



**Valmerdan Enterprise v Kiriago & another (Appeal E045 of 2024)
[2024] KEELRC 1069 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1069 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E045 OF 2024**

M MBARŪ, J

MAY 9, 2024

BETWEEN

VALMERDAN ENTERPRISE APPELLANT

AND

HASSAN MARUBE KIRIAGO 1ST RESPONDENT

TOTAL ENERGIES 2ND RESPONDENT

RULING

1. The appellant filed an application dated 22 March 2024 under the provisions of Section 29 of the *Employment and Labour Relations Court Act*, rule 13(5) and 32 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and Order 22 Rule 22 of the *Civil Procedure Rules*, Section 79G of the *Civil Procedure Act*. He is seeking orders that;
 1. Spent.
 2. In the interim order do issue and is hereby issued staying the execution of the judgment entered by the trial court on 16 November 2023.
 3. This court be pleased to admit on record the Memorandum of Appeal filed herein and it be deemed to be properly filed.
 4. In the alternative to prayer (3), this court be pleased to extend the time limit for filing the Memorandum of Appeal herein and that the Memorandum of Appeal filed herein be deemed to be filed within the statutory limits.
 5. The court do order the return of this suit to the trial court for expeditious re-trial de novo and all parties be allowed to file relevant documents within 14 days before retrial.



2. The application is supported by the affidavit of Ann Mwapula and on the grounds that the appellant appointed its advocates to take over from the previous advocates at the stage when the 1st respondent was proceeding ex parte and despite the former advocates filing a response to the claim before the trial court.
3. The appellant instructed new advocates who filed an application seeking to participate in the proceedings but the trial court failed to set down this application for hearing since the presiding magistrate was on transfer. Later, the appellant realized the court had issued a date for judgment and to arrest them asked for its application to be allocated a hearing date. Unfortunately, the file was with the presiding magistrate and no hearing date was allocated.
4. Upon a new presiding magistrate being assigned the matter, the appellant filed another application seeking to be given a hearing but no hearing date was allocated. The judgment was delivered before the appellant's applications could be heard. No notice was served for the judgment date on 16 November 2023. The 1st respondent waited until 19 March 2024 to inform the appellant that the judgment had been delivered. This was acting in bad faith well aware that the appellant was waiting for a hearing date.
5. The failure to file an appeal in time was occasioned by the delay and movement of the file before the trial court. Unless the orders sought are granted, the appellant will suffer loss and damage. There was no delay in moving the court once the appellant learnt that judgment had been issued.
6. The appeal raises serious issues which need to be heard and determined on merits and only fair under the provisions of Articles 50, 25 and 24 of the Constitution that the orders sought to be issued.
7. Ann Mwapula avers in the Supporting Affidavit that the appellant is keen to be heard on its appeal on the merits following the judgment delivered by the lower court on 16 November 2023 in Mombasa MCELRC No.E251 of 2022. A Memorandum of Appeal is filed which raises serious issues concerning the right to be heard.
8. In response, the 1st respondent filed Grounds of opposition that the application is without merit and the appellant has failed to address the principles for the grant of stay of execution required under Order 42 rule 5 of the Civil Procedure Rules. There is a failure to provide security for the due performance of the decree.
9. The application is filed with inordinate delay to deny the 1st respondent the fruits of its judgment. The orders sought to be challenged were issued on 16 November 2023 and the instant application was only filed on 22 March 2024 after 5 months and the delay is not explained.
10. The appeal contemplated in the Notice of Motion is frivolous and has no chance of success. Unless there is a basis for the exercise of the court discretion, the orders sought should not be issued. The application should be dismissed with costs.
11. Both parties filed written submissions and lists of cases. Both attended open court for oral highlights.

Determination

12. The application, affidavit and submissions are taken into account and the issues for determination are whether the court should stay the execution of the judgment entered on 16 November 2023; and whether the court should admit on record the Memorandum of Appeal filed out of time; whether time to file appeal out of time should be extended; and whether the court should return the suit to the lower court for re-trial de novo; and who should pay costs.



13. At the heart of the appellant's application is the judgment delivered by the trial court on 16 November 2023 in Mombasa CMELRC No.251 of 2022. The appellant is aggrieved by the process leading to the judgment and the resulting orders. There was no appeal lodged in time.
14. The appellant is seeking to stay execution of the trial court judgment, extension of time to file an appeal, and remittance of the suit back to the trial court for re-trial.
15. First things first. Upon the judgment of the trial court on 16 November 2023, the appellant had 30 days right of appeal under Section 17 of the *Employment and Labour Relations Court Act, 2011* read together with Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* to file an appeal. For reasons that the presiding magistrate was on transfer and that no notice was issued indicating when judgment would be delivered, the appellant only learnt of the issued judgment upon execution proceedings.
16. The appellant also asserts that great efforts had been taken to arrest the judgment and two applications were filed to seek a right to a hearing to avert the *ex parte* judgment but this application has not been allocated a hearing date. Further, upon change of advocates, the appellant tried to seek an audience with the trial court without success.
17. In the back and forth, time to file an appeal was lost. Since 16 November 2023, the appellant only moved the court as herein done on 22 March 2024 over 4 months since.
18. The 1st respondent is emphatic that the appellant has all along been aware of the pending judgment and did nothing. There was a notice issued to the parties through email and through the Mombasa Law Society (MLS) forum that judgment was to be delivered on 16 November 2023 but there was no action taken. The appellant knew about the whereabouts of the file and cannot be found to assert that they were stopped from prosecuting their application.
19. The 1st respondent is keen to proceed with execution since the appellant only filed the instant application upon the realisation the motions of execution had kicked off. Had there been no action, the appellant would still be sleeping on its rights.
20. In the case of *Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR the Supreme Court held that;

... Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it
21. In this case, the delay though inordinate has been explained by the applicant and may be excusable given the movement of the subject trial court file from the presiding magistrate upon transfer and return where the file was allocated to another magistrate. These, one may consider extenuating circumstances. On the second tangent, I will stress the point on a particular prejudice likely to be occasioned because the respondent will be deprived of the fruits of the judgment in respect of a case in which I can fairly say that in pursuit of the appeal the applicant should have proposed to pay out part of the decretal sum not contested. The appellant asserts that the judgment sum is not liquidated to justify a claim for a security deposit.
22. Indeed, an extension of time to file an appeal is a discretionary order. Upon it, an applicant ought to abide by the conditions given by the court.



23. In this case, to allow the applicant to lodge its appeal and become an appellant, it is only fair to grant more time within which the Memorandum of Appeal shall be filed and served upon the respondents.
24. The applicant is hereby given 14 days within which to file its appeal failure to which, such right shall automatically lapse.
25. Pending the applicant addressing the right allocated to file an appeal out of time, there is an application to stay the judgment issued on 16 November 2023. The applicant has well made this application and relied on the provisions of Order 22 rule 22 and not Order 42 rule 6 of the Civil Procedure Rules.
26. Under Order 22 Rule 22 of the Civil Procedure Rules the key conditions are that sufficient cause has to be demonstrated and that when an order for a stay of execution is granted it shall subsist just for a reasonable time to enable a judgment debtor to apply to the Court that passed judgment or to an appellate Court for some further remedy touching on that judgment. Order 22 Rule 22(1) of the said Rules provides as hereunder-
27. The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
28. This is the appellate court.
29. The stay of execution is not given indefinitely but only for a reasonable time. It is noteworthy that when the application herein was brought under a certificate of urgency, the trial court did not have the chance to address the pending application for a stay of judgment. This Court is therefore left to determine whether or not to grant the applicant a stay of execution of the judgment of the trial court.
30. The 1st respondent has a valid judgment. This judgment stands unchallenged as there is no valid appeal. The appellant has together with this application sought leave to file an appeal out of time.
31. In the case of John Maiga Wambua v Polycap O Nyakundi [2021] eKLR the court in addressing an application seeking a stay of execution held that;

... as a principle from the civil procedure rules. The purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules.
32. In Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR, the Court held that Section 1A of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. The duty of the Courts in performing such mandate under Section 1B of the Civil Procedure Act are;
 - (a) The just determination of the proceedings,
 - (b) The efficient disposal of the business of the Court,
 - (c) The efficient use of the available judicial and administrative resources,



- (d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties,
 - (e) The use of suitable technology.
33. For these reasons, the applicant is now allowed to file an appeal out of time, to enjoy a further right of stay of execution of the subject judgment delivered on 16 November 2023, it is only fair that the applicant should secure the subject judgment with a deposit of the judgment sum. This balances the rights of both parties, the applicant's right of appeal and the 1st respondent's right to the fruits of his judgment.
34. The agitation by the applicant that the judgment of the trial court is not liquidated and hence not secured cannot stand. Each party has a right to justice. To allow the applicant to agitate its right of appeal, the decretal sum of Ksh.313,324 is to be deposited in court within 14 days from the date hereof failure to which the order of stay shall automatically lapse.
35. On the question of whether the return the file to the trial court for re-hearing de novo this is a premature request. There is no valid appeal. The applicant has to file its appeal first and acquire the status of an appellant. Only then can the issues subject of the appeal be addressed.
36. On costs, the applicant is seeking discretionary orders. Essentially, the lapse in filing an appeal in time should not be blamed on the 1st respondent. Equally stay of execution is granted to assist the applicant secure its rights. The applicant should pay to meet costs due to the 1st respondent which are hereby assessed at Ksh.20, 000 to be paid within 14 days.
37. Accordingly, the application dated 22 March 2024 is conditionally allowed in the following terms;
- a. The time to file an appeal is hereby extended by 14 days after which the right shall automatically lapse;
 - b. Stay of execution of judgment delivered in Mombasa E251 of 2022 is hereby allowed on condition the applicant deposits the sum of Ksh. 313,324 within 14 days failure to which the order shall automatically lapse; and
 - c. The applicant shall pay Ksh.20,000 costs to the 1st respondent within 14 days.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

