



**Kenya Chemical And Allied Workers Union & another v East Africa
Portland Cement & 2 others; Kipchumba & 228 others (Respondent) (Cause
2119 of 2014) [2023] KEELRC 1190 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1190 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2119 OF 2014
AN MWAURE, AN MWAURE & AN MWAURE, JJ
MARCH 23, 2023**

BETWEEN

KENYA CHEMICAL AND ALLIED WORKERS UNION CLAIMANT

AND

CEMENT & ANOR APPLICANT

AND

EAST AFRICA PORTLAND CEMENT APPLICANT

AND

WORKERS UNION & ANOTHER RESPONDENT

AND

JULIET KIPCHUMBA & 228 OTHERS RESPONDENT

RULING

1. Before this court for determination are four applications brought by notice of motion applications as hereunder and a preliminary objection.
 - a. Amended notice of motion application dated 12th April 2023 field by Gichuki Kingara & Co Advocates. The prayers sought vide that notice of motion are
 - i. That this application is certified urgent and service thereof be dispensed with in the first instance – spent.



- ii. That the firm of Gichuki Kingara & Co Advocates be granted leave to come on record on behalf of the applicants herein after judgment in the place of Nyabena Nyakundi & co Advocates.
 - iii. That cost of this application be in the cause.
- b. The second notice of motion is dated 16th February 2023 filed by D.K. Muema & Company Advocates and seeks the following prayers.
- 1. That this application be certified as urgent and service of the same be dispensed with at the 1st instance – spent.
 - 2. That the firm of D.K. Muema & Co Advocaes be granted leave to come on record for the claimant/applicant.
 - 3. That the 1st respondent be compelled to release the sum of Kshs. 2,234,201.63/- being the amount due to the claimant/applicant together with interests from 6/7/2015.
 - 4. That this court be pleased to adopt the sum of Kshs 2,234,201.63/- plus interests from 6/7/2015 as an order of the court and a decree do issue.
 - 5. That the 1st respondent be compelled to file their respective mode of payment of the said sum.
 - 6. That the firm of Nyabena Nyakundi & Co advocates be compelled to give an account of all monies paid by the 1st respondent on behalf of the claimant/ applicant.
 - 7. That cost of this application be paid by the respondents.
2. Application No. 3 was filed by the respondents advocates

George Muchiri Gichuki C/o Daly Inamdar and dated 6th March 2023. The prayers thereto are as herein under:

- 1. This application be certified as urgent and heard ex parte in the first instance- spent.
- 2. This instant application be placed before the honourable learned lady justice Anna Ngibuini Mwaure for adjudication and disposal.
- 3. That this honourable court be pleased to review and vary a portion of its order issued on 14/2/2023 and specifically that portion of the order which ordered that
 “ that the court also orders the respondent to give a more reasonable offer of not less than Kshs. 50,000,000/- per month in settling the decretal sum and demonstrate to court attempts to sell the 7 pieces of land. The amount they will propose to pay will be per month pending clearing the whole amount once they sell the land.
- 4. This honourable court be pleased to grant such further orders that are fair and just



5. Costs of this application be provided for.
3. The fourth one is filed by Victor Ochieng Okuta a grievant and is dated 15th March 2023 and seeks the following prayers:
 1. That this application be certified urgent, heard ex parte and service hereby be dispensed with in the first instance.
 2. That this instant application be placed before the honourable learned lady justice Anna Ngibuini Mwaure.
 3. That the honourable court be pleased to order the firm of Gichuki Kingara & Co. Advocates do follow procedure in respect to Order 9 Rule 9 of the Civil procedure Rules.
 4. That the honourable court not entertain the firm of Gichuki Kingara & Co. Advocates until properly on record.
 5. That this honourable court be pleased to grant any further orders that it might see fit, fair and just.
 6. That costs of this application be provided for.
 4. The fifth application is by way of a preliminary objection dated by 20th march 2023 and is instituted by the advocates for the claimant/decreed holder Messrs Nyabena Nyakundi & Co Advocates. The preliminary objection raises a point that the respondent having filed an appeal to the Court of Appeal against the order of the honourable court issued on 14th February 2023 the honourable court has no jurisdiction to hear and determine an application for review of the same orders as it amounts to being frivolous and an abuse of the process of the court. He prays the notice of motion dated 6th March 2023 be struck out with costs.
 5. The court has considered the numerous applications by the respective parties to this suit. First the court has noted this is a very old case which started in 2014. Judgment was rendered by the honourable court in 2015. An appeal was filed in the Court of Appeal and the same was dismissed on 6th October 2017.
 6. Since then apart from Kshs 90,000,000 paid out of about 1.4 billion Kenya shillings the parties have been filing application upon applications up to date. This trend is bound to proceed until time provided for execution of the decree will definitely expire. The respondent will be the main beneficiary and all the counsels will have nothing much to lose. The main losers will definitely be the grievants.
 7. The court has decided to take a decisive action and bring these application to their expected end. There comes a time when vicious litigation has to come to an end.
 8. The court will deal with the applications systematically. In the application by Messrs Gichuki & Company Advocates to be granted leave to represent the applicants listed in their application dated 12th April 2023 the court will be guided by article 50(2) (9) of the Constitution which provide that every accused person has a right to choose an be represented by an advocate and to be informed of that right promptly.
 9. This may not be a criminal case but nevertheless the same principle applies that every person has a right to choose an advocate who will represent them. In that case unless the grievants specifically deny they signed the annexed list by way of a sworn affidavit the court will allow Messrs Gichuki Kingara and Co



advocates to represent the listed grievants and so the said grievant will hence be represented by the said Gichuki Kingara in place of Nyabena Nyakundi & Co. Advocates.

10. As well Messrs D.K Muema & Company advocates are also given leave with immediate effect to represent grievant Morris Muteti Kawinzi in the place of Messrs Nyabena Nyakundi & Co advocates.
11. That therefore renders the 4th application of grievant Victor Ochieng Okoth dated 15th March 2023 as settled since the court has handled the issue of representation of Mesrs Gichuki Kingara & Co Advocates.
12. The court will now deal with the notice of motion by the respondent's advocates George Muchiri Mwangi C/o Daly Inamdar advocates.
13. As earlier enumerated the background of the suit is that there was judgment entered in favour of the grievants on 6th July 2015 and on 2nd August 2018 the same was certified to be Kshs 1,401,585,364.80. The prayers as per this applicant are as set out hereinbefore.
14. The parties agreed on 8th January 2020 how the same would be settled. The consent was adopted by the court as an order of the court on 13th January 2020.
15. Pursuant to the court order the applicant company paid kshs 90,000,000 and so balance outstanding is kshs 1,311,585.80.
16. The consent set out elaborate and detailed procedure in which the entire sum would be fully settled. Execution as per balance was to issue only:

If the applicant company fails to settle the balance from monies arising from the sale of certain properties being L.R. NO. 8786 and L.R. No 8784/4 but which monies should first have been applied to settle loan amounts owed to the Kenya Commercial bank and further also only if the entire amount remaining after settling the loans owed to the Kenya Commercial Bank is sufficient to settle the entire balance. The consent order further provides: that further to clause 7 and if the aforementioned remainder of the proceeds of sale of the properties is not sufficient to offset the balance or if the properties are not sold as contemplated under the settlement the 1st respondent to make reasonable endeavours to source alternative avenues of funds to offset the entire balance or the remainder of the balance as the case may be.

17. The applicant company was unable or unwilling to settle the balance from the sale of properties.
18. That in an effort to settle the decretal sum this honorable court asked the applicant to file proposal considering the decretal sum and the long period since judgment was delivered on how to settle the same and applicant offered to pay kshs 12,500,000 by 31/3/2023 (now past) and 12,500,000 by 31/12/2023 and balance in equal instalments between 2024-2027 out of proceeds of properties LR no 10428/18, 10424/19, 20,21,22,23 and 27.
19. The court was unimpressed by the proposal and demanded respondent to give a more reasonable proposal of not less than Kshs 50,000,000 per month and demonstrate to court attempts to sell the 7 pieces of land. The amounts were to be paid monthly pending paying the entire amount once the 7 pieces of land were sold.
20. The applicant/respondent filed this application and stated that the court did not consider the financial situation of the applicant and hence if orders are given which the applicant will not be able to comply with the said judgment will essentially be a "paper judgment."



21. The applicant states the amount they can raise are Kshs 12,500,000/- by 31/3/2023 and 31/12/2023 as earlier stated.
22. The applicant reveals they are faced with myriads of financial difficulties and are operating at a loss and furthermore have outstanding agency notices from Kenya Revenue authority and many other liabilities hence pray for review of the subject order dated 14/2/2023. The application is supported by affidavit of Mohamed Adan head of Finance at the Applicant's company and he confirms the contents in the application hereto.

Grievants/claimant's grounds of opposition

23. Juliet Chepchumba Tuwot deponed an affidavit on 20th March 2023 on her behalf and on behalf of 228 others. She averred that the settlement of their claim is premised on a collective bargaining agreement as well as consent entered between the parties and she purports the funds to settle the claimant was available.
24. She says to retract the consent and pay piecemeal is dishonesty and so she prays execution to proceed.
25. She also asks the 228 grievants be incorporated in a fresh deed of settlement and Kshs 50,000,000 be paid and shared with the 228 grievants since the grievants represented by the firm of Nyabera & Nyakundi & Co Advocates shared the Kshs 90 million.
26. She says the applicant is a big cement factory and are unwilling to settle the decree. She prays they be paid the 50 million and agree on payment of the balance.
27. The other counsels for the other grievants did not file any response.

Determination and analysis.

28. The court has advised itself this is a very old matter which was filed in 2014. Judgment was entered in 2015 and actual figures certified in August 2018 and since then the respondent has managed to pay 90,000,000 and balance is still outstanding which is Kshs 1,311,585.00.
29. The consent was signed between the parties and dated 8th January 2020 and that is how the respondent paid the Kshs 90,000,000/-. The balance was to be paid as soon as 1st respondent who was herein East African Portland Cement Company limited would dispose and is paid the purchase price as regards real property land reference no 8786 and land reference number 8784/4 but the grievants would be paid once the proceeds of sale are applied in the settlement decree and if same was insufficient to offset the balance and further if proceeds of sale of the properties were not sufficient to offset the balance or if they are not sold as contemplated in the deed of settlement the respondent would make reasonable endeavours to source alternative resources to offset the entire balance or the remainder of the balance.
30. If the above was not complied with the grievants/claimants/applicants to execute for the balance whichever the case.
31. The applicants Head of Finance Mr Mohammed Adan of EA Portland deponed a detailed affidavit explaining the dire financial position of the applicant. He quotes demands from Kenya Revenue Authority, Kenya Power and Lighting debt Rates from County Government of Kajiado and still says all these are a tip of the iceberg. He prays the applicant to be given time to pay decretal sum and maintain itself as a going concern.
32. The court has listened to all the parties and has had time to see the pained faces of the grievants in court as they have waited for years for the fruit of their judgement. The court will no doubt sympathise with the plight of the applicant but at the same time the plight of these grievants is not lost to the court.



- They lost their jobs on or around 2014 and since then save for the 90,000,000 which is peanuts among all those grievants they have never received any other payment.
33. At the same time reading the consent signed between the parties in January 2020 the grievants were not paid after sale of the properties 8786 and 8784/4 and yet the respondent did not give account of the purchase money after settling the Kenya Commercial Bank loan. That was on or around 2020.
 34. The respondent have been purporting to sell their 7 pieces of land in Athi River but part of the consent was that they would make reasonable endeavours to source alternative avenues of funds to offset the balance. The honourable court is not presented with evidence of the reasonable efforts made to offset the balance. Indeed the offer made by the applicant is contemptuously considering time taken since the judgment was entered and the number of the grievants. If respondent only pay Kshs 12,500,000 in March 2023 (now in past) and Kshs 12,500,000/- in December 2023 how will it be divided among over 600 grievants?
 35. The court finds the only fair solution is to go by the consent provision that “ in default of the 1st respondent complying with clause 7 and 8, the claimant /applicant be at liberty to execute for the balance.
 36. The above was adopted as a court order dated 13th January 2020.
 37. Flowing from the foregoing the application dated 6th March 2023 is therefore reviewed as far as payment of the decretals sum in monthly instalments of kshs 50,000,000 is concerned and instead the claimant’s grievants are at liberty to execute as per the order dated 13th January 2020.
 38. The application by D.K Muema advocates is incorporated in this ruling that all the grievants are at liberty to execute.
 39. The preliminary objection by Messrs Nyabena Nyakundi & Co advocates is found not to be merited as the court has not been shown evidence of the notice of appeal in relation to the order of this court issued on 14th February 2023. Preliminary objection is dismissed and costs will be in the cause. Each party will meet the costs of these other applications.

Orders accordingly.

Dated, Signed and Delivered virtually in Nairobi this 16th day of May, 2023.

ANNA NGIBUINI MWAURE

JUDGE

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.



ANNA NGIBUINI MWAURE

JUDGE

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