



**Adie v Jims Fresh Vegetable Growers and Exporters Limited (Appeal
221 of 2022) [2024] KEELRC 1145 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1145 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 221 OF 2022
SC RUTTO, J
MAY 17, 2024**

BETWEEN

VITALIS ASUGO ADIE APPELLANT

AND

**JIMS FRESH VEGETABLE GROWERS AND EXPORTERS
LIMITED RESPONDENT**

RULING

1. What comes up for Ruling is the Respondent/Applicant's Notice of Motion Application dated 31st January 2024, through which it seeks an order for grant of an unconditional leave to file and serve a cross-appeal in terms of the draft Memorandum of Cross-Appeal.
2. The grounds in support of the Motion are set out on its face and the Affidavit of Sudhir Kent, the Director of the Applicant herein. Grounds on the face of the Application are that, the Appellant herein filed a Memorandum of Appeal dated 15th December 2022 which was served upon the Applicant on 16th January 2023. The Applicant entered appearance through its Advocates on record pending receipt of the record of appeal, certification that the record is proper and the appeal admitted for hearing.
3. That at the time the Applicant intended to file a cross-appeal, the appeal had been listed for notice to show cause and there was no indication on whether or not the appeal had been admitted for hearing.
4. That the intended cross-appeal raises crucial points of law and fact that ought to be considered for determination in the instant appeal. Further, that the Court is yet to issue directions on the disposal of the appeal hence the Appellant shall not be prejudiced if the Applicant is allowed to prosecute the cross-appeal.
5. In his Affidavit, Mr. Sudhir avers that soon after entering appearance, he was indisposed attending to an urgent personal matter while his codirector sought alternative legal advice over the matter.



6. The Appellant countered the Application through a Replying Affidavit dated 19th February 2024 in which he avers that the Learned Honourable V. Kachuodho (Senior Resident Magistrate) delivered Judgment in this matter on 30th November 2022 through which she awarded him one month's salary, terminal dues and a certificate of service.
7. Dissatisfied with the Learned Magistrate's finding and holding that she would not declare his termination unlawful and unfair, he filed a Memorandum of Appeal and served it upon the Applicant on 16th January 2023.
8. All through, the Applicant has been aware of the existing appeal but failed to move swiftly to file a cross-appeal despite being cognizant of the timelines set for filing an appeal.
9. In the Appellant's view, the explanations tendered before the Court to justify the delay in filing the appeal are not sufficient to grant unconditional leave or at all. Disputing the Applicant's explanation that its Director was indisposed, the Appellant avers that nothing has been placed before the Honourable Court to demonstrate indisposition and or the alleged personal matter.
10. The Appellant further contends that even if it were to be considered that the Applicant's director, Mr. Sudhir Kent had an urgent personal matter or was indisposed as he alleges, it cannot have persisted for a year.
11. That besides, the intended cross-appeal lacks merit. He further avers that the Applicant's intended cross-appeal is clearly intended to steal a march. In his view, the 2nd limb of the intended cross-appeal that the Learned Magistrate failed to consider and or award its counterclaim is an afterthought. He avers that a counterclaim is an independent claim and is not anchored, conditional to, or in any way anchored on his appeal.
12. The Appellant further states that the Applicant admits being served with a Record of Appeal on 17th September 2023 but elected not to exercise its right to appeal for another period of more than two months before the scheduled date for the notice to show cause.
13. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions.

Analysis and Determination

14. I have considered the Application, the grounds in support thereof as well as the submissions by both parties and find the singular issue for determination as being whether the Court should grant unconditional leave to the Applicant to file a cross-appeal in terms of the draft Memorandum Cross-Appeal.
15. From the record, the trial Court delivered Judgment in the matter on 30th November 2022 while the Appellant filed the Memorandum of Appeal on 15th December 2022. Thereafter, there was no activity on the file hence on 4th November 2023, at the behest of the Court, the parties were asked to show cause why the appeal should not be dismissed for want of prosecution.
16. When the notice to show cause came up on 18th December 2023, the Applicant's Advocate intimated to the Court that they had instructions to file a cross-appeal. The Appellant's Advocate protested hence the Court directed the Applicant to file a formal application seeking leave to lodge the said cross-appeal. It is subsequent to that directive that the Applicant filed the instant Application dated 31st January 2024.



17. Attempting to explain the delay in lodging the cross-appeal, the Applicant has averred that at the time it intended to file the cross-appeal, the appeal had been listed for notice to show cause. As stated herein, the notice to show cause was issued on 4th November 2023. This was almost a year after judgment had been delivered in the trial court.
18. Submitting on the issue, the Applicant has sought to rely on the case of Kenya Power & Lighting Company Limited vs Peter Langi Mwasi (2018) eKLR and has argued that there are no prescribed timelines for filing cross-appeals.
19. On his part, the Appellant contends that whereas Section 79G does not make mention of a cross-appeal, it implies that it applies to all appeals hence a cross-appeal must be deemed to be an appeal like a main appeal with the attendant rules applying.
20. In as much as the *Civil Procedure Act* has not expressly provided for the timelines within which a cross-appeal may be filed, it is my view that regard ought to be had to the provisions of Section 79G which provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
21. Therefore, if the Applicant was keen on challenging the Judgment of the trial Court, it is expected that it would have filed an appeal within a period of 30 days or at the very least, lodged a cross-appeal within a reasonable time upon being served with the Memorandum of Appeal. Instead, the Applicant waited for one year to lapse and only raised the issue when the matter was coming up for notice to show cause.
22. On this score, I ascribe to the position taken by the Court in the case of *Kenya Power & Lighting Co. Ltd v Peter Langi Mwasi* [2018] eKLR, thus:

“ [13]. The above provisions however do not address the timelines within which a cross-appeal should be filed. Going by the record herein, the memorandum of appeal was filed on 8th July, 2014. If the applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time.” Underlined for emphasis
23. As stated herein, the Applicant intimated to the Court its intention to file a cross-appeal on 18th December 2023, which was more than a year after delivery of Judgment by the trial Court. Besides, as of 15th December 2022, the Applicant was well aware that an appeal had been lodged against the Judgment of the trial Court. Why didn't it move within a reasonable time and file the cross-appeal?
24. In the circumstances, I cannot help but conclude that the Application herein is an afterthought.
25. Besides, an order for extension of time is discretionary hence it is trite law that such discretion must be exercised judiciously. One of the factors to be considered in an application for extension of time as the one herein, is whether there has been inordinate delay and where it is inordinate, the applicant must give a plausible explanation to the satisfaction of the court.



26. In this case, the Applicant has not advanced plausible grounds for the inordinate delay. Its assertion that one of its directors Mr. Sudhir Kent was indisposed and was attending to an urgent personal matter has not been substantiated. Indeed, I agree with the Appellant's submission that it is unclear whether the said director was indisposed or was attending to an urgent personal matter.
27. It is further instructive to note that extension of time is an equitable remedy hence a party seeking an order to that effect, must demonstrate, by laying basis to the satisfaction of the court, that he or she is deserving of the same.
28. In this case, the Applicant has not sufficiently demonstrated why the Court should exercise discretion in its favour whereas it was clearly indolent.
29. It is this Court's respectful view that the Applicant has not conducted itself as a litigant who was genuinely aggrieved by the Judgment of the trial Court thus deserving of the orders it now seeks.
30. The total sum of my consideration is that the Application dated 31st January 2024 lacks merit and the same is hereby dismissed with costs to the Appellant.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF MAY 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Ms. Aradi for the Applicant

Ms. Abai for the Appellant/Respondent

Millicent Kibet Court Assistant

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 had 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.

