



**Wachira v Kenya Ports Authority (Cause 1590 of 2010)
[2023] KEELRC 3260 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3260 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1590 OF 2010
B ONGAYA, J
DECEMBER 7, 2023**

BETWEEN

ANTHONY MUTHUMBI WACHIRA CLAIMANT

AND

KENYA PORTS AUTHORITY RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday, 7th December, 2023)

RULING

1. The Claimant filed the amended Notice of Motion application amended on 05.10.2021 through the firm of Muma & Advocates. The application is made pursuant to leave granted by the Hon. Lady Justice Maureen Onyango J on 28.09.2021 and is brought under Article 159 of the Constitution of Kenya, section 7 of the Appellate Jurisdiction Act, Order 50 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law. The applicant prayed for the following orders that:
 - a. The application be heard *ex-parte* in the first instance (spent).
 - b. The Honourable Court do extend time by 14 days for the claimant/applicant to give notice of intention to appeal from the judgment of Honourable Justice Stephen Radido dated 2nd March 2020 and subsequently serve the same with the letter requesting for proceedings upon the respondent.
 - c. The costs of this application be in the cause.
2. The application is based on the supporting affidavit of Lynn Nyangweso Advocate for the claimant sworn on 03.08.2021 and upon the following grounds:
 - a. Judgment in this matter was delivered on 02.03.2020 by the Honourable Justice Stephen Radido in the Employment and Labour Relations Court at Nairobi.



- b. That the applicant being dissatisfied by the judgment filed a Notice of Appeal on 16th March, 2020. The Notice of Appeal was lodged on 12th June, 2020 as a result of the Court file going missing on several occasions. Further, parties were denied access to the Court registries due to the Covid – 19 pandemic thus hampering services at the Court registries.
 - c. That due to the prevailing conditions stated in (b) above the Notice of Appeal was inevitably not served upon the respondent. This was noted at the point the applicant was preparing the Record of Appeal.
 - d. Counsel urged the Honourable Court not to punish the claimant or applicant for the inadvertent omission of her failure to serve the Notice of Appeal in time as stipulated in law.
 - e. Further that the issuance of proceedings in this matter took long forcing counsel to physically visit the Court registry on 15.12.2020. The proceedings were subsequently issued on 21.01.2021.
 - f. That upon issuance of the proceedings, counsel embarked on following up on the issuance of the decree that equally took long and the same were issued on 14.04.2021 after several follow up efforts by counsel. This was attributed to the fact that the Court file went missing.
 - g. The applicant argues that he has a meritorious appeal with high chances of success and thus urges this Honourable Court to allow his application to serve the Notice of Appeal out of time.
 - h. The applicant states that the instant application has been brought without unreasonable delay, is meritorious, and should be allowed as prayed.
3. In response to the application the respondent filed a replying affidavit sworn by Anthony Njagi, its Human Resource Manager, on 07.11.2023, in which he confirms judgment having been delivered in this matter on 02.03.2020. He further states that there has been delay in prosecuting the instant application now before the Court.
 4. Further, the respondent attributes the delay to attempts by the claimant or applicant to drag this matter despite the fact that the Honourable Court had already rendered its decision and the claimant paid the amount awarded marking the matter as closed. The respondent states that the Court is in fact *functus officio*.
 5. The respondent argues that the instant application is an abuse to the court process to its detriment and therefore urging this Honourable Court to find the same devoid of merit and to accordingly dismiss it with costs to the respondent.
 6. The parties made oral submissions when the matter was listed for hearing of the instant application on 21.11.2023. The Court has considered the respective positions and resolves as follows.
 7. The applicant had initially filed the application as dated 02.06.2021 and which was amended as dated 05.08.2021. On 09.08.2021 the application was certified urgent for inter-partes hearing on 27.09.2021. The matter was in Court on 18.01.2022 and Counsel for both parties were present. The Court ordered that the respondent to file response to the amended notice of motion within 21 days and parties thereafter to file written submissions with the applicant filing within 14 days and respondent within 14 days of service for mention on 28.02.2022 to fix a date for ruling. The parties appear not to have acted until 02.11.2023 when a mention date for 02.11.2023 was fixed. As submitted for the respondent there is no evidence given for the delay in prosecuting the application particularly from 28.02.2022 to 02.11.2023 and which is not saved with the advanced reason of COVID-19 situation. In particular, the applicant's counsel was directed to file submissions on the application but no explanation has



been given why that was not done. By judicial notice, the judgment being delivered on 02.03.2020 and application being filed in June 2021, that delay is properly explained by the difficulties arising from COVID-19 situation. However, the delay from 28.02.22 to 02.11.2023 has not been explained at all. The respondent has shown that as per the exhibited letter dated 02.09.2021, the decretal amount in the judgment the applicant seeks to appeal against has since been fully paid. As submitted for the respondent the court finds that the applicant failed to diligently prosecute the application as was amended and the inordinate delay in prosecuting the application within the directions and orders by the Court given on 02.11.2023 remains unexplained. The Court further considers that the respondent having fully settled the principal sum in the judgment, it will be seriously prejudicial to belatedly reopen the case in the proposed appeal that is belated as the respondent has fully shifted its position as relates this very old dispute spanning over about 15 years – and litigation should be allowed to terminate and parties' dispute rested per the judgment already satisfied. It appears that the application was prosecuted as an afterthought and in a clear circumstance that the Court was misled about the parties' failure to comply with the directions of 02.11.2023. In that consideration each party to bear own costs of the application.

In conclusion the application as amended on 05.10.2021 is hereby dismissed with orders each party to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 7TH DECEMBER, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

