



REPUBLIC OF KENYA



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Kaleve v East African Portland Cement Company Limited (Cause 248, 247 & 249 of 2019 (Consolidated)) [2024] KEELRC 13181 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13181 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 248, 247 & 249 OF 2019 (CONSOLIDATED)**

**L NDOLO, J
NOVEMBER 21, 2024**

BETWEEN

MUSA MOHAMMED KALEVE CLAIMANT

AND

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED . RESPONDENT

RULING

1. This ruling disposes of two applications; one by the Claimants dated 7th February 2024 and the second by the Respondent dated 15th March 2024.
2. By their application dated 7th February 2024, the Claimants seek an order for the release of Kshs. 13,250,975 deposited in court by the Respondent.
3. The Claimants' application is supported by an affidavit sworn by Peter Ndung'u Matheri and is based on the following grounds:
 - a. On 14th February 2020, the Court delivered judgment in favour of the Claimants in the sum of Kshs. 14,226,341 plus costs and interest;
 - b. Through an application dated 3rd March 2020, the Respondent sought stay of execution. The application was highly contested by the Claimants and the Court delivered its ruling on 5th February 2021;
 - c. In its ruling, the Court gave a conditional stay of execution, the condition being that the Respondent deposits the whole decretal sum in a joint interest earning account, in the names of Counsel for the parties, within 21 days, that is, by 26th February 2021;
 - d. The Respondent did not comply with these orders and the Claimants proceeded with execution, upon which the Claimants' Advocates were served with an application dated 28th May 2021, by which the Respondent sought extension of the stay orders granted on 5th



February 2021, and made a proposal to immediately deposit Kshs. 3,500,000 in a joint interest earning account and the balance in 11 equal instalments of Kshs. 975,122;

- e. After hearing the parties, the Court reserved a ruling for 30th September 2021 and in the meantime gave the following orders:
 - i. No execution would proceed on condition that Kshs. 3,500,000 was deposited in court forthwith and not later than 18th June 2021;
 - ii. The proposed monthly instalments of Kshs. 975,122 be deposited in court effective 30th June 2021, and thereafter on every 20th day of the succeeding months;
 - iii. In default of any of the instalments, execution to proceed.
 - f. The Respondent deposited Kshs. 3,500,000 and the first instalment but defaulted in the monthly deposits for July and August 2021, which were deposited on 7th September 2021;
 - g. By its ruling delivered on 30th September 2021, the Court dismissed the Respondent's application for review of the ruling delivered on 5th February 2021. The Court directed that the status quo be maintained for 30 days, to allow the Respondent to either pay the decretal sum or go on appeal;
 - h. The Respondent filed another application dated 8th December 2021, pursuant to which the Court delivered a ruling on 21st September 2023, granting stay of execution on condition that the Respondent files its appeal within 90 days, failing which the Claimants would move the Court for the deposited funds to be released to them;
 - i. The Respondent having failed to file the appeal within 90 days, should not continue to enjoy the stay orders;
 - j. While delivering its ruling on 30th September 2021, the Court gave the Respondent 30 days' stay to enable it pay the decretal sum or seek orders of stay from the Court of Appeal;
 - k. The Respondent has not sought nor obtained stay orders from the Court of Appeal and the 30 days' stay has lapsed;
 - l. It is imperative that the Claimants proceed with execution, which has commenced, for the balance of the decretal sum, and access the portion deposited in court;
 - m. No prejudice will be occasioned to the Respondent if the application is allowed;
 - n. It is in the interest of justice that the application is allowed.
4. The Respondent opposes the Claimant's application by a replying affidavit sworn by its Senior Legal Counsel, Roselyne Ominde on 15th March 2024. Ominde concedes that the Respondent did not meet the conditions of stay of execution granted on 5th February 2021, owing to what she refers to as financial constraints and distress.
 5. Ominde depones that the Respondent moved the Court by way of an application dated 28th May 2021, seeking review of the order granted on 5th February 2021, to the extent that the Respondent be allowed to deposit the decretal sum by monthly instalments.
 6. She states that upon considering the Respondent's application, the Court issued directions on 14th June 2021 requiring the Respondent to deposit an initial sum of Kshs. 3,500,000 not later than 18th June 2021. According to Ominde, the Respondent complied with these directions and subsequently



made monthly deposits as directed. She denied the Claimants' averment that the Respondent had defaulted in making monthly deposits.

7. On its part, the Respondent, by its application dated 15th March 2024, seeks leave for the firm of G.K Muturi & Co. Advocates to come on record and extension of time for compliance with the conditions of stay granted on 21st September 2023. In addition, the Respondent asks that the Record of Appeal and Memorandum of Appeal filed in this matter be deemed as duly filed.
8. The Respondent's application is supported by an affidavit sworn by its Senior Legal Counsel, Roselyne Ominde and is premised on the grounds that:
 - a. On 21st September 2023, the Court delivered its ruling with respect to the Claimants' application dated 1st December 2021 and the Respondent's application dated 8th December 2021;
 - b. The Court granted the Respondent orders of stay of execution pending the Respondent filing an appeal within 90 days from the date of the ruling, failing which the Claimants could move the Court for release of the portion of the decretal sum deposited in court;
 - c. The Respondent's previous Advocates, without notice, ceased acting for the Respondent and Respondent was not aware of the decision of the Court until 19th February 2024, when it received the Claimants' Advocates' email, attaching an application dated 7th February 2024, plus a hearing notice;
 - d. The Respondent inquired from its previous Advocates the progress of the matter and was informed by the Advocates that they had ceased acting before delivery of the ruling on 21st September 2023;
 - e. The Respondent promptly instructed its current Advocates to come on record and a Notice of Appointment dated 20th February 2024 was filed in court;
 - f. The Respondent was not aware of the ruling delivered on 21st September 2023, which set the conditions to be met by the Respondent;
 - g. In its ruling dated 21st September 2023, the Court granted the Respondent orders of stay of execution pending hearing and determination of the Respondent's appeal. The Court further directed that the appeal be filed within 90 days from the date of the ruling, failing which, the Claimants could move the Court for release of the portion of the decretal sum deposited in court;
 - h. The Respondent did not deliberately refuse to comply with the conditions set in the above mentioned ruling, as it was not aware of its delivery;
 - i. The Respondent is still desirous of pursuing its appeal against this Court's judgment and has already filed the appeal;
 - j. The Claimants have already moved this Court by way of an application dated 7th February 2024, seeking release of the decretal sum deposited in court;
 - k. Unless this application is allowed, the Respondent will be greatly prejudiced as the portion of the decretal sum already deposited in court will be released to the Claimants, thus rendering the appeal nugatory;
 - l. The Respondent will be at the risk of losing the decretal sum if its appeal succeeds but the decretal sum has been released to the Claimants. On the other hand, the Claimants will not be



prejudiced if the Court continues to hold the decretal sum as it will be released to the Claimants if the appeal fails;

- m. It is just in the circumstances that the instant application be heard and disposed of on a priority basis as the appeal has a high chance of success.
9. Peter Ndung'u Matheri swore a replying affidavit and a supplementary affidavit on 26th July 2024, reiterating the contents of his affidavit in support of the Claimants' application. He further challenges the jurisdiction of this Court to extend time for filing the Record of Appeal, stressing that this is the preserve of the Court of Appeal under Rule 4 of the Court of Appeal Rules.
10. On 11th October 2024, the Respondent's Acting Managing Director, Mohamed Osman Adan, swore a further affidavit to bolster the supporting affidavit sworn by Roselyne Ominde on 15th March 2024 and in opposition to the Claimants' replying affidavit dated 25th July 2024.
11. In his affidavit, Adan states that the Respondent's current application is not for extension of time to file the Record of Appeal but rather for extension of the period to comply with the conditions of stay of execution granted by this Court. He adds that the Respondent seeks to have the appeal deemed as duly filed within the 90-day period, to ensure that the decretal sum remains held by the Court, pending determination of the appeal.
12. In their pleadings and submissions filed in court, the Claimants challenge the jurisdiction of this Court to grant the orders sought by the Respondent. Given the centrality of this issue, I am satisfied that this is where I ought to begin.
13. In this regard, the Claimants' case is that this Court has no jurisdiction to extend time for filing of the Record of Appeal, citing Rule 4 of the Court of Appeal Rules, which provides as follows:
4. The Court may, on such terms as may be just, by order, extend the time limited by these Rules, Extension or by any decision of the Court or of a superior court, for the doing of any act authorized or of time 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.
14. The Respondent argues that its current application does not seek extension of time for filing the Record of Appeal but rather enlargement of the 90-day period granted by this Court (differently constituted) in its ruling dated 21st September 2023. I am constrained to comment on the efficacy of these orders in light of Rule 84 of the Court of Appeal Rules, which gives the following directives on institution of appeals at the Court of Appeal:

84. Institution of appeals

- (1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged-
- (a) a memorandum of appeal, in four copies;
 - (b) the record of appeal, in four copies;
 - (c) the prescribed fee; and
 - (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with subrule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within



which the appeal is to be instituted, be 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 such copy.

2. An appellant shall not be entitled to rely on the proviso to subrule (1) unless the appellant's application for such copy was in writing and a copy of the application was served upon the respondent.
 3. The period specified in subrule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.
15. My reading of Rule 84 of the Court of Appeal Rules is that civil appeals to the Court of Appeal are to be lodged within 60 days from the date of filing of the Notice of Appeal before the trial court and only the Court of Appeal can extend time in this regard. It would appear therefore that the 90-day period granted in the ruling of 21st September 2023, was not in sync with the Court of Appeal Rules. That is all I will say on this issue.
16. The Court of Appeal Rules, at Rule 85, go further to state the effect of default in instituting an appeal thus:
85. Effect of default in instituting appeal
- (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the court may, on its own motion or on application by any other party, make such order.
 - (2) The party in default under subrule (1) shall be liable to pay the costs rising therefrom to any persons on whom the notice of appeal was served.
17. In its numerous pleadings filed in court, the Respondent went to great length to explain the reasons for delay in filing its Record of Appeal at the Court of Appeal. While these explanations may be persuasive, they are being made before the wrong court.
18. The jurisdiction of this Court, being a trial court, terminated at the lodging of the Notice of Appeal and determination of the initial application for stay of execution. Any further pleas, including variation of the conditions of stay and extension of time for filing the Record of Appeal, ought to have been made before the Court of Appeal.
19. That said, the only conclusion to make is that there is no appeal upon which the decretal amount held by the Court can continue being held. Additionally, as demonstrated in the foregoing part of this ruling, I have no jurisdiction to grant the prayers sought by the Respondent.
20. In the result, the Claimants application dated 7th February 2024 is allowed and the Respondent's application dated 15th March 2024 is dismissed. Consequently, I direct that the sum of Kshs. 13,250,975 being part of the decretal sum held in court be released to the Claimants, through their Advocates on record.
21. The Respondent will pay the costs of these proceedings.
22. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF NOVEMBER 2024



LINNET NDOLO

JUDGE

Appearance:

Mr. Nyabena for the Claimants

Mr. Muturi for the Respondent

