



**Kenya Aids NGOs Consortium (KANCO) v Okumu (Miscellaneous Application 1 of 2022) [2023] KEELRC 546 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 546 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
MISCELLANEOUS APPLICATION 1 OF 2022**

**JW KELI, J  
MARCH 2, 2023**

**BETWEEN**  
**KENYA AIDS NGOS CONSORTIUM (KANCO) ..... APPLICANT**  
**AND**  
**LINDA ACHIENG OKUMU ..... RESPONDENT**

**RULING**

1. The Respondent (judgment debtor), upon delivery of judgment against it in Kakamega CMCC NO. 151 of 2019 Linda Achieng Okumu v Kenya AIDS NGO's Consortium on the March 28, 2022, approached the court by way of Notice of Motion brought under Section 79G and section 95 of *Civil Procedure Act*, Order 51 Rule 1 and Order 42 Rule 6(2) of the *Civil Procedure Rules* under certificate of urgency dated June 10, 2022 seeking the following orders:-
  - a. That the application be certified as extremely urgent requiring to be placed before the next available judge.
  - b. Pending the hearing and determination of this application this Honourable court be pleased to issue an order of stay of the orders issued on March 28, 2022.
  - c. Pending the hearing and determination of this appeal this Honourable court be pleased to issue an order of stay of the orders issued on March 28, 2022.
  - d. The applicant be granted leave to file appeal out of time against the judgment given on the 28<sup>th</sup> day of March 2022 by Hon. Dolphina Alego ( Chief Magistrate).
  - e. Upon grant of leave to appeal out of time, the draft memorandum and record of appeal lodged herein be deemed as duly filed.
  - f. This Honourable Court be pleased to issue any order it deemed fit and juts in the circumstances.



- g. Cost of this application be provided for.
2. The court allowed the said application by issuing the following orders on the October 13, 2022:-
1. There shall be a stay of execution of the judgment and/or Decree in Kakamega CMCC No. 151 of 20189 Linda Achieng Okumu vKenya Aids Ngos Consortium pending the filing, hearing and determination of the intended appeal to the Court of Appeal on condition that the decretal sum of Kshs.582,769/- is deposited in court within 14 days of this order.
  2. Failure to comply with the deposit will lead to automatic vacation of the order Nos. 1 above.
  3. Order of leave extending the time of filing appeal and to file appeal out of time against the judgment of Hon. Dolphina Alego (CM) Kakamega CMCC NO. 151 OF 2019 Linda Achieng Okumu vKenya Aids NGOs consortium of 28<sup>TH</sup> March 2022.
  4. Failure to file the notice of appeal, memorandum of appeal and the record of appeal within 30 days of this Order will lead to automatic lapse of order no.3
  5. Costs to therespondent.”
3. The respondent/applicant(decree holder) on the December 8, 2022filed in court Notice of Motion application of even date seeking the following orders:-
- a. That the application be certified urgent and be set down for hearing on priority basis
  - b. That this honourable court be pleased to order for the release of KES 582,769 deposited in court as security by the respondent to the applicant’s advocates herein
  - c. That the costs of this application be borne by the respondent.
4. The Application was supported by the affidavit of the applicant dated December 8, 2022to the effect that no notice of appeal, memorandum of appeal and record of appeal had been filed in compliance with the court order of October 13, 2022 outlined above.
5. That the said appeal cannot be lodged without extending time upon expiry of the leave of 30 days under the order. That no leave had been sought to extend the said orders. That the delay in filing of the appeal in compliance with the orders issued on the October 13, 2022 prejudicing the applicant who was yet to enjoy the fruits of judgment delivered in her favour in Kakamega CMELRC No. 151 of 2019. That in response to the reply, the respondent did not require proceedings of the lower court to file memorandum of appeal to enable the court invoke its appellate jurisdiction.
6. That the certificate of delay request would not aid the respondent as no memorandum of appeal had been filed in court. That there is no justification why the memorandum of appeal had not been filed.

## Response

7. The Application is opposed by the Respondent vide replying affidavit of Kwame Shago Advocate sworn on theDecember 21, 2022 and received in court on the January 19, 2023. The response was to effect that the respondent had complied with the said court order by depositing the decretal amount in court and embarked on preparing the intended appeal. That the respondent had not filed the appeal due to inability to obtain certified typed proceedings from the trial court . That they had requested for the typed proceedings, judgment and decree for purposes of lodging appeal unsuccessfully(KS1 AND 2). That the applicant was privy to letter sent to the executive officer as copied to his email(KS-3). The court noted that the applicant’s advocate in supplementary affidavit averred he only received the



request for certificate of delay. That by letter dated November 16, 2022 the court registry furnished them with certified copies of judgment and decree and also informed them that the typed proceedings were yet to be prepared. (KS-4 copy of the letter). That the delay to lodge appeal had been caused by the court registry and they had complied with the order on decretal deposit. That their appeal has high probability of success as it raises serious and arguable, factual, evidentiary and legal issues and the same would be rendered nugatory if the application is allowed (KS-5 was a draft memorandum of appeal).

8. The court directed the application be canvassed by way of written submissions.
9. The respondent/ applicant submissions drawn by Odhiambo Opar & Company were dated January 31, 2023 and received in court on the February 3, 2023.
10. The respondent/ applicant submissions drawn by now Advocates LLP were dated February 6, 2023 and received in court on the February 10, 2023.

## **Determination**

### **Issues for determination**

11. The applicant/respondent identified the following issues for determination:-
  - a. Whether there is an appeal duly filed by the applicant /respondent herein before court.
  - b. Whether the applicant /respondent is in compliance with the conditional orders of stay in respect to the ruling dated October 13, 2022 issued by the court.
  - c. Which orders to grant ?
12. The respondent/applicant identified the following issues for determination:-
  - a. Whether the applicant / respondent should be allowed to file its intended appeal?
  - b. Whether the respondent/applicant should be granted the reliefs sought.
13. The court is of the opinion that all those issues raised by the parties border on the merit of the instant application and the court will proceed to consider the merit of the application.
14. The orders of the court of October 13, 2022 emanated from Notice of Motion brought under Section 79G and section 95 of *Civil Procedure Act*, Order 51 Rule 1 and Order 42 Rule 6(2) of the *Civil Procedure Rules* under certificate of urgency dated June 10, 2022 by the judgment debtor/respondent.
15. The court considered there were two orders sought under application dated June 10, 2022. The first being for stay of execution pending filing of appeal under Order 42 Rule 6(2) of the *Civil Procedure Rules* and the second one being an order for leave to file appeal out of time under section 79G and section 95 of *Civil Procedure Act*.
16. Under the Order sought for stay the same was granted in the following terms:- There shall be a stay of execution of the judgment and/or Decree in Kakamega CMCC No. 151 of 20189 Linda Achieng Okumu v Kenya Aids NGOS Consortium pending the filing, hearing and determination of the intended appeal to the Court of Appeal on condition that the decretal sum of Kshs.582,769/- is deposited in court within 14 days of this order. Failure to comply with the deposit will lead to automatic vacation of the order. There was no dispute that the respondent /applicant complied with the requirement for the order for stay of execution.
17. On the prayer for leave to file appeal out of time the court granted the following orders:- Order of leave extending the time of filing appeal and to file appeal out of time against the judgment of Hon.



Dolphina Alego (CM) Kakamega CMCC No. 151 of 20189 Linda Achieng Okumu vKenya aids NGOS consortium of 28<sup>th</sup> March 2022.Failure to file the notice of appeal, memorandum of appeal and the record of appeal within 30 days of this Order will lead to automatic lapse of order. It is this second order of leave to appeal that is said to have not been complied with and the applicant on that basis seeks for the release of the decretal money deposited in court.

18. The Applicant opines that the failure to file the memorandum of appeal is not justified as the certified typed proceedings were not necessary for the respondent/ applicant to make that move to invoke the appellate jurisdiction of the court. The applicant submits that the filing of memorandum of appeal is the gate opening of the appeal and to buttress this submission relied on the decision in *Haron E. Egechi Nyaberi v British American Insurance Co. Ltd* (2012)e KLR where the court held that: ‘I am persuaded that an application for dismissal of an appeal for want of prosecution under Order 42 Rule 35(1) aforesated, cannot successfully lie unless and until directions have been given by the judge. It is however, clear to this court that the Registrar cannot give notice of directions to the parties of an appeal and cannot himself fix an appeal for directions before a judge unless and until the appellant has caused it by first complying with rule 11 and 13 thereof. Appellant’s compliance to those rules is the gate-opening for admission of appeal and for the taking of directions. It is to be observed, therefore, that it will be the appellant who shall really cause the appeal to be listed for giving directions before a judge by: -
- a) Serving the Memorandum of Appeal and
  - b) Filing and serving the Record of Appeal.’”
19. The respondent/applicant in their submissions reiterated facts in the affidavit of Kwame Shago being that they had been pursuing the availability of the certified typed proceedings from the trial court unsuccessfully and had even applied for certificate of delay to enable them lodge the appeal. That they had complied with the condition for the stay of execution as ordered by the court and would be prejudiced if the application is granted as it would render their intended appeal nugatory. That there was no inordinate delay in failure to file the appeal and they had diligently taken steps to get the trial court proceedings to file the appeal. That section 79G and 95 of the *Civil Procedure Act* provide for enlargement of time and article 48 of the *Constitution* guarantees every person access to justice and further relied on article 50 on fair trial.

## Decision

20. The court finds that the respondent complied with the condition of stay of the execution of the judgment of the trial magistrate court. The court would be turning on its own order if it were to allow the application as sought which is tantamount to allowing execution to proceed when the condition for stay being deposit of security for the decretal amount had been complied with.
21. The court finds it is premature to determine on the question of enlargement of time to lodge appeal at this stage. On balance of probabilities the court is satisfied with the reasons for the delay being the non-availability of the certified typed proceedings by the trial magistrate court. The court interpreted decision in *Haron E. Egechi Nyaberi v British American Insurance Co. Ltd* (2012)e KLR to mean that the appeal is not deemed filed until filing and service of the Memorandum of Appeal and Filing and service of the Record of Appeal.
22. The court holds that it was postulation for the applicant to state that the respondent was capable of filing the memorandum of appeal without access to the certified typed proceedings. What if the respondent needs to find out whether the court recorded their evidence during the trial? How will they know without access to the court certified proceedings? There was evidence before court that the



trial court had not availed the certified typed proceedings as requested by the respondent. The court finds and determines that it premature to deal with the issue of non-compliance of the order of leave to appeal within 30 days in the circumstances. The court will deal with the issue at the right time. The court notes that the ruling would have been otherwise if the respondent had been availed the certified typed proceedings and failed to lodge an appeal. The court finds that it would be unfair and in violation of provisions of article 48 of the Constitution to lock the gates of appeal for the respondents when they had sufficient cause for the delay in filing the appeal as ordered by court.

23. In the circumstances the application dated December 8, 2022 is held to be premature and dismissed. Each party to bear own costs in the application.
24. It is so ordered.

**WRITTEN, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 2<sup>ND</sup> DAY OF MARCH, 2023.**

**J. W. KELI,  
JUDGE.**

In the presence of:-

Applicant/Respondent: Shago holding brief for Nungo

Respondent/Applicant: Absent

