



REPUBLIC OF KENYA



KENYA LAW
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**H Young & Co (EA) Limited v Nthiwa (Miscellaneous Appeal E099/
E057 of 2024) [2024] KEELRC 2094 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2094 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPEAL E099/E057 OF 2024**

M MBARÚ, J

JULY 4, 2024

BETWEEN

H YOUNG & CO (EA) LIMITED APPLICANT

AND

ALVIN NDUNDA NTHIWA RESPONDENT

RULING

1. The applicant filed a miscellaneous application and a Memorandum of Appeal at the same time. This was registered as an Appeal. The pleadings concerning the instant application relate to a miscellaneous application.
2. The applicant filed an application dated 15 May 2024 under the provisions of Order 52 Rule 1, 42 Rule 6, Section 66 of the *Civil Procedure Act* and Section 17 of the *Employment and Labour Relations Act* seeking orders;
 1. to 4. Spent;
 5. The applicant be granted leave to file an appeal out of time and the Memorandum of Appeal annexed hereto be deemed duly filed.
 6. pending the hearing and final determination of the appeal, this court be pleased to stay the execution of the judgment delivered on 29 February 2024 and any other subsequent orders thereto.
 7. Costs of this application be provided for.
3. The application is supported by the affidavit of Lilian Omwenga the legal officer of the applicant and on grounds that judgment in Mombasa MCELRC No.799 of 2021 was delivered on 29 February 2024 in favour of the respondent for a decretal sum of Ksh.402, 178. Dissatisfied, the applicant would like to file an appeal but was out of the time. The delay in not filing the appeal in time was occasioned by



the failure of the court registry to avail a copy of the judgment for the applicant to read and appreciate the issues and draft the memorandum of appeal.

4. In the Supporting Affidavit, Omwenga aver that following judgment on 29 February 2024 it took time for the court registry to supply the applicant with a certified copy of the judgment. An application for typed proceedings was received but these have not been issued. Time lapsed as the applicant was making efforts to secure these documents for appeal. The delay has not been inordinate and the applicant has an arguable appeal with high chances of success a Memorandum of Appeal is filed to demonstrate the readiness to address the appeal once time to file out of time is allowed.
5. Omwenga also aver that pending the hearing of the appeal, the application seeks a stay of execution. The respondent has issued notice of execution and unless a stay is allowed, this will proceed to the loss and damage of the applicant since the appeal will be rendered nugatory. The applicant is ready and willing to deposit the decretal sum in a joint interest-earning account pending the hearing and determination of the appeal.
6. In reply, the respondent filed Replying Affidavit of M. N. Wawere advocate and Grounds of Opposition that the instant application was only filed after the respondent issued notice for payment of the decretal sum. The respondent has the right to enjoy the fruits of the judgment and should not accommodate a party who slept on its rights.
7. In the Replying Affidavit, Waweru advocate issued the application letter dated 6 March 2024 on behalf of the respondent informing them of the judgment of the trial court. On 22 March 2024, the applicant replied and noted that they were willing to settle and save on costs. The matter was however not resolved upon the applicant filing this application which should be dismissed with costs.

Both parties attended and made oral submissions.

8. The applicant submitted that the trial court delivered judgment on 29 February while in Nairobi and the subject file was not available at the Mombasa registry and efforts to get a certified copy of the judgment and proceedings took time leading to delay in filing the appeal. The applicant has an arguable appeal with high chances of success and to be able to address it, a stay of execution be allowed. The applicant is willing to deposit the decretal sum in a joint interest-earning account held by both parties.
9. The applicant submitted that they admit to receipt of various letters from the respondent in efforts to resolve the matter but these were issued on a without prejudice basis and not a bar to the instant application.
10. The respondent submitted that there is a valid judgment and should be executed. The applicant has replied to various communications and demonstrated a willingness to resolve the matter save the only pending issue was cost. To file this application is an abuse of the court process and it should be dismissed with costs.
11. The respondent submitted that the applicant has not satisfied the conditions under Order 42 rule 6 which fundamentally requires that they demonstrate the substantive loss to be suffered if the judgment amount is paid to the respondent. There is no prejudice to be suffered if the respondent is paid and he can refund if the appeal is heard and determined.

Determination

12. As noted above, this is not an appeal though filed as such. The issues for determination are whether the applicant should be given leave to appeal out of time and whether a stay of execution should be issued.



13. In a miscellaneous application such as herein filed by the applicant, the issue at hand is to satisfy the conditions for the allocation of more time to file an appeal.
14. The applicant has relied on Section 17 *Employment and Labour Relations Court Act*, 2011 which relates to appeals to this court which is also secured under Section 66 of the *Civil Procedure Act* for the High Court. However, an applicant seeking a time extension to file an appeal should move the court under the motions of Section 79G of the *Civil Procedure Act*;
15. Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 preparation and delivery to the appellant of a copy of the decree or order:
16. 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.
17. These provisions permit the extension of time to file an appeal. Once the delay is convincingly explained, then time ought to be enlarged.
18. In this case, the explanation is that the trial magistrate was on transfer to Nairobi where his file was kept. By the time the applicant was able to get the certified copy of the judgment to be able to read and form the issues for appeal, time had lapsed. These explanations are noted. There was no delay in filing the instant application and the applicant should be allowed the right under Section 17 of the *Employment and Labour Relations Court Act*, 2011 to file an appeal and time is extended by 14 days to file the Memorandum of Appeal and the draft is filed.
19. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 which empowers the court to stay the execution, either of its judgement or that of a court whose decision is being appealed from pending appeal. The conditions to be met before the stay is granted are provided for under Rule 6(2) of Order 42 and stated as follows:
No order for stay of execution shall be made under sub-rule (1) unless–
 - A. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
20. Upon the allocation of more time to file an appeal out of time, it is only fair that the same be secured through the proposal by the applicant that the deceral sum of Ksh.402, 178 be deposited in a joint interest earning count held by both parties. The letters exchanged between the parties before this application was filed were indeed on a prejudiced basis. Such is not a bar to the applicant moving the court.
21. Accordingly, the application dated 15 May 2024 is hereby allowed in the following terms;
 - a. The time to file an appeal is hereby extended by 14 days;
 - b. To secure the intended appeal, judgment in Mombasa CMELRC No.799 of 2021 is hereby stayed, the applicant is to deposit the decretal sum of Ksh.402,178 in a joint interest-earning account held by both parties within the next 30 calendar days;
 - c. File and serve a Record of Appeal within 30 days.



- d. Where there is no compliance on (a) and (b) above, the Order of stay of execution shall automatically lapse.

DELIVERED IN OPEN COURT AT MOMBASA THIS 4TH DAY OF JULY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

