



REPUBLIC OF KENYA



**KENYA LAW**  
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**Warutere v Open World Limited (Cause 586 of 2013)  
[2024] KEELRC 411 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 411 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 586 OF 2013  
MA ONYANGO, J  
FEBRUARY 29, 2024**

**BETWEEN**

**MARTIN RUGENYI WARUTERE ..... CLAIMANT**

**AND**

**OPEN WORLD LIMITED ..... RESPONDENT**

**RULING**

1. Before me for determination is the Respondent/Applicant's Notice of Motion dated 28<sup>th</sup> June, 2022 seeking orders that:
  - i. Spent
  - ii. That pending the hearing and final determination of this application and the intended appeal or any such time and duration as this court will deem fit, this Honourable Court be pleased to issue orders for Stay of Execution, against the Respondent/Applicant, of the Judgement made by the Hon. Lady Justice Maureen Onyango delivered on 31<sup>st</sup> January, 2020 and all consequential orders flowing therefrom.
  - iii. The Court be pleased to grant leave to the Respondent/Applicant to lodge a Notice of Appeal, against the Judgement made by the Hon. Lady Justice Maureen Onyango delivered on 21<sup>st</sup> January 2020, out of time.
  - iv. Upon payment of the requisite court fees, the attached Notice of Appeal be deemed as properly lodged.
  - v. This Honourable Court be pleased to make sure other and/or further orders as may appear to this Court to be just and convenient.
  - vi. The costs of this application be provided for.



2. The Application is based on the following grounds:
  - a. The Claimant/Respondent filed a Memorandum of Claim dated 24<sup>th</sup> April 2013 against the Respondent/Applicant seeking, inter alia, a declaration that his termination was unlawful and payment of his dues owed.
  - b. That the Respondent/Applicant, with the belief that the advocates were going to diligently and professionally handle the matter to its conclusion, proceeded to instruct the firm of CR Advocates LLP to represent the interests in the matter.
  - c. That the matter was heard and concluded and a Judgement delivered on 31<sup>st</sup> January 2020. However, this state of affairs was not communicated to the Respondent/Applicant by its Advocates.
  - d. The Respondent/Applicant, through its representatives, dutifully and periodically kept on, through telephone calls, following up with its advocates on record for an update on the matter and each time, the Respondent/Applicant was informed that the matter was still pending.
  - e. That however, it is not until on or about 17<sup>th</sup> June 2022, when the firm of advocates representing it alerted the Respondent/Applicant of its intention to file an application to cease from action on its behalf, when, in utter shock and amazement, the Respondent/Applicant learnt that a Judgement had been delivered against it.
  - f. The respondent/Applicant also learnt that, flowing from the Judgement, a Party and Party Bill of Costs had been filed by the Claimant/Respondent and that the same was pending taxation and, thereafter, execution.
  - g. That upon reading the Judgement, the Respondent/Applicant is now desirous to appeal against the same and, therefore, unless the prayers sought herein are granted, it will suffer prejudice and incomprehensible financial hardships since the decretal amount involved is colossal for a company such as the Respondent/Applicant and may lead to the ruin of its day-to-day operations.
  - h. That in the circumstances, the Respondent/Applicant proceeded to instruct the firm of Messrs. Kithi and Company Advocates to come on record on its interest, thereby necessitating this instant Application as Judgement has already been entered.
  - i. That it is, therefore, in the interest of justice to allow the instant application as the Respondent/Applicant shall highly be prejudiced if execution of the Judgement, which is imminent, is satisfied.
  - j. That on the other hand, the claimant/respondent will not be prejudiced in any way if the instant applicant is allowed.
  - k. The Respondent/Applicant, therefore, prays that the orders sought herein be allowed as prayed.
3. The Application is supported by the affidavit of Dorcas Muthoni Gachari, the Director of the Respondent/Applicant, sworn on 28<sup>th</sup> June, 2022 in which she reiterated the grounds set out on the face of the Application.
4. In response to the Application the Claimant/Respondent's counsel filed a Replying Affidavit dated 25<sup>th</sup> July, 2022 in which he contends that the Application is unmeritorious, incompetent and fatally defective as the statutory limit for appeal has lapsed more than two (2) years ago.



5. He avers that this matter was filed in 2013 and the same was substantively heard, determined and judgement was delivered on 31<sup>st</sup> January 2020 in the presence of counsel for both parties.
6. The affiant states that the Respondent/Applicant has not offered any plausible explanation for the delay in seeking to set aside the orders as per the judgement of 31<sup>st</sup> January 2020.
7. He states that it has taken the applicant more than 30 months after the judgement was delivered to file the instant application thus making the delay unreasonably inordinate.
8. The affiant avers that allowing another firm of advocates to come on record for the applicant after the court has delivered its judgement and has become functus officio will only prolong the denial of the Claimant/Respondent's right to enjoy the fruits of his judgement. That the application is designed to deny the Claimant the fruits of his legally obtained judgement as he is only awaiting the assessment of costs for him to extract the decree in the matter for the purposes of execution.
9. He deposes that the applicant has neither demonstrated nor furnished to this court any evidence to show that it will suffer any substantial loss or injustice if the orders sought are not granted.
10. The affiant maintains that the applicant has failed to advance sufficient reasons for the orders sought in the instant application. That this honourable court, in exercise of its discretion, should prioritize the Claimant/Respondent's right to enjoy the fruits of a legally obtained the judgment over the applicant's prayers considering the unjustified inordinate delay on their side.
11. In conclusion, the affiant avers that in considering the above grounds, should dismiss the Application herein with costs to the Respondents.

#### **Claimant/Respondent's Submissions**

12. The Claimant/Respondent submitted that the application is incurably defective because it is founded on the wrong provision of the law and by ignoring the fundamental provisions that would address the prayers as sought in the application. As such, he submitted that the instant application lacks merit and should be dismissed with costs at the earliest instance.
13. As regards whether the prayer of appeal out of time should be granted, the Respondent submitted that the difference between when the judgement was delivered and when the application was filed is over two years and six months and the applicant has not cared to avail any explanation for the delay save for stating that their legal representatives did not inform them of the progress of the matter.
14. He submitted that the delay was inordinate and the reasons given for such delay by the Applicant are unjustifiable and urged the court to find as such. Further, he maintained that the applicant has not made any demonstrations whatsoever to show that the intended appeal has any chances of success. He referenced the case of *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* (2018) eKLR to support his case.
15. The Claimant/Respondent submitted that he is a holder of a lawful decree issued by a court of competent jurisdiction and that the applicant has not attempted to establish any factor which will show that execution will create a state of affairs that will cause irreparable loss to it.
16. He submitted that the applicant has deliberately left out to even mention their willingness to furnish security and the fact that it is seeking for orders as prayed in the application on one hand but demonstrating their unwillingness to comply with the requirement on the other hand, not only shows waste of precious judicial time, but also a deliberate scheme to deny him his chance to enjoy the fruits of the judgment.



## Analysis and Determination

17. Section 7 of the *Appellate Jurisdiction Act* gives this court powers to extend time for filing notice of Appeal. The section provides as follows-
7. Power of High Court to extend time
- The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:
- Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.
18. Rule 4 of the *Court of Appeal Rules* further provides:
4. Extension of time
- 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.
5. Suspension of sentence, injunction and stay of execution and stay of further
19. Rule 75 provides that:
75. Notice of appeal
- (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
- (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.
- (3) The judgment herein was delivered on 31<sup>st</sup> January 2020. The instant application is dated 28<sup>th</sup> June 2022. The notice of appeal which is attached to the supporting affidavit as Exhibit DMG – 2 also dated 28<sup>th</sup> June 2022 and has not yet been lodged. The application was lodged in court two years and 5 months after delivery of judgment.
20. The grounds for delay as stated in the grounds and affidavit in support of the application sworn by Dorcas Muthoni Gachari, a director of the Respondent, are that
- a. That the Respondent/Applicant, with the belief that the advocates were going to diligently and professionally handle the matter to its conclusion, proceeded to instruct the firm of CR Advocates LLP to represent its interests in the matter.
- b. That the matter was heard and concluded and a Judgment delivered on 31<sup>st</sup> January 2020. However, this state of affairs was not communicated to the Respondent/Applicant by its Advocates.
- c. That I, as the Respondent/Applicant director and representative, dutifully and periodically kept on, through telephone calls, following up with the advocates on record for an update on the matter and each time, I was informed that the matter was still pending.



- d. That however, it is not until on or about 17<sup>th</sup> June, 2022, when the firm of advocates representing the Respondent/Applicant alerted me of its intention to file an application to cease from action on its behalf, when, in utter shock and amazement, I learnt that a Judgment had been delivered against it. Copies of correspondence in that regard between me and
21. It is instructive that the erstwhile advocates of the Applicant M/S. CR Advocates LLP filed an application to cease acting for the Applicant dated 15<sup>th</sup> June 2022. In the application the Mr. Benson Wanyoike Aleeken on behalf of the said firm depons in the supporting affidavit that the reasons for seeking to cease acting for the Applicant are that:
- a. That despite neglecting to issue CR Advocates LLP with instructions in the taxation herein, the Respondent is yet to instruct another Advocate to take over the conduct of this matter as evidenced by the fact that we are still served with court processes and Notices in the matter.
  - b. That the firm of CR Advocates LLP has made efforts to obtain further instructions from the Respondent on how to proceed with the conduct of this matter or appoint other Advocates to take over.
  - c. That the said efforts have been unsuccessful hence the need to file this application before this Honourable Court.
  - d. That it would be just and in the interests of justice that the firm of CR Advocates LLP be discharged from acting for the Respondent so as not to appear to delay these proceedings.
22. Ngugi J. while handling a similar Application in *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another* [2018] eKLR rendered herself thus:

“Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested the Court of Appeal in *Mwangi v Kenya Airways Ltd* [2003] KLR. They include the following.

- a. The period of delay:
- b. The reason for the delay:
- c. The arguability of the appeal:
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted:
- e. The importance of compliance with time limits to the particular litigation or issue: and
- f. The effect if any on the administration of justice or public interest if any is involved.
- i. The Learned Justices of the Court of Appeal Justices Visram, Karanja and Koome also laid down the several factors that the court ought to consider whenever an application for extension of time is before it as observed by Odek, JJ.A in *Edith Gichugi Koine v Stephen Njagi Thoithi* [2014] eKLR, thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not



limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

24. From the grounds in the two applications it is obvious that the Applicant is not truthful on the reasons for the delay. A party who comes to court to seek discretionary orders like in the instant application must do so with clean hands like stated in the maxims of equity. This factor alone is sufficient for the court to deny the orders sought in the application herein.
25. Even if the court were to accept those grounds, they would not be sufficient to explain the inordinate delay of two-and-a-half years. The only explanation that comes to my mind is that the applicant went on a long slumber from which it was woken up by the Notice of Taxation of the Bill of costs. There is no application for typed proceedings and certified judgment. There is not even a draft memorandum of appeal. In other words, there is no expression of intent to file appeal.
26. I find no reason at all to grants the orders sought whichever way I look at the application. The only orders that in my view commends itself in the present case is an order of dismissal of the application dated 28<sup>th</sup> June 2022 with costs. I accordingly order so.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024**

**MAUREEN ONYANGO**

**JUDGE**

