



Tungani & 2 others v Juma Hardware Limited (Miscellaneous Case E279 of 2023) [2024] KEELRC 959 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 959 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E279 OF 2023**

K OCHARO, J

APRIL 26, 2024

BETWEEN

MIRIAM TUNGANI & 2 OTHERS APPLICANT

AND

JUMA HARDWARE LIMITED RESPONDENT

RULING

1. Through a Notice of Motion application dated 6th December 2023, the Applicants seek the following orders:
 - a. That this matter be certified urgent, and same be dispensed with in the first instance.
 - b. That the Honourable Court be pleased to compel both the firms of Lemmy Regau & Company Advocates and Gikera & Vadgama Advocates to pay forthwith the judgment debt.
 - c. That the Honourable court be pleased to set aside its Ruling Order of 12th July, 2023 in ELRC MISC./E081/2023 to grant the Respondent leave to appeal out of time.
 - d. That the Honourable court be pleased to order the Respondent to issue forthwith the cheques to the Claimants on amounts due that were tabulated and agreed upon by both the Union and the employer.
2. The application is anchored on the grounds put forth on the face thereof, and those obtaining on the supporting affidavit sworn on the 7th December, 2023.
3. The Applicants state that on the 9th March 2023, judgment was entered in their favour in Milimani MCELRC/E438/2021.
4. They state further, that subsequently, the Respondent filed an application, ELRC MISC/E081/2023 for stay of execution of the decree in the above stated lower court cause, pending an intended appeal.



The application was allowed on 12th July, 2023 on condition that the Respondent deposits the decretal sum and costs in a joint interest earning account in the names of Counsel representing the parties, within 14 days of the order.

5. The Applicants further contend that outside the 14 days, the Respondent deposited the sum of KShs.941,263/= into a joint account in the names of Counsel, Account No. 1320465927 hosted at the KCB Bank Kenya Limited.
6. The money having been deposited out of time, contrary to the court order in ELRC MISC/E081/2023, Counsel were obliged to release the deposited amount to the Applicants. They have without reason failed and or neglected to release the same to them. Their act amounts to withholding their (the Applicants) money unlawfully.
7. They argue further that the Counsel have without justification deliberately delayed them from enjoying the fruits of their judgment.
8. The Applicants assert that by 12th July, 2023, the Respondent had not filed a Notice of Appeal, and today it has not. Further, a notice of appeal is a jurisdictional pre-requisite for an Appellate Court to make an order against a decision of a subordinate court. In absence of the Notice of Appeal properly on record, this court as an appellate forum lacked jurisdiction to grant the orders it did in the matter hereinabove stated.
9. The Applicants further contend that the Respondents obtained the order through misrepresentation when it alleged that its former Advocate did not notify it on the trial court's judgment, yet the trial court did notify all the parties including the Respondent and its Counsel well in time through the court's Case Tracking System (CTS). It abused the court process, as a result.

Determination

10. I have carefully considered the application and the submissions filed by the Applicants, and take a clear view that the application must fail for the reasons that:-
 - a. The orders that the Applicants seek to have set aside are orders that were issued by Justice Nzioka Wa Makau in Miscellaneous application No. E081 of 2023. To grant the orders shall be tantamount to this Court sitting on appeal on a colleague's decision, jurisdiction which I do not have.
 - b. I am unable to fathom why the instant application was not filed under the above stated matter, Miscellaneous Application E081 of 2023. The instant application is largely an application for review which can only be procedurally handled under the matter wherein the order sought to be reviewed was issued.
11. In the upshot, I find no merit in the application. It is hereby dismissed.

READ, DELIVERED AND SIGNED THIS 26TH DAY OF APRIL, 2024.

OCHARO, KEBIRA.

JUDGE

In the presence of:

Miriam Tingani present

No appearance for 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 15th March 2020 and subsequent directions of 21st 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.

OCHARO KEBIRA

JUDGE

