



Wairimu & another (Suing as the Legal Representatives and Administrators of the Estate of Josphat Kiuri Mwangi (Deceased)) v Zhongmei Engineering (K) Group Limited (Miscellaneous Application 102 of 2018) [2020] KEELRC 484 (KLR) (16 September 2020) (Ruling)

Anthony Wachira Wairimu & another (Suing as the Legal Representatives and Administrators of the Estate of Josphat Kiuri Mwangi (Deceased)) v Zhongmei Engineering (K) Group Limited [2020] eKLR

Neutral citation: [2020] KEELRC 484 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION 102 OF 2018

HS WASILWA, J

SEPTEMBER 16, 2020

BETWEEN

ANTHONY WACHIRA WAIRIMU 1ST APPLICANT

JOHNSTON NGARI MWANGI 2ND APPLICANT

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF JOSPHAT KIURI MWANGI (DECEASED)**

AND

ZHONGMEI ENGINEERING (K) GROUP LIMITED RESPONDENT

RULING

1. Before this Court is the Applicants' Notice of Motion Application dated 6/5/2020 seeking the following orders:-
 - a. That this Honourable Court be pleased to order that the sum of KShs. 2,534,400.00 plus accrued interest that was deposited in the joint interest earning account in the joint names of B.M. Mutie & Company Advocates and Kivuva Omuga & Company Advocates and at NCBA Bank Kenya be released to the firm of Kivuva Omuga & Company Advocates forthwith.
 - b. That costs of this application be in the cause.
2. The Application is supported by the grounds set out therein and the Supporting Affidavit of Anthony Wachira Wairimu, sworn on 6/5/2020. The Respondent has opposed the Application vide the Replying Affidavit of Xu Xiao Yu sworn on 27/6/2020.



The Applicants' Case

3. The Applicant avers that KShs. 2,534,400.00 was deposited at NCBA Bank Kenya, pursuant to the Orders issued on 1/4/2019, as a condition for stay of execution pending the hearing and determination of the Respondent's intended appeal.
4. It is averred that the Respondent filed a Notice of Appeal on 20/12/2018 and by virtue of operation of the law, ought to have filed a Record of Appeal on or before 20/2/2019.
5. On 14/1/2020, the Respondent was notified that proceedings were ready for collection hence ought to have filed its record 60 days from that date, being, on or before 14/3/2020. Having failed to do so, the decretal sum ought to be released to the Applicant's Advocates.

The Respondent's Case

6. The Respondent avers that the application is presumptive premature, misplaced, mischievous, extremely prejudicial to the Respondent and an abuse of the court process hence should be struck out or dismissed, in the interests of justice.
7. The Respondent contends that they have not deliberately delayed or omitted to file their record of appeal within the stated period; and aver that their advocates made a formal request for certified copies of the proceedings and judgment, which were not ready until January 2020. It is their position that they should not be penalized for the delay as they had no control over the operations of the Court.
8. The Respondent avers that their advocates never received the notification that the typed proceedings were ready for collection as alleged, hence no further action could be taken. Contrarily, it is through their Advocates follow ups that it was discovered that the proceedings were ready for collection.
9. The Respondent avers that upon perusing the procured documents, their advocates discovered that the ruling dated 1/4/2019 had not been certified hence sought for a certified copy vide the letter of 10/2/2020, which was certified on 5/3/2020.
10. It is averred that the Respondent's Advocates obtained the Decree and Certificate of Delay on 13/3/2020 and embarked on preparing the record of appeal which was disrupted by the announcement of the first COVID-19 case in the country that was followed by stringent safety measures which led to the closure of their advocates' offices. Further, Court operations came to a standstill as Courts and registries were closed for the wellbeing of staff and Court users.
11. The Respondent avers that their advocates' offices were opened on 17/6/2020 and the appeal filed on 18/6/2020. As such, the Respondent submits that the orders sought should not be granted as the application has been overtaken by events because there is an appeal pending before the Court of Appeal.
12. The Respondent therefore contends that this Court lacks the jurisdiction to make any substantive orders touching on matters which are already pending before the appellate Court.
13. The Respondent contends that the Application should be dismissed with costs to them, as they have demonstrated that they have been diligent in expediting the filing of their appeal despite the challenges.
14. The Application was dispensed with through written submissions, with both parties filing their submissions.



The Applicants' Submissions

15. The Applicants submit that no appeal has been filed and if the same was filed on 17/6/2020 as alleged by the Respondent, then it was done out of time as the deadline for filing a record of appeal was 18/5/2020. The Applicants aver that no Court filing receipt has been annexed to the Memorandum of Appeal as evidence that the same was filed and paid for.
16. It is the Applicants' submissions that COVID-19 did not suspend the running of time for filing the record and that on 20/4/2020, the Chief Justice directed that filing of urgent civil matters was to proceed electronically. They submit that the order for depositing the decretal sum was to subsist during the pendency of the appeal and in the absence of the same, the decretal sum should be given to their Advocates.
17. The Applicants submit that this Court has inherent powers to grant the orders sought as the Respondent is not keen on filing a record of appeal. They rely on the cases of *Mereka & Company Advocates vs. National Bank of Kenya Limited*; High Court Misc. Application 11 of 2004 (cited in *Kenya Pipeline Company Limited vs. Transnational Bank Limited & Others*; HCCC 569 of 2005) and *Republic vs. Registrar of Societies ex parte Justus Nyangaya vs. 3 Others* [2005] eKLR, to support this position.

The Respondent's Submissions

18. The Respondent submits that the application is res judicata by dint of section 7 of the [*Civil Procedure Act*](#), on account of pending appeal proceedings and because the issues raised had previously been raised at the time the Respondent was making their application for stay. As such, this Court no longer has jurisdiction to make any substantive determination or issue further orders. They rely on the cases of Civil Appeal 162 of 2004 between Mohammed Sheikh Omar Dahman (Sued as the Personal Representative of Sheikh Omar Bin Dahman) and Esha Ahmed Bin Dahman & 3 Others and Nairobi High Court Civil Suit 1130 of 1996; *Lucy Wairimu Mwaura vs. Aswinchand Hirji Shah & 3 Others*, to support this position.
19. The Respondent submits that the application is founded on provisions which are irrelevant to the claim. In particular, orders 28 and 30 of the Civil Procedure Rules are irrelevant whereas order 51 is a general order and order 34 has been spent. As such, the same should be dismissed with costs.
20. It is submitted that the Application is overtaken by events as the Respondent already filed a record of appeal. It is their explanation that they could not be supplied with a stamped copy of the record of appeal due to the current COVID-19 restrictions and that the Memorandum of Appeal shows the appeal number.
21. The Respondent submits that they have exercised due diligence in filing the record of appeal and contend the delay was occasioned by circumstances beyond their control as explained in their Replying Affidavit.
22. I have considered the averments herein. The Respondents having demonstrated that they have since filed their appeal on 18/6/2020, the application is overtaken by events.
23. I therefore decline to grant orders sought. I direct the Parties to await for the direction from the Court of Appeal.
24. Costs to await in the appeal.

DATED AND DELIVERED IN OPEN COURT THIS 16TH DAY OF SEPTEMBER, 2020.



HON. LADY JUSTICE HELLEN WASILWA
JUDGE

In the presence of:

Mahugu for Applicants – Present

Nzuki holding brief Mutie for Respondent – Present

