



**Musau v World Vision Kenya (Cause E049 of 2023)
[2025] KEELRC 295 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 295 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E049 OF 2023
NZIOKI WA MAKAU, J
FEBRUARY 5, 2025**

BETWEEN

CECILIA MUTANU MUSAU CLAIMANT

AND

WORLD VISION KENYA RESPONDENT

RULING

1. Before this court are the Applications dated 5th November 2024 and 15th November 2024 filed by the Respondent, as well as a Preliminary Objection dated 21st November 2024 raised by the Claimant. Before outlining the prayers sought in these applications, it is important to provide some context.
2. In a judgment delivered on 31st January 2024, this Court, differently constituted, found that the Respondent had breached the Claimant’s legitimate expectation of contract renewal and awarded the Claimant Kshs 3,196,720/- in damages. Following this judgment, the Respondent filed an application for stay pending appeal dated 8th February 2024. This application was later compromised through a consent order dated 26th February 2024, which stipulated that the full decretal amount be deposited in a joint interest-earning account in the names of both counsel on record. Simultaneously, the Respondent lodged an appeal with the Court of Appeal, which was struck out on 4th November 2024 for failing to comply with the court’s rules.
3. In the wake of the appeal being struck out, the Respondent filed the Applications dated 5th November 2024 and 15th November 2024. In the application dated 5th November 2024, the Respondent sought a stay of execution of this court’s judgment pending the hearing and determination of an application to enlarge time for filing an appeal before the Court of Appeal. Additionally, the Respondent sought stay of execution pending the hearing and determination of the appeal itself.
4. The Respondent argued that no stay orders had been issued and that there was a risk of the Claimant executing the judgment at any time, which would render the appeal nugatory. The Respondent further



contended that the appeal had been struck out through no fault of its own, citing difficulties in obtaining communication regarding payment for the typed proceedings. Moreover, the Respondent indicated that it was actively seeking enlargement of time to file an appeal before the Court of Appeal.

5. In the application dated 15th November 2024, the Respondent sought the following orders:
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3. That they be granted leave to file a Notice of Appeal out of time and/or that the time for filing and serving be extended.
4. That the annexed draft Notice of Appeal be deemed as duly filed.
5. That leave be granted to file a Record of Appeal out of time and/or that the time for filing and serving be extended.
6. That this court be pleased to give any other such orders and directions as it may deem fit and just.
7. That costs of this application be provided for.
6. The Respondent based this application on the fact that a certificate of delay had not been filed with the Court of Appeal due to inadvertent technical issues with the judiciary's e-filing system and delays in paying for the proceedings. Moreover, the Respondent argued that, following the striking out of its appeal, the Claimant was threatening to execute the judgment, despite the Respondent's active efforts to reinstate the appeal before the Court of Appeal. The Respondent emphasized that it had deposited security for costs at the Court of Appeal and underscored the urgency of obtaining an extension of time to file the Notice of Appeal.
7. In response, the Claimant filed a Preliminary Objection on 21st November 2024, challenging this court's jurisdiction. The Claimant argued that the court was functus officio, asserting that the issues raised in the application had already been addressed by the Court of Appeal in Kisumu Court of Appeal Civil Application No. E014 of 2024. The Claimant cited Articles 162(2), 165(6),(7), and 164(3) of *the Constitution* in support of this argument. Additionally, in her response to the application dated 5th November 2024, the Claimant filed a replying affidavit, reiterating that this Court was functus officio, having previously dealt with the issue of stay in the application dated 8th February 2024. The Claimant emphasized that litigation must come to an end and argued that she should not suffer due to the Respondent's mishandling of its appeal.
8. Pursuant to directions by the Court, both parties filed written submissions in support of and in opposition to the applications and Preliminary Objection. I have taken the preliminary objection as a response to the Respondent's applications and therefore for clarity and good order, I will begin with the Respondent's submissions.

Respondent's Submissions

9. In its submissions dated 10th December 2024, the Respondent proposed to address the application dated 5th November 2024, the Preliminary Objection dated 21st November 2024, and the application dated 15th November 2024 in chronological order. In support of the application dated for stay of execution dated 15th November 2024, the Respondent argues that it will suffer substantial loss if the application is denied. It highlights the significant decretal amount of Kshs 3,192,720/- and expresses doubt about the Claimant's ability to repay it if released to him and the appeal ultimately succeeds. Furthermore, the Respondent contends that losing such a large sum would severely deplete its



resources, negatively impacting its operations. The Respondent cites the principle in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, where it was held, that an applicant must demonstrate factors that could irreparably affect the Applicant as the successful party in the appeal. The Respondent draws the attention of the Court to the centrality of substantial loss and cites the case of *New Soita Ltd v Naivasha South Lake SACCO Ltd* [2022] eKLR which referred to the case of *Silverstein v Chesoni* [2002] 1 KLR 867 where the Court stated that:

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”

10. To further buttress the uncertainty surrounding the Claimant’s ability to pay back, the Respondent relies on the Court of Appeal decision in the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Lantech Limited* [2015] KECA 337 (KLR) where the Court of Appeal acknowledged the critical role of the Respondent’s financial position in assessing the risk of substantial loss, noting that where there is doubt about the Respondent’s ability to pay, substantial loss is deemed to have been established.
11. In further support of the application of stay, the Respondent submits that it has provided security of costs and has deposited the decretal amount and taxed costs in a joint interest earning account. Furthermore, it emphasizes that the appeal raises substantial issues that justify the preservation of the status quo. In conclusion the Respondent urges the court to exercise discretion in its favour asserting that there is no limit to how many times the court can do so.
12. Regarding, the Preliminary Objection the Respondent submits that it is a non-starter. It contends that this Court is empowered to extend time for filing a notice of intention to appeal by section 7 of the *Appellate Jurisdiction Act* and section 95 of the *Civil Procedure Act*. The Respondent also cites Article 159(2)(d) of *the Constitution*, on the mandate of the court to administer justice without undue regard to procedural technicalities. In further opposition to the Preliminary Objection the Respondent submits that the appeal was not res judicata, as it has not been heard on its merits.
13. In relation to the Respondent’s application dated 15th November 2024, the Respondent asserts that the considerations for exercise of discretion were outlined by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, where the Supreme Court held thus:
 - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and



- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
14. The Respondent submits that the technical issues with the e-filing system and a lack of clarity on fee payments, are reasonable explanations warranting the Court's exercise of discretion in its favour. The Respondent cites the case of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), where the court exercised discretion in favour of the applicant, finding that the delay in obtaining certified proceedings was satisfactorily explained and excusable.
15. Additionally, the Respondent contends that it is entitled to the Court's discretion having acted in good faith, by promptly filing the Notice of Appeal and complying with court directives including depositing the decretal amount in a joint interest earning account. Regarding the issue of alleged prejudice to the Claimant, the Respondent submits that none will be suffered if time is enlarged. It points out that the decretal amount is safely held in the account and that the Claimant has not demonstrated any specific harm. On the other hand, the Respondent asserts that it would suffer irreparable harm if denied the opportunity to pursue its appeal. In conclusion the Respondent submits that it has met the threshold for both the stay of execution and the extension of time to file the appeal.

Claimant's Submissions

16. The Claimant submits that the Respondent is employing underhand tactics to deny her access to the decretal sum. Specifically, she references the spent application for stay, dated 8th February 2024, as well as the Respondent's attempt at deceit by backdating the letter requesting a certificate of delay. The Claimant identifies the following issues for determination:
- a. Whether the court has jurisdiction to entertain the Respondent's applications.
 - b. Whether the orders sought should be granted.
17. Regarding the issue of jurisdiction which is the thrust of the preliminary objection, the Claimant submits that this Court lacks jurisdiction, as the notice and record of appeal were struck out by the Court of Appeal. Additionally, she contends that a stay of execution was previously granted and perfected by Kisumu Civil Appeal No. E104 of 2024. The Claimant urges the Court to decline jurisdiction, citing the Supreme Court's decision in *Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020)* [2022] KESC 62 (KLR) (7 October 2022) (Judgment) where the Supreme Court held that, after unsuccessfully appealing to a higher court, a party cannot seek redress from a superior court such as the High Court on the same matter. As allowing such an action, would subvert the principle of the rule of law, even if bias is alleged. Consequently, the Claimant urges the court to disregard the applications, emphasizing the principle of finality of litigation.
18. In further support of the argument that this court lacks jurisdiction, the Claimant submits that the Court is functus officio. She refers to the consent dated 26th February 2024, which disposed of the stay application dated 8th February 2024, as well as the resultant striking out of the appeal preferred by the Respondent by the Court of Appeal. Regarding leave to file a notice and record of appeal out of time, the Claimant asserts that it falls within the jurisdiction of the Court of Appeal. In support of this argument, the Claimant cites the case of *Odinga v Independent Electoral & Boundaries Commission & 3 others (Petition 5, 4 & 3 of 2013)* (Consolidated) [2013] KESC 8 (KLR) (24 October 2013 and *Jersey Evening Post Limited v A 1 Thani* [2002] JLR 542 at 550, where it was held that a court is functus officio once it has performed all its duties, except for correcting clerical errors. She also cites the case of *Elephant Oil Mills Limited v Njoroge & 5 others* (Environment & Land Case 101 of 2021)



[2024] KEELC 1379 (KLR) (11 March 2024) where the court held that an application for review was overtaken by events and the court was functus officio having previously adopted a consent judgment.

19. The Claimant further submits that the applications meet the test for res judicata outlined in the decision in the case of Benard Mugo Ndegwa v James Nderitu Githae & 2 others [2010] eKLR under five distinct heads:
 - (i). the matter in issue is identical in both suits;
 - (ii) The parties in the suit are the same;
 - (iii). Sameness of the title/claim;
 - (iv) concurrence of jurisdiction; and
 - (v) finality of the previous decision.
20. The Claimant invites the Court to examine the issues raised in the previous proceedings in comparison with those in the current proceedings to determine whether they are indeed the same, cautioning against pleadings drafted in such a way as to circumvent the res judicata principle. She relies on the decision in E.T v Attorney General & another [2012] eKLR, where the court warned against litigants attempting to evade res judicata by introducing new causes of action, emphasizing that the test is whether the plaintiff in the second suit is attempting to re-litigate a matter already resolved in a different form. Regarding whether the orders should be granted, the Claimant submits that they should not. She emphasizes the lawfulness of the execution, referencing James Wangalwa & another v Agnes Naliakka Cheseto [2012] eKLR, in which the court stated that execution in itself does not constitute substantial loss, as it is a lawful process. The Claimant further reiterates that the Respondent has squandered the orders previously granted and has failed to demonstrate the harm it would suffer if the orders are not granted. In conclusion, the Claimant submits that the Respondent would suffer no harm if the applications are dismissed, as all available avenues in this court have already been exhausted.
21. This Court is being invited to stay the proceedings herein and enlarge time in order for the Respondent to pursue an intended appeal before the Court of Appeal. In the Supreme Court decision in the case of Kenya Hotel Properties Limited v Attorney General & 5 others (supra) it is clear that this Court does not have any jurisdiction to reopen cases finalized by the Court of Appeal. This Court lacks jurisdiction to order the Court of Appeal to try an appeal de novo or to reverse a Court of Appeal decision. The decision emanating from this Court, differently constituted, went on appeal and was struck out. The issues the Respondent seeks to address squarely fall within the jurisdiction of the Court of Appeal and I am bereft of any jurisdiction to entertain applications to enlarge time as this Court is functus officio. I need not resolve the other issues raised as to do so would be to re-open concluded matters before this Court and fly in the face of the res judicata doctrine. Applications by the Respondent are dismissed with costs to the Claimant.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF FEBRUARY 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE

