



**Hatari Security Guards v Muia (Appeal E007 of 2024)
[2024] KEELRC 1363 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1363 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E007 OF 2024**

M MBARŪ, J

JUNE 6, 2024

BETWEEN

HATARI SECURITY GUARDS APPELLANT

AND

JOHN NDETO MUIA RESPONDENT

RULING

1. The ruling herein relates to the respondent's Notice of Preliminary Objections dated 24 April 2024. The objections are that the appeal should be dismissed with costs on the grounds;

The Memorandum of Appeal dated 22/12/2023 and filed on 6/2/2024 has been filed contrary to the provisions of Rule 8(2) of the *Employment and Labour Relations Court (Procedure) Rules*.

2. In reply, the appellant filed the Replying Affidavit of Kitonga Kiiva advocate on the grounds that he is acting for the appellant in this appeal. That the appellant was initially represented by another firm of advocate. On 18 March 2024 consent was recorded allowing a new firm of advocates to come on record for the appellant.
3. Kiiva advocates aver that the trial court delivered judgment in Mombasa ELRC Cause No. E100 of 2020 on 30 November 2023. The appellant procured a copy of the judgment on 19 December 2023 after it was certified by the court. The legal position has been that every appeal from a subordinate court to the High Court should be filed within 30 days from the date of the decree or order appealed against, excluding from such period and time which the lower court may certify as having been requisite for preparation and delivery to the appellant a copy of the decree or order.
4. The period starting from 30 November 2023 to 19 December 2023 should be excluded when tabulating the time for appeal as that was the time used by the court to supply a certified copy of the judgment herein. The period from 21st December 2023 to 13 January 2024 is statutorily excluded



when tabulating the time to file an appeal in Kenya. For the appellant, time started running from 20 December 2023 and as such, the appeal was filed 18 days within the statutory 30 days provided under the law.

5. The objections filed by the respondent are without merit and should be dismissed. The mistake of advocate should not be visited against the appellant and the court should put in mind the provisions of article 159(2)(d) of the Constitution and not allow prescriptions of procedure to trump the primary object of dispensing substantive justice.
6. Both parties attended and made oral submissions. The appellant also filed written submissions.
7. The respondent submitted that judgment in the trial court was delivered on 30 November 2023 and the instant appeal should have been filed within 30 days required under Rule 8(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (the Court Rules). The time for filing the appeal started running from 1st December 2023 and the allegations by the appellant that time started running when the decree was issued on 18 December 2023 lack any legal basis. The time to file an appeal lapsed on 21st December 2023.
8. Under Order 50 Rule 2 of the Civil Procedure Rules, when there is limited time to file an appeal and there is a Sunday or a Public Holiday, such are excluded. In this regard, from 14 January 2024 time was running but the Memorandum of Appeal was not filed until 6 February 2024.
9. The appellant did not seek leave to file the appeal out of time and there are no explanations as to why this was not done. There is no valid appeal and the instant appeal should be dismissed with costs.
10. The appellant submitted that upon the trial court's judgment on 30 November 2023, the decree was not issued until 19 December 2023 when time started running as required under Section 79G of the Civil Procedure Act. tabulation of time should be the day after the decree was issued which is 20 December 2023 and upon the court vacation, time started running from 14 January 2024 and the Memorandum of Appeal filed on 6 February 2024 is within time and under Rule 8 of the Court Rules. The objections made are without merits and should be dismissed with costs to allow the appellant to be heard on the appeal.
11. The objections and submissions put into account and the single issue for determination is whether the instant appeal is filed contrary to the provisions of Rule 8(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016.
12. The appellant acknowledges that appeals to this court from the lower court are regulated under the provisions of Rule 8 of the Court Rules.

Rule 8(2) of the Court Rules requires that;

- (2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.
- (3) ...
- (4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.

Provided that where copies of proceedings are not filed with the memorandum of appeal, the appellant shall file such copies as soon as possible and within a reasonable time.



13. An appeal to this court from the lower court should be filed within 30 days from the date the decision was delivered. In this case, the judgment of the lower court was delivered on 30 November 2023. This is the effective date for tabulating time.
14. The start date in tabulating time cannot be the date the decree was issued. The decree is part of the records to be attached to the appeal forming the Record of Appeal. The date the impugned judgment was issued cannot change because of the decree. Rule 8 of the *Court Rules* gives emphasis to the effect that where copies of proceedings are not filed with the memorandum of appeal, the appellant shall file such copies as soon as possible and within a reasonable time.
15. This therefore creates room for the appellant to file the Memorandum of Appeal first and then obtain the Record of Appeal within a reasonable time. Practically, by filing a Memorandum of Appeal within time, an appellant enjoys more time to file the Record of Appeal within timelines allowed by the court.
16. The appellant has further relied on the provisions of Section 79G of the *Civil Procedure Act*. These provisions, well addressed allow an intended appellant to move the court and seek more time to file an appeal that is otherwise not filed in time. These provisions cannot be applied in tabulating time after decree issuance.
17. Even the application of the *Civil Procedure Rules* with regard to appeals filed to the High Court reiterates the provisions of Rule 8 of this *Court Rules*.
18. The motions of Section 79G only set in when the time to file an appeal has lapsed and on good cause, an intended appellant can move the court to enlarge time. 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 a good and sufficient cause for not filing the appeal in time. [Emphasis added].

19. An appeal from the trial court to the court must be filed within 30 days from the date of the order appealed against. In calculating time, the lower court is mandated to issue Certificate of Delay with regard to the issuance of the decree or order and not the judgment. This court reading of Section 79G of the *Civil Procedure Act* is that it does not change the date the judgment is delivered but allows a party seeking to appeal and does not have the decree or order thereof to be issued with a certificate of delay.
20. In *Tonui v National Bank of Kenya (Miscellaneous Civil Appeal E002 of 2022)* [2022] eKLR the court in addressing a similar matter held that where the Judgment was delivered on 25 October 2021, the law allowed the claimant 30 days within which he was to file an appeal. Time started running from the date the judgment was delivered.
21. This is reiterated in the case of *Paul Njage Njeru v Karija K Mugambi* [2021] eKLR where the court held that;

The Court takes the learning that the timeline of filing a memorandum of appeal is different from the timeline of filing a record of appeal. Filing a memorandum of appeal does not require the filing of typed and certified proceedings. An Advocate may peruse the Judgment and craft grounds of appeal which can be amended later



Nothing stopped the Applicant from filing a Memorandum of Appeal within the stipulated 30 days and if need be, upon the receipt of the typed proceedings, apply to make amendments.

22. In this case, the appeal herein relating to a judgment delivered in Mombasa Cmelrc No.E100 of 2020 on 30 November 2023, time for filing appeal started running on 1st December 2023.
23. A generous tabulation of time by application of Order 50 rule 4 of the *Civil Procedure Rules*, time of 30 days lapsed before the appellant could file the appeal on 6 February 2024. See *Company Ltd v Globetrotter Agency Limited (Civil Appeal E024 of 2022)* [2022] eKLR.
24. Filing an appeal is a matter regulated in law. Lapse in filing an appeal to this court within the provisions of Rule 8 of the Court Rules cannot be cured by application of Article 159(2)(d) of the *Constitution*. The *Constitution* is not a panacea for all procedural shortfalls as held by the Court of Appeal in the case of *Ludwick Musindu v Nancy Nduta* [2021] eKLR that;

... the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent. ...

Therefore, the motions of Rule 8 of the Court Rules are procedural and in accordance with Section 19 of the *Employment and Labour Relations Court Act*, 2011. The time to file an appeal with the court is from the date of the judgment and not otherwise.

The appeal herein filed outside the allowed time is invalid. It cannot stand.

The objections by the respondent dated 24 April 2024 are without merit. The appeal herein is invalid and therefore dismissed with costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JUNE 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

.....and.....

