



**China Road and Bridge Corporation v Kadinyiru (Miscellaneous Application
E142 of 2022) [2023] KEELRC 128 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 128 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E142 OF 2022
K OCHARO, J
JANUARY 27, 2023**

**BETWEEN
CHINA ROAD AND BRIDGE CORPORATION APPLICANT
AND
DOMINIC ANGANDA KADINYIRU RESPONDENT**

RULING

1. Through an application dated September 20, 2022, the Applicant seeks the following orders:
 - i. Spent.
 - ii. That pending the hearing and determination of this application inter parties this Court be pleased to grant an order of stay of the notification of sale dated September 14, 2022 of the Applicant's motor vehicle registration number KBU 372 L and the Warrants of Attachment and Warrants of Sale dated and issued on July 28, 2022 by the Respondent and or the Respondent's agents, servants and or employees or any person claiming through the Respondent in execution of the Judgment delivered on December 4, 2020 and the resultant decree.
 - iii. That pending the hearing and determination of this application inter partes, this Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered on December 4, 2020 and the resultant decree by the Respondent and or Respondent's agents, servants and or employees or any person claiming through the Respondent in execution of Judgment delivered on December 4, 2020 and resultant decree.
 - iv. That pending the hearing and determination of this application inter partes, this Court be pleased to order that the Applicant's motor vehicle registration number KBU 372 L be released to the Applicant for purposes of carrying on its business.



- v. That pending the hearing and determination of this application inter partes, the court be pleased to recall, set aside and or cancel the notification of sale dated September 14, 2022 of the Applicant's motor vehicle registration number KBU 372 L and the Warrants of Attachment and Warrants of Sale dated and issued on July 28, 2022 respectively with no order to payment of Auctioneer costs on the Applicant herein.
 - vi. That the Honourable Court be pleased to enlarge time for the Applicant to file its memorandum of appeal out of time.
 - vii. That pending the hearing and determination of the Applicant's intended appeal, this Honourable Court be pleased to grant an order of stay of execution of the Judgment delivered on December 4, 2020 and the resultant decree by the Respondent and/or the Respondent's agents, servants and or employees or any person claiming through the Respondent in execution of Judgment delivered on December 4, 2020 and the resultant decree.
 - viii. That in the alternative, pending the inter partes of this application, the Honourable Court be pleased to issue an order of status quo ante September 14, 2022.
 - ix. That in the alternative, pending the inter partes of this application, the Honourable Court be pleased to issue an order of preservation of the Applicant's motor vehicle registration number KBU 372 L.
 - x. That costs of this application abide the intended appeal.
2. The application is expressed to be anchored on the grounds obtaining on the face of the application, and the affidavit sworn by one William Duko on the September 20, 2022.
 3. The Respondent opposes the application upon basis of the grounds obtaining on the replying affidavit sworn by the Respondent on the September 23, 2022.
 4. Outstanding for determination on the Applicant's application is:
 - i. Whether the leave sought for filing the appeal out of time is grantable in favour of the Applicant and;
 - ii. Whether there can be granted a stay pending the hearing and determination of the intended appeal.
 5. The Applicant contended that the Judgment, the subject matter of the intended appeal was delivered in absence of its Counsel. There was no notification by the trial Court or Counsel for the Respondent that the Judgment was to be delivered on the date it was.
 6. That despite the non-communication the Respondent's Counsel proceeded to extract the decree without first sharing a draft thereof with its Counsel contrary to the dictates of Order 21 Rule 8 of the Civil Procedure Rules.
 7. The Applicant argued that the trial Court did not have jurisdiction to render itself on the matter that was before it. The matter flowed from a workplace injury and therefore squarely fell under the realm of WIBA. According to the Supreme Court decision in Petition No. 4 of 2019 – Law Society of Kenya - vs- Attorney General & another, all work injury related matters were to be determined by the Director of Occupational Safety and Health.
 8. The Applicant submitted that applications for stay pending appeal are governed by the provisions of Order 42 Rule 6 of the [Civil Procedure Rules](#). If the orders sought are not granted and the motor vehicle



is sold, it shall suffer substantial loss. As to what amounts to substantial loss the definition that was given in *G. N. Mwema t/a Mount View Maternity & Nursing Home -vs- Miriam Maalim & another [2018]* eKLR, was cited, and the Court urged to be persuaded by the same.

9. The Applicant asserts that there is no evidence brought forth by the Respondent that he will be able to refund the sum of the decree if the same is paid to him but eventually the outcome of the intended appeal require that he refunds the same.
10. Citing the case of *Superior Homes Kenya Limited -vs- Musango Gitome* [2018] eKLR, the Applicant argued that where an allegation of incapacity to refund is raised, the evidential burden shifts to the Respondent to prove that he or she has sufficient means to refund.
11. Considering the circumstances of this matter as brought out in its affidavit in support of the application, it is safe to conclude that the application has been filed without undue delay, the Applicant submitted.
12. The Applicant is willing to abide by any conditions that this Court may deem just and fair to attach to the grant of an order for stay of execution.
13. The warrants of attachment and sale should be lifted, as they flow from a judgment by a court which in the first place did not have jurisdiction.
14. In response to the Applicant's application and submissions, the Respondent contended that the application is an afterthought, bad in law and only filed to deny him the fruits of his judgment.
15. The Respondent states further that contrary to what the rules of procedure demand, the Applicant has not offered security for the performance of the decree, should the intended appeal fail.
16. It was argued that the trial Court record will reveal that the Respondent had two law firms representing him. The firm of Simiyu, Opondo & Company was served with the hearing notice. They did not attend Court when the matter came up for hearing. Satisfied with the service the trial Court proceeded to hear the matter.
17. The issue of jurisdiction was not raised as a preliminary objection or in any manner before the trial Court. It cannot be raised on appeal.
18. The Respondent contended that the hearing notice for the September 16, 2020, and a mention notice dated October 15, 2020, having been served upon counsel for the Applicant, the Applicant's counsel ought to have been prompted to follow the progress of the matter through the Court's digital system, which is open to the public.

Determination

19. It is not in doubt that the Judgment that the Applicant intends to assail by way of an appeal if the leave herein sought is granted, was delivered on the December 4, 2020 and that the instant application was filed on the September 21, 2022, after a period of almost two years.
20. I have carefully considered the material placed before me, by the Applicant, it does not in any way explain events leading to the Judgment. It denies not that there was an invitation for a hearing that was slated for September 16, 2020, through the hearing notice dated July 16, 2020, that was received on the July 30, 2020 by the law firm of Simiyu, Opondo, Kiranga & company Advocates. The Applicant does not deny that a mention notice for purposes of confirming filing of submissions was served on the counsel.



21. The Court further notes that through an email dated October 6, 2020, the Respondent's counsel wrote to the Applicant's counsel indicating that they [counsel for the Respondent] had filed their submission, and thereunder forwarding the submission to the Counsel for the Applicant. That the email was such written and submissions forwarded has not been challenged by the Respondent.
22. Any counsel receiving submissions on a matter that has been heard on the substantive claim would reasonably be expected to know that the next stage in the matter shall be preparation and delivery of a judgment in regard thereto. I take it that Counsel for the Applicant knew this or ought to have known.
23. After receiving the mention notice, one would reasonably expect a diligent party keen to prosecute his defence, to follow up the happenings of the mention date, if it happened that he or she was absent on the day of mention. Following up by making an inquiry from the counter-part or the Court. It is clear the Applicant did not do it.
24. It has not escaped my mind that the Judiciary has heavily invested in its e-system. At a click of a button, one is able to follow the progress of his or her matter from whatever part of the globe.
25. This Court cannot assist indolent parties, parties who are not keen to follow up their matters.
26. Considering the totality of the material placed before me, I am persuaded by the Respondent's position that the application herein is an afterthought.
27. By reason of the premises hereinabove, I come to a conclusion that the Applicant has not demonstrated that there was a sufficient reason that impeded it from filing an appeal against the trial Court's Judgment in time. I decline to grant the leave sought for filing an appeal out of time, consequently.
28. Having declined to grant the leave as I have, I find it unnecessary to consider the prayer for stay of execution pending the hearing and determination of the intended appeal.
29. The long and short of it all being, that the application herein is dismissed with costs.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY, 2023.

OCHARO KEBIRA

Judge

In presence of

Ms. Kisiangani for the Respondent.

Ms. Gatera for the applicant.

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

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