



REPUBLIC OF KENYA



Gitonga v Matimbo (Appeal E076 of 2021) [2023] KEELRC 1956 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1956 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

APPEAL E076 OF 2021

JK GAKERI, J

JULY 26, 2023

BETWEEN

KELLEN WANGARI GITONGA APPELLANT

AND

JUDITH MAJUMA MATIMBO RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Respondent/Applicant dated 24th March, 2023 seeking orders that;
 1. The court be pleased to order release of funds deposited in the joint Account Number 01192643921900 Account Name: Kenneth Mwangi Mburu and Mokaya Omwoyo and Associate domiciled at Co-operative Bank, Moi Avenue Branch, Nairobi to the Applicant's Account M.O. and Associates Advocate Client Account, Account Number 1282809067.
 2. The court be pleased to order that Sidian Bank, K-Rep Centre Kilimani Wood Avenue, Nairobi to honour a bank guarantee issued to the Respondent on 27th April, 2022 and release to the Respondent/Applicant the funds so guaranteed to the Applicant's Account M.O and Associate Advocate, Client Account, Account Number 1282809067.
 3. The appellant be directed to pay the remaining decretal sum of Kshs.82,430/= which the Respondent intentionally declined to deposit as directed by the court to the applicant's Account M.O and Associate Advocate, Client Account, Account Number 1282809067.
 4. The Respondent be granted costs of this application.



2. The Notice of Motion herein is based on the grounds set forth on its face and supported by the Affidavit of Judith Majuma Matimbo dated 24th March, 2023.
3. The applicant argues that the appeal herein has since been dismissed consistent with the Ruling dated 14th February, 2023 and the appellant and the advocate herein has refused to co-operate in the withdrawal of sums deposited in the joint interest earning account as directed by the court and the court should stamp its authority to safeguard the rights of the applicant.
4. The affiant deposes that the judgement of the lower court was delivered on 6th July, 2021 and the appeal was filed on 27th July, 2021.
5. That the court directed that the decretal sum be deposited in an interest earning account and a bank guarantee be issued. This is not the state of affairs.
6. That vide a ruling dated 14th February, 2023, the court directed the appellant to file the record of appeal within 30 days failing which the appeal stood dismissed and the appellant did not comply and the appeal stood dismissed.
7. The affiant prays that the application be granted as prayed.
8. The affiant deposes that the appellant did not deposit the entire decretal sum as directed, that this is a misrepresentation of the court order and the Ruling was very clear on what was to be deposited in an interest earning account.

Response

9. In the Replying Affidavit sworn by Mwangi Mburu Advocate dated 21st April, 2023, the affiant deposes that he received instructions and filed a consent to come on record on 8th April, 2022 and on 28th September, 2022, the Respondent filed an application for dismissal of the appeal for want of prosecution which the court declined in its Ruling on 14th February, 2023 and
10. That during the 30 days given by the court for the appellant to file the record of appeal, counsel filed a letter dated 22nd February, 2023 requesting for certified copies of proceedings for purposes of compliance with the court order.
11. That the counsel's office clerk visited the court's Registry to obtain the same but was unsuccessful due to backlog in the issuance of certified copies of proceedings.
12. The affiant invited the court to take judicial notice of the pending applications or requests for certified copies of proceedings.
13. That the appellant was not to blame for the delay.
14. The affiant further deposes that the applicant had been unnecessarily incessant in filing applications and ought to have been aware of the challenges counsel was facing.
15. The affiant states that the affidavit was in opposition to a Notice to Show Cause issued on 16th March, 2023 and the application dated 24th March, 2023.
16. The affiant urges the court to direct the Court Administrator, Milimani Commercial Courts to issue certified copies of the proceedings in CMEL No. 273 of 2020 Judith Majuma Matimo V Kellen Wangari Gitonga.



Applicant's submissions

17. Counsel for the Respondent/Applicant isolated three issues for determination as to whether;
 - i. the appeal stands dismissed.
 - ii. the applicant is entitled to the orders sought and
 - iii. who bears the costs?
18. As to whether the appeal herein stood dismissed pursuant to the court's directions dated 14th February, 2023, counsel submitted that the appellant's failure to comply with the orders meant that the appeal stood dismissed automatically and there was no appeal before the court. That the only issue outstanding was for the court to grant the orders sought herein.
19. As to whether the applicant is entitled to the orders sought, counsel rehearses the orders granted to the appellant pursuant to the application for stay of execution dated 19th December, 2021, namely deposit of half of the decretal sum in an interest earning account and security for the balance within 45 days failing which execution to ensue.
20. Counsel urged that the applicant deposited part of the decree and the sum of Kshs.82,430/= was not deposited.
21. That the appellant ought to be ordered to pay the sums due.
22. Counsel submitted that despite calls and letters to the appellant's advocate to facilitate the withdrawal of the sum in the joint account, the advocate had declined and there was need to recover the sum in the account.
23. Counsel further urged that since the bank guarantee was for the purpose of the appeal herein which stood dismissed, the bank should be directed to release the funds guaranteed.

Respondent/Appellant's submissions

24. Counsel for the appellant addressed two issues, namely;
 - i. Whether the appeal stands dismissed.
 - ii. Whether the appellant had demonstrated valid reasons for the delay in filing the record of appeal.
25. As to whether the appeal stood dismissed, counsel submitted that as per the grounds of opposition, the court's suo moto notice to show cause meant that the appeal was alive. That the notice to show cause cannot issue if the appeal has already been dismissed.
26. Counsel submitted that the application herein was misplaced premature and lacked merit as the applicant has been exceedingly obstinate and vexatious as the instant application replicates an earlier one dated 28th September, 2022.
27. As to whether the appellant had demonstrated valid reasons for the delay in filing the record of appeal, counsel rehearsed the history of the appeal from 26th July, 2021 to 22nd February, 2023 when the appellant's letter filed a letter to the Court Administrator urging the extraction of certified court proceedings in order to comply with the court order dated 14th February, 2023.



28. According to counsel, the reasons and grounds deponed in the Replying Affidavit explain the delay in complying with the court's directions.
29. Reliance was made on the sentiments of the court in *Julius Kiruma Kariuki V Kamau Mwangi & 3 others* (2011) eKLR to urge that the appellant was not to blame for non-compliance with court orders.
30. Counsel urged that the facts of the two cases were similar.
31. According to counsel, the duration of one (1) year and eight (8) months since filing of the appeal was subjected to interlocutory proceedings and rulings and the time ought not to be computed.
32. Reliance was also made on the decision in *Winstar Security Guards Ltd & another V Nathan Mulupi Ndimuli* on dismissal for want of prosecution.
33. That the court order dated 14th February, 2023 notwithstanding the delay was not inordinate and was excusable and the two letters on record explain the efforts made to obtain the record of appeal.

Determination

34. The issues for determination are;
 - i. Whether the court issued a Notice to Show Cause on 13th March, 2023.
 - ii. Whether the Notice of Motion dated 24th March, 2023 is merited.
35. As to whether the court issued a Notice to Show Cause suo moto on 16th March, 2023, applicant made no reference or mention of it.
36. On the other hand, the appellant made reference to it in the Grounds of Opposition, Replying Affidavit and Submissions. To contextualize this issue, on 14th February, 2023, the court delivered a Ruling on the Notice of Motion by the Applicant herein dated 28th September, 2022 and declined the same but directed the Appellant/Respondent to file the record of appeal within 30 days failing which the appeal would be deemed dismissed.
37. The Ruling was delivered in the presence of Mr. Wasike holding brief for Mr. Mokaya for the Appellant and Mr. Mwangi for the Respondent/Applicant and a mention was slated for 16th March, 2023 to confirm compliance with the court's directions.
38. On 16th March, 2023, none of the parties were present and a mention was slated for 24th April, 2023 and notice was to be issued by the Deputy Registrar.
39. Court record is unambiguous on the directions given on 16th March, 2023.
40. Indeed, during the mention on 24th April, 2023, Mr. Mwangi indicated in his address that the purpose of the mention was to confirm compliance with the directions issued on 14th February, 2023 and also reported that the Respondent/Appellant had filed the instant application.
41. Counsel made no reference to the alleged Notice to Show Cause.
42. Puzzlingly, counsel for the appellant did not file a copy of the alleged Notice to Show Cause to illustrate the contents of paragraph 11 of the Replying Affidavit and the Grounds of Opposition.
43. In sum, it is the finding of the court that the Appellant/Respondent has failed to demonstrate that the court issued a Notice to Show Cause on 16th March, 2023 scheduled for hearing on 24th April, 2023.



44. As to whether the instant Notice of Motion is merited, both counsels addressed the salient issues which the court has noted.
45. In order to contextualize the issues, it is essential to recapitulate the history of this case as therein lies the outcome of this application.
46. First, the judgement sought to be appealed against was delivered on 16th July, 2021 by Hon. Kagoni E.M. (Principal Magistrate) Milimani Commercial Courts and the learned Magistrate awarded the Claimant a total of Kshs.407,635.80 with costs.
47. The Memorandum of Appeal was filed on 27th July, 2021.
48. Records show that by letter dated 27th July, 2021, the then counsel or the appellant requested the Executive Officer of the Milimani Commercial Courts to avail typed copies of proceedings in CMELR NO. 273 OF 2020 Judith Majuma Matimbo V Kelen Wangari Gitonga & another.
49. By letter dated 11th August, 2021, counsel for the Claimant reminded counsel for the appellant of his client's obligation to honour the judgement and demanded Kshs.547,325.80 and threatened to execute in the event of default.
50. When the Appellant was served with the Decree dated 29th November, 2021, the appellant move to court under Certificate of Urgency filed on 15th December, 2021 seeing various orders and in its Ruling delivered on 21st February, 2022, the court directed the appellant to;
 1. Deposit half of the decretal sum in a joint interest earning account in the names of the advocates, within 45 days; and
 2. Provide security for the balance within 45 days failing which the Claimant/ Respondent would have liberty to execute the decree.
51. By a second letter dated 3rd December, 2021, counsel for the Claimant/Respondent wrote to the appellant's counsel reminding counsel of his client's obligation to honour the decree and a copy of was enclosed. Counsel demanded the sum of Kshs.490,065.80 within 7 days. This letter precipitated the certificate of urgency filed on 15th December, 2021.
52. Copies of documents on record reveal that the appellant deposited the sum of Kshs.203,820/= in an interest earning account at the Co-operative Bank in the joint names of the Advocates and executed a bank guarantee for Kshs.203,820.00 dated 27th April, 2022. Evidently, the appellant did not secure the entire decretal sum as directed by the court.
53. Second, by a Notice of Motion dated 28th September, 2022, the Claimant/Applicant herein sought the dismissal of the appeal for want of prosecution as well as the release of funds in the joint interest earning account at the Co-operative Bank as well as honouring of the Bank Guarantee with Sidian Bank, K-Rep Centre.
54. By a ruling delivered on 14th February, 2023, although the court was satisfied and found that no action had been taken by the appellant in furtherance of the appeal since 27th July, 2021, yet the appellant had sought and obtained a stay of execution pending the hearing and determination of the appeal, the court was persuaded not to dismiss the appeal subject to the appellant filing the record of appeal within 30 days failing which the appeal would be deemed dismissed.
55. This is the direction the appellant did not comply with.



56. Counsel for the appellant contended that in his endeavour to comply with the directions issued on 14th February, 2023, he wrote to the Deputy Registrar on 21st February, 2023 seeking certified copies of proceedings.
57. Counsel attached the previous letter dated 27th July, 2021. To his credit, counsel underlined the urgency with which the certified copies of proceedings were required to comply with the timelines.
58. The letter to the Deputy Registrar was written 6 days after the directions of the court.
59. Although counsel deponed that his office clerk visited the court's Registry to secure the proceedings but was unsuccessful, he tendered no evidence as to when the visit(s) were made and what directions were given by the Registry on the progress made or indeed any challenges at the Registry.
60. From the record, it is clear that no other action was taken after the letter was sent to the Deputy Registrar.
61. Evidence of calls made or emails sent to demonstrate that there were court directions to be complied with would have shown the interest the appellant had in ensuring that court directions were complied with.
62. Counsel had sufficient time to notify the court and his counterpart that he was facing challenges at the Registry, if that was the case. This no doubt would have reinforced the appellant's case significantly as it would have brought to the fore the real circumstances the appellant's counsel was grappling with.
63. Counsel tendered no evidence of any demonstrable action or step taken after 21st March, 2023, yet time was running against the appellant.
64. The appellant counsel's invitation to the court to take judicial notice of the challenges of backlog of certified copies of proceedings was not supported by any written or verbal communication by the Registry as evidence of the challenges.
65. Thirdly, the appellant's conduct in this appeal is largely unknown save for the change of advocates by consent on 16th April, 2022.
66. It is unclear as to why the appellant changed counsel which is her right granted by *the Constitution* of Kenya, 2010. What is puzzling is that the counsel on record from April, 2022 took no steps in furtherance of the appeal until 21st February, 2023 after the court's Ruling, 10 months later.
67. Needless to emphasize, this appeal has been before this court since 18th January, 2022 and no significant steps have been taken by the appellant to progress the matter to conclusion and none at all after the grant of stay orders on 21st February, 2022.
68. Although counsel appears to blame the applicant herein for the interlocutory applications, the appellant filed the first one on 15th December, 2021 and is arguably estopped from complaining about the applicant's two applications, this being the second.
69. The appellant's inertia precipitated the 1st application by the applicant herein for dismissal for want of prosecution.
70. The applicant has a judgement in her favour and has been keen to have the matter concluded so as to enjoy the fruits of the judgement.
71. In the court's view, the Applicant's conduct in the course of this appeal demonstrate the requisite alertness to ensure that suits progress from one stage to the next. It cannot be characterised as obstinacy as alleged.



72. The instant application was precipitated by the appellant's failure to comply with court directions.
73. Rule 16(4) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides that;
- “The Court may dismiss the suit for non-compliance with any directions given under this rule.”
74. In response to the Notice of Motion dated 28th September, 2022, the Appellant/Respondent tendered no evidence to explain the delay in prosecuting the appeal since July 2021. The court was also alive to the fact that after the order of stay of execution was granted in February 2022, the appellant took not a single step in furtherance of the appeal, for 12 months.
75. Finally, although the court found that no action had been taken and the appellant tendered no evidence to demonstrate that the appeal would proceed without further delay, it exercised discretion in favour of the appellant and accord the appellant time to salvage the appeal. This is manifested by the directions given on 14th February, 2023.
76. The court was compelled by the appellant's inertia to give strict timelines within which the record of appeal had to be filed and the consequences in default. This is a common practice to jolt an indolent party to act. (See *Winstar Security Guards Ltd & another V Nathaniel Mulupi Indimuli* (Supra) cited by the appellant).
77. This court is persuaded that had the appellant's counsel reached out to the Deputy Registrar, and intimated the challenges he was facing in the face of the directions of the court, the court would have found it difficult to ignore such overwhelming evidence of activity in an endeavour to ensure compliance with court directions.
78. An application under Certificate of Urgency for extension of time filed before the 30 days lapsed would have demonstrated the appellant's unbridled desire and commitment to comply with the directions given and propel the appeal forward.
79. In the absence of such supportive and demonstrable evidence as to why court directions were not complied with, the directions given on 14th February, 2023 remain in force and the appeal herein stood dismissed when the appellant failed to file the record of appeal within 30 days.
80. Consequently, the Applicant's Notice of Motion dated 24th March, 2023 is merited and is granted as follows;
1. The funds deposited in the joint Account, Account Number 01192643921900, Account Name: Kenneth Mwangi Mburu and Associates and Mokaya Omwoyo and Associates domiciled at Co-operative Bank, Moi Avenue Branch, Nairobi, be released to the Applicant's Account M.O and Associate Advocate Client Account, Account Number 1282809067.
 2. The amount secured by the Bank Guarantee dated 27th April, 2022 be released to the applicant's advocate.
 3. The appellant to pay the balance of the decretal sum in the sum of Kshs.82,430/=.
 4. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF JULY 2023

DR. JACOB GAKERI



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 *Civil 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.

DR. JACOB GAKERI

JUDGE

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