



**Nyangena v Hi-Tech Inks and Coating Limited (Cause 851 of 2019)  
[2024] KEELRC 186 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 186 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 851 OF 2019  
K OCHARO, J  
FEBRUARY 9, 2024**

**BETWEEN**

**SHEM MOGOI NYANGENA ..... CLAIMANT**

**AND**

**HI-TECH INKS AND COATING LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. The Respondent/Applicant herein moved this Court vide a Notice of Motion dated 29<sup>th</sup> June 2023 expressed to be brought under the provisions of Sections 3 and 12 of the Employment and *Labour Relations Act*; Articles 48 and 159 (2) (d) of *the Constitution* of Kenya 2010; and all other enabling provisions of the law, seeking the following orders: -
  - a. Spent.
  - b. Spent
  - c. Pending the hearing and determination of this application inter partes, this Honourable Court be pleased to issue an order granting the applicant leave to lodge Notice of Appeal out of time against the judgment and decree of the learned Hon. Mr. Justice Ocharo Kebira, Judge, in the Employment and Labour Relations Court at Nairobi, Milimani Law Courts, Cause No. 851 of 2019, delivered on 9<sup>th</sup> February 2023 in cause no. 851/2019).
  - d. Pending the hearing and determination of the appeal/intended appeal inter partes, this Honourable Court be pleased to issue an order staying the proclamation and intended sale or disposal of the Motor Vehicle Registration No. KCU 817Y, belonging to the applicant/respondent/intended appellant.
  - e. Costs be in the cause.



2. The Notice of Motion application is based on the grounds set forth on the face of it and buttressed by the Supporting Affidavit of one Vipul Vyas sworn on 29<sup>th</sup> June 2023.
3. The Respondent resisted the application upon the basis of the grounds obtaining in the Replying Affidavit sworn on 12<sup>th</sup> July 2023.
4. In response to the same, the Applicant filed a Further Affidavit sworn on 17<sup>th</sup> July 2023.
5. On the 21<sup>st</sup> of September 2023, when the application came up for hearing inter partes, Counsels for the parties were allowed to make their oral respective submissions.

### **The Application**

6. The Applicant contends that Judgment was delivered by this Court on 9<sup>th</sup> February 2023 in favour of the Claimant and against them without notice. Consequently, they were not aware of the Judgment date, and the delivery thereof. They only became aware of the Judgment when a proclamation was carried out on 29<sup>th</sup> June 2023, against them in execution of the decree herein.
7. It is further stated that Chador Auctioneers who carried out the proclamation intentionally backdated the proclamation notice to 19<sup>th</sup> June 2023 intending to sell the proclaimed motor vehicle on 14<sup>th</sup> July 2023.
8. The Applicant states that they intend to assail the judgment of this Court at the Court of Appeal by way of an appeal. Further, the intended Appeal raises several arguable and important issues of law, is not frivolous and has a good chance of success.
9. The right to Appeal is a Constitutional right under Articles 48 and 50 (1) of *the Constitution* of Kenya 2010 and cannot be limited under Article 25.
10. The Applicant asserts that unless the orders sought are granted, the intended Appeal will be rendered nugatory, occasioning them to suffer serious financial losses, prejudice and closure of their business.
11. The Applicant further contends the Decree Holder is an individual whose means of income is presently unknown, hence if the Motor Vehicle Registration Number KCU 817Y whose market value is Kshs. 3,000,000/- is sold to recover the decretal sum of Kshs.1,246,944/-, the same will not be recovered or will be difficult to recover if the Appeal is successful.
12. Further, the Claimant/Respondent secretly taxed the Party and Party Bill of Costs without serving the Applicant contrary to Section 94 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya.

### **The Response**

13. The Claimant/Respondent contends that upon being served with summons to enter appearance, the Respondent/Applicant instructed the firm of Jaoko and Company Advocates to have the conduct of this matter for and on its behalf. This firm of Advocates never ceased to be so on record either by the Respondent/Applicant filing a notice of intention to act in person or a notice of change of advocates being filed.
14. The Claimant/Respondent states further that all through, the Respondent's Counsel's law firm was served with various documents and court processes, service which they accepted by stamping on the documents.



15. The matter herein was set down for pre-trial directions on 1<sup>st</sup> February 2022 and a notice for the same was served on Counsel for the Respondent/Applicant. The notice was received and Counsel attended court on the date.
16. When the matter came up for the pre-trial directions, Counsel for the Respondent/Applicant, asked for time to place documents that his client intended to rely reliance on in fortification of their defence case. The matter was then re-slated for 4<sup>th</sup> April 2022 for directions. On this appointed date, the Respondent's/Applicant's Counsel failed to attend court, constraining the Deputy Registrar of this Court to direct that the matter be placed before this Court for hearing on the 25<sup>th</sup> of July 2022.
17. The Claimant/Respondent states that his Counsel served a mention notice for the stated date on Counsel for the Applicant, notice which was duly received. Despite the service, Counsel for the Applicant failed to attend court. The matter proceeded to hearing in his absence and that of his client, the Applicant. The matter then got slated for Judgment on 9<sup>th</sup> February 2023. The Respondent was notified of the judgment date through a notice dated 13<sup>th</sup> October 2022, which their Counsel duly received.
18. The Claimant further states that flowing from the Judgment, he filed his party and party bill of costs. The taxation thereof was fixed for 18<sup>th</sup> May 2023. Counsel for the Applicant was served with the Bill and a taxation notice. The allegation that the Bill of Costs was taxed secretly is therefore untrue.
19. The Claimant/Respondent contends that the Respondent/ Applicant has not explained the delay in lodging the appeal, considering the fact that 7 months from the date of Judgment lapsed before they filed the instant application. The application has been filed with inordinate delay.
20. The Application herein is a knee-jerk reaction. It is only orchestrated to defeat the course of justice in this matter. The Applicant's Counsel has not acted candidly. He deserves to be reprimanded.
21. Allowing the application, shall put the Claimant/Respondent to great prejudice as he shall be denied the fruits of his judgment.

### **The Applicant's Rejoinder**

22. In response to the Claimant's/ Respondent's position brought out hereinabove, the Applicant stated that one Vipin Parihar, the then Financial Controller of the Respondent/Applicant company, withdrew instructions from the law firm of Nchoe, Jaoko & Co. Advocates without the authority of the Board of Directors. He forgot to continue with the matter herein or appoint another law firm to continue with the conduct thereof in the place of the said firm.
23. Upon withdrawal of the instructions, the law firm handed over the files under cover of a letter dated 28<sup>th</sup> February 2022. The Board of Directors were not aware of the actions of the Finance Controller, until the proclamation of the Applicant's property.
24. The Respondent/Applicant contends that this Court should not allow the mistakes and dilatory conduct of Mr. Vipin to be visited on them.
25. The Respondent/Applicant contends that this application has been filed without unreasonable delay and that this Court has unfettered discretion to order a stay of execution and allow lodging of the Appeal.
26. That no prejudice will be occasioned to the Claimant/Respondent if the orders sought are granted.



## Analysis and Determination

27. I have carefully considered the Notice of Motion, the grounds thereof and the affidavit in support, the Replying Affidavit sworn by Shem Mogoi Nyangena on 12<sup>th</sup> July 2023 and the Further Affidavit sworn on 17<sup>th</sup> July 2023, and the brief oral submissions by Counsel for the parties, the following two issues emerge for determination: -
- a. Whether this Court should grant leave to the Applicant to file its appeal out of time, and
  - b. Whether the Applicant's application for a stay of execution pending Appeal is merited.

### Whether this Court should grant leave to the Applicant to file its appeal out of time.

28. Before I delve further, I consider it imperative to state this. The Respondent/Applicant has expended immense effort in the two affidavits, trying to demonstrate that it has an appeal which, has a high chance of success and one that isn't frivolous. With great respect, the effort is not well directed and spent. The same could be useful in an application filed before the Court of Appeal under Rule 5 of the Court of Appeal Rules. Having rendered a judgment herein without the conviction that it is; founded on sound reasoning, fair and just, I find great difficulty to fathom how then I could accept the Applicant's invitation to start evaluating whether or not the intended appeal has a chance of success.
29. Under Rules 75 (1) and (2) of the Court of Appeal Rules 2010, an Intended Appellant must give notice in writing of their intention to appeal within 14 days of the decision which they intend to appeal against.
30. Imperative to state, however, that Section 7 of the *Appellate Jurisdiction Act*, Cap 9 of the Laws of Kenya donates authority upon this Court to extend the time within which a Notice of Appeal may be filed. The said Section provides: -
- “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...”
31. The factors considerable in an application for an extension of time were aptly set out by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & OTHERS* [2014] eKLR. It stated: -

“From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in the exercise of such discretion:

- a. 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;



- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
32. It is through the lens above that I will consider the instant application. The Applicant contended that it was not served with a judgment notice. Consequently, they were unaware of the judgment date and the delivery of the judgment herein. They only came to know of the judgment when their motor vehicle was proclaimed in the execution of the decree herein way after the statutory period of filing the notice of appeal had lapsed. The Claimant/Respondent countered the Applicant’s position stating that through a notice dated 13<sup>th</sup> October 2022, the law firm of Nchoe Jaoko & Company Advocates was notified of the judgment date.
33. Undoubtedly, the above-stated law firm was at all material times on record for the Applicant. It never ceased to be even for a moment, in any of those manners known in law. The Claimant/Respondent cannot be faulted in any manner that it all through directed service of documents and or court processes to them.
34. I note that the Judgment Notice dated 13<sup>th</sup> October 2022, was served through the email address nchoejaokoadvocates2020@gmail.com, the same address as that indicated on their Certificate of Urgency dated 29<sup>th</sup> June 2023, Notice of Motion bearing the same date, and supporting affidavit sworn on the same date. I am therefore satisfied that the aforementioned law firm received notice of the Judgment date.
35. The material placed before me by the Applicant reveals not any specific denial by Counsel for the Applicant that the notice was received, and served through the email address. I am convinced that the notification on the date of delivery of the judgment was effected.
36. In an attempt to explain away the Claimant/Respondent’s position that the Applicant knew the judgment date considering that their Counsel was served, the Applicant through the further affidavit, contended that confusion was caused when its Financial Controller, Vipin Parihar, withdrew instructions from the said law firm without the authority of the Board of Directors and failed to pursue the continuance of the matter or instruct a new Counsel. This is such a pivotal issue that one would expect to be brought up from the onset, surprisingly it wasn’t. It was only raised in the further affidavit, in a manner that in my view, was an afterthought.
37. No doubt, Counsel knew or ought to have known that they were still effectively on record until either a notice of intention to act in person by the Applicant or a notice of change of advocates by a new Counsel, was filed. Without this, it could be expected of Counsel when he received the notification, to write to Counsel for the other party, intimating that he no longer had instructions so that the service could be directed to his client in person, or for the Counsel to attend court, pick the judgment and inform his client, or appear in court and seek time to file an application to cease acting for the client.



Inexplicably, Counsel did none of these. This Coupled with the premises hereinabove, paragraphs, 34,35, and 36, and as shall come out shortly hereinafter, paragraph 38, I conclude that; at all material times, the date for delivery of the Judgment herein was known to the Applicant; instructions were never withdrawn from Counsel as alleged or at all and; the Applicant has not been candid to this Court.

38. The Applicant placed before this Court a letter dated 28<sup>th</sup> February 2022 under the further affidavit mentioned hereinabove. I have carefully considered the letter, it does not speak to the instant matter but file No. E 490 of 2021. The emails by Counsel on the alleged release of the file also refer to the above-stated file. Moreover, the Court notes that the emails between Counsel and Mr. Vipin over the alleged handover of the file were constantly copied to other persons including Mr. Vipul Vyas, the deponent of the two affidavits filed herein by the Applicant. The assertion that the file was withdrawn from Counsel without the knowledge of the Board of Directors is untrue, in my view, therefore.
39. The Applicant was under a duty to explain, the delay in lodging the notice of appeal within time, and the reason why it took them five months to file the instant application for leave and stay of execution. Principally, the explanation given was that the Applicant was not notified of the judgment date and therefore had no information that the Judgment was delivered on the 9<sup>th</sup> of February 2023. Further, the alleged takeover of the file by Mr. Vipin caused confusion which diminished proper representation for the Applicant. Having found as I have hereinabove that the explanation[s] aren't convincing, I come to an inescapable conclusion that the delay has not been sufficiently explained.
40. On this ground, the Applicant's application fails. Consequently, I find no necessity of proceeding to consider the second issue.
41. In the upshot, the application is hereby dismissed. Each party shall bear its own costs of the application.
42. It is so ordered.

**READ, DELIVERED AND SIGNED THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**OCHARO, KEBIRA**

**JUDGE**

In the presence of:

Mr. Jaoko for Respondent/Applicant

Mr. Kibiku for Claimant/Respondent

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO KEBIRA**  
**JUDGE**

