



**Sunwood Enterprises v Mulatya (Appeal E015 of 2024)
[2024] KEELRC 1198 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1198 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E015 OF 2024**

**M MBARŪ, J
MAY 9, 2024**

BETWEEN

SUNWOOD ENTERPRISES APPELLANT

AND

SAULO MUSYOKA MULATYA RESPONDENT

RULING

1. The applicant filed an application dated 18 March 2024 under the provisions of Articles 40, 50, 159 of the Constitution of Kenya, Section 1A, 3A, 79G of the Civil Procedure Rules, Order 51 Rule 1 seeking orders that;
 1. The court be pleased to grant the Applicants leave to Appeal out of time against the Ruling of Hon. D.O. Mbeja (PM) at Mombasa on the 16th November 2023 and the Memorandum of Appeal filed herein be deemed as duly filed.
 2. The costs of this application be provided for
2. The application is supported by the affidavit of Jeshmine Shah the director and on the grounds that the trial court delivered a judgment in this matter on 16 November 2023 and the applicants are dissatisfied with the Judgment. An appeal has been lodged which has a high chance of success.
3. In the Supporting Affidavit, Jeshmine Shah avers that the Applicant had been consulting amongst themselves and gathering funds to appeal against the said judgment. There was a delay in communicating the outcome of the judgment between the Appellant and his counsel hence the delay in lodging the Appeal in time. The mistake of counsel should not be visited upon the Appellant.
4. The Judgment herein was delivered a few days before the Christmas festivities when offices were closing for the holidays. Justice would better be done and served if the entire Judgment is re-looked into on Appeal. There is a Memorandum of Appeal that raises serious grounds with high chances of success.



The Application herein is filed with utmost good faith and without inordinate delay. The Respondents shall suffer no prejudice if the orders sought are granted.

5. In reply, the respondent filed Grounds of Opposition and a Replying Affidavit that the applicant did not show any interest in the judgment delivered on 16 November 2023 until warrants of attachment were issued on 22 February 2024. The Memorandum of Appeal is filed irregularly without seeking leave and should be dismissed. Extension of time to file an appeal is not a right but at the discretion of the court and the applicant has not invited the court to apply its discretion hence the application should be declined.
6. The respondent further responded that there is no reasonable cause established for the delay in filing an appeal to justify the extension of time. Cases belong to litigants and not the advocates and the allegations that the mistake was on the advocate are left bare. The applicant has not demonstrated what steps were taken to progress any appeal. The purported Memorandum of Appeal contravenes the provisions of Rule 8(2) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and Section 79G of the *Civil Procedure Act*.
7. The appellant had no intention of filing the appeal and only moved after the Warrants of Attachment were served on 22 February 2024. The letter purporting to seek typed proceedings is dated the same date. There is nothing to demonstrate that the appellant and its directors could not consult to file an appeal in time. The 30 days contemplated under the Rules lapsed and a further time of 90 days went unutilized. Extension of time to file an appeal is not a right of a party but rather an equitable remedy only available to a deserving party at the discretion of the court.
8. The applicant filed a Further Affidavit and aver that they moved the lower court for a conditional stay pending appeal which was granted by Consent of the parties being that the Decretal sums be deposited in a joint interest-earning account in the names of counsels on record. The applicant already executed the Bank Account opening forms and is awaiting the bank to give us the ahead to deposit the funds. The Respondent has not indicated what prejudice he shall suffer should the orders sought herein be granted.
9. The applicant risks suffering great loss as they shall be condemned to pay the respondent huge sums of money as compensation when it is evident that his contract of Employment was fixed term and had expired. The Respondent's monies are already secured per the trial court's conditional orders. He shall have the same released to him in the unfortunate event that the Appeal does not succeed.
10. The court has discretion under Section 79 to enlarge time which discretion can be exercised in favour of the applicant. Hon. Mbeja delivered the subject judgment but erroneously noted to be Hon. Akee. The court should look for substantive justice and that it shall not engage in small procedural technicalities.
11. Both parties filed written submissions.
12. The appellant submitted that in the case of *Evans Kiptoo v Reinhard Omwonyo Omwoyo* [2021] eKLR the court Section 79G of the *Civil Procedure Act* requires that when seeking time to file an appeal out of time, the appeal must be filed at the same time. The appellant filed this appeal on 22 February 2024 against the judgment of the trial court delivered on 16 November 2023. The only missing document is the typed proceedings which are yet to be issued.
13. In the case of *Mombasa County Government v Kenya Ferry Services & another* [2019] eKLR the court held that the discretion to allow an appellant to file an appeal out of time is unfettered and the applicant must explain the reasons for the delay in making the application. The appellant has an arguable appeal with high chances of success and only fair that he be allowed to urge the same. There will be no prejudice against the respondent who will have a chance to defend the appeal. The delay in not filing the appeal



in time was occasioned by facts beyond the control of the appellant who instructed the advocates to proceed but due to lack of funds could not initiate the appeal in time. In the case of *Veronica Gathoni Mwangi & another v Samuel Kagwi Ngure & another* [2016] eKLR, the court held that the delay of less than 3 months was not inordinate. In this case, immediately after the appellant secured instructions, this appeal was filed.

14. The respondent submitted that the Memorandum of Appeal in this case should not be admitted as it offends the provisions of Rule 8 of the *Court Rules*. An appeal should be filed within 30 days from the date the subject decision is issued. Section 79G of the *Civil Procedure Act* requires an applicant to satisfy the court that there is a good and sufficient cause for not filing an appeal in time. From 16 November 2023 to 22 February 2024 the appellant failed to take any action. The principles outlined under the case of *Nicholas Kiptoo Arap Korir v IEBC & 7 others* [2014] eKLR are meant to safeguard both parties. On the one hand, an application seeking for extension of time must demonstrate a reasonable basis for the delay. On the other part, a party who has a valid judgment should be allowed to enjoy the fruits of his judgment as held in the case of *Omwoyo v African Highlands and Produce Co. Ltd* [2002] eKLR that legal practitioners should shoulder the consequences of their negligent acts or omissions like other professionals do in their field of endeavour. In the case of *Ruth Njoki Mwangi & another v Cecilia Muthoni Nduati* [2010] eKLR the court held that if there are reasons to fault the trial court, a litigant must keep in touch with the advocate to know the fate of his case. In this case, the appellant has failed to demonstrate good cause to justify for time extension to file an appeal.

Determination

15. The single issue for determination is whether leave to appeal out of time should be granted.
16. Section 79G of the *Civil Procedure Act* is the operative part in answering the question of whether the prayer to enlarge the time to file the appeal is merited. Section 79G of the *Civil Procedure Act* provides that:

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.

17. Section 79G of the *Civil Procedure Act* is not far removed from the provisions of Rule 8(2) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016. An appeal should be filed within 30 days.
18. Where a party is keen to appeal out of time, leave should be obtained first before filing the appeal to seek leave to file it out of time. The court must first be satisfied that an applicant had good and sufficient cause for not filing the appeal in time.
19. In this case, the applicant filed the appeal. There is no leave to file the appeal. This invalidates the entire process of appeal.
20. Secondly, the reasons given for failing to file an appeal in time are that the applicant went into the Christmas festivities when offices were closing for the holidays. A party who sits on its rights cannot look back and assert that it deserves the court's discretion. The choice of whether to file an appeal or go for Christmas festivities is basically in the control of the applicant.



- 21. Also, the applicant filed an application seeking a stay of execution before the lower court and was granted a conditional stay. What was the purpose of such a stay? The Order attached to the Affidavit of Jashmine Shah is to the effect that the trial court allowed a stay of execution for the applicant to file its appeal. There is no valid appeal filed. The applicant waited for time to abate.
- 22. Finally, the subject judgment was delivered on 16 November 2023. The instant application was not filed until 18 March 2024. Even where applicant closed for the Christmas festivities, the lapse in failing to file the same immediately into the New Year has not been gone into.
- 23. The Court of Appeal in the case of *Omar Shurie v Marian Rushe Yafar* Civil Application No. 107 of 2020 held that in addressing an application seeking leave to file an appeal out of time, the court must take into account;
 - The length of the delay;
 - The reasons for the delay;
 - The chances of the appeal succeeding if the application is granted; and
 - The degree of prejudice to the respondent if the application is granted.
- 24. Fundamentally, leave to file appeal should be by way of a miscellaneous application upon which, the issue of leave to file appeal out of time should be addressed first. With leave, an applicant should proceed as directed. A memorandum of appeal may be filed in support of the application but to file an appeal first and then seek leave to file it out of time is a misapplication of procedure.
- 25. Application dated 18 March 2024 is struck out. This goes with the appeal herein filed without leave. The respondent is awarded costs of Ksh.20, 000.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 9 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

