the preparation and delivery to the

appellant of the copy of the proceedings, where an application for the proceedings was made within thirty (30) days of the date of the decision intended to be appealed against. Rule 82 (2) in addition



provided that an appellant shall not be entitled to rely on the proviso unless the application for the copy of the proceedings was in writing and a copy of it served on the respondent. Similar provisions are now found in Rule 84 of the Court of Appeal Rules, 2022.

7. Under Rule 84 of the 2010 Court of Appeal Rules, any person affected by an appeal may apply to strike out Notice of Appeal or Appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. However, the proviso to Rule 84 required such an application to be brought before the expiry of thirty

(30) days from the date of service of the Notice of Appeal or Record of Appeal as the case may be. Similar provisions are now found in Rule 86 of the 2022 Rules. In this regard, it is notable that the instant application to strike out the Notice of Appeal was lodged on October 14, 2022, over one year after the lodging and service of the Notice of Appeal, and to this extent the application is incompetent.

8. As regards the alternative prayer that this court deems the Notice of Appeal withdrawn, this indeed is an option and route that this court has the power and discretion to take, pursuant to Rule 83 of the Court of Appeal Rules of

2010 and Rule 85 of the Court of Appeal Rules 2022, either on application or on its own motion as was held in the case of Mae Properties Limited vs Joseph Kibe & another (2017) e KLR. The provisions of Rule 83 of the Court of Appeal Rules, 2010 and Rule 85 of the Court of Appeal Rules 2022 are however predicated on the existence of circumstances from which the court can deem that a Notice of Appeal had been withdrawn. It is our view that such circumstances do not exist in the instant application, for the reason that there is evidence of steps taken by the 2nd respondent of filing of the Record of Appeal and despite the service thereof having been disputed by the applicant, copies of the record of appeal was provided by the 2nd respondent. This is therefore not a case where we can hold that the 2nd respondent went to slumber.

9. On the alleged misuse by the 2nd respondent of this court's orders of stay, it is notable that the evidence availed by the applicant of the alleged alteration by the 2nd respondents of its records is a CR form dated October 4, 2022, of a company with the 2nd respondent's name. The 2nd respondent provided a CR form dated May 18, 2017 with different registration number and Directors, and it is also not known who the directors of the said companies were at the time of delivery of the ruling by this court granting orders of stay on June 4, 2021. We therefore find that the allegations by the applicant have not been adequately demonstrated.

10. For these reasons we find that the alternative order sought by the applicant is also not merited. The Notice of Motion application dated October 13, 2022 is accordingly dismissed, with costs to the 2nd respondent.

11. Orders accordingly.

Dated and delivered at Mombasa this 28th day of July, 2023

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL



G.V. ODUNGA

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JUDGE OF APPEAL

I Certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

