



Melly v Mogogosiek Tea Factory Company Ltd (Employment and Labour Relations Cause 74 of 2018) [2024] KEELRC 1858 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1858 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS CAUSE 74 OF 2018**

HS WASILWA, J

JULY 18, 2024

BETWEEN

STEPHEN KIRWA MELLY CLAIMANT

AND

MOGOGOSIEK TEA FACTORY COMPANY LTD RESPONDENT

RULING

1. This ruling is in respect of the Claimant/ Applicant's Notice of Motion dated 25th April, 2024, brought pursuant to Article 159 of *the Constitution*, Section 3, 3A, 3B and 79G of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, seeking for the following Orders;-
 1. Spent.
 2. That this Honourable Court be pleased to issue the applicant with a fresh certificate of delay for the proceedings of this court in Kericho Employment and Labour Relations Court, Cause Number 74 of 2018; Stephen Kirwa Melly Versus Mogogosiek Tea Factory Limited herein.
 3. That this Honourable Court do give any other or further orders as it deems fit in the circumstances in the interest of justice.
 4. That the costs of this Application be provided for.
2. The application is supported by the grounds on the face of the Application and he supporting affidavit of Rodgers Muguma, the advocate ceased of the matter on behalf of the Applicant, sworn on 25th April, 2024.
3. The Applicant stated that judgement in this suit was delivered on 1st February, 2019, when the Court dismissed the claim.



4. That the Applicant was dissatisfied with the Judgement and filed a Notice of Appeal dated 13th February, 2019 and applied to be supplied with copies of the proceedings however that there was no response and a reminder letter was sent dated 13th May, 2019.
5. The Applicant stated that they followed up with the court to be issued with the proceedings, until a year later, on 22nd January, 2020, that they were informed that the Court file could not be traced and on 30th January, 2020, he was informed of the availability of the Court file and the proceedings, which the paid for.
6. He stated that despite receiving the typed proceedings, he was not issued with certificate of delay as per Section 79G of the *Civil Procedure Act*, neither was he notified when the same was ready until 7th March, 2024, when he saw one in the Court file.
7. The Applicant stated that the certificate of delay is dated 14th October, 2022, and states that the delay took 368 days to have the proceedings ready but that these certificate was not served on the Applicant or notified of its readiness as such the delay is squarely attributed to the Court.
8. Further that Mr. Rodger Mugumya Advocate, who is ceased of this matter, was then in P.Sang and Company Advocate but currently practising in Mugumya and company advocates, which transition cause more delay in following up the matter.
9. It is his case that, his Appeal at the Court of Appeal is in jeopardy unless a fresh certificate of delay is issued. Failure to issue a fresh certificate of delay will deny the Applicant his right to Appeal and in effect cause prejudice to him.
10. The Respondent opposed the Application and filed Replying Affidavit sworn on 6th May, 2024. In the affidavit, the Affiant stated that the Applicant's counsel had admitted that it did not procure the said Certificate of delay for more than 2 years until 14th October, 2022, when they were issued with the certified proceedings on 30th January, 2020. Hence, the delay it took to seek for the certificate of delay was inordinate and unreasonable in the circumstances.
11. He stated that the Applicant and his Counsel on record did not take any initiate to inquire about the certificate of delay for a period of more than 3 years and therefore can not now blame the Court for the delay.
12. It is stated that from the circumstances of this case, it is evident that the Applicant is not keen in pursuing his Appeal and therefore the Court should not allow the Application herein.
13. The Application herein was canvassed by written submissions.

Applicant's Submissions

14. The Applicant submitted on three issues; whether the applicant has made out a case for issuance of a fresh certificate of delay, whether the Respondent will suffer any prejudice if the orders sought are granted and who should bear the costs of this Application.
15. On the first issue, it was submitted that the Fresh certificate of delay should be issued because the Applicant has already filed a notice of Appeal dated 13th February, 2019 as such the Appeal is alive and has not been struck out. It was argued that the Notice of Appeal was filed timeously, only 12 days after judgement. Additionally, that the registry prepared the certificate of delay two years later and never notified them. He urged this Court in the interest of justice to allow the Application and relied on the provisions of Article 159(2)(d) of *the Constitution* as read with section 3 of the *Employment*



and Labour Relations Court Act, which provide for the overriding objective of this Court to include facilitating the expeditious, proportionate and accessible resolution of dispute.

16. It was argued that the Certificate of delay in their possession cannot be utilized to lodge the Appeal, causing the filling of the Application herein requesting for fresh certificate of Delay. To support this, they relied on the case of Daniel Nganga Kanyi Vs James Gatik Ndolo [2005] eKLR, where the Court of Appeal held that:-

“the Certificate of delay confirms when delivery of the copies was made to the appellants. That is all that the rules requires of the Court to consider. We are satisfied, as no evidence has been placed before us to confirm otherwise, that any errors of omissions and commission in this matter were made by the Court.”

17. Accordingly, it was argued that the registry failed to inform the Applicant of the existence of the Certificate of delay, therefore that the omission cause them to delay in filling the Appeal on time, thus, its only proper that they are issue another certificate of delay. Moreover, that even if the said certificate of Delay was collected by them, then, there was need to explain the delay for 2 years, which the Registry did not. Therefore, that the Application herein was inevitable.

18. The Applicant submitted that no prejudice will be visited on the Respondent if a fresh certificate of delay is issued. In this, he relied on the decision by H.I Ong’udi J in the case of Bethany Villag Africa Vs Bank of Africa Kenya Limited[2021] eKLR, where the Court held that

“I do not find any serious prejudice that the Respondent will suffer if the Applicant is granted the leave sought. The Applicant lost its suit in the lower court and all it seeks is to have this court re-examine the material that was placed before the trial court to see if it would arrive at the same finding”.

19. On costs, the Applicant submitted that costs follow event in line with section 27 of the Civil Procedure Act.

Respondent’s Submissions

20. The Respondent on the other hand submitted on only one issue; whether the Application herein is merited.
21. It was submitted that it is not in dispute that a certificate of Delay was issued in respect of the proceedings herein and that the law does not anticipate the re-issuance of a Certificate of Delay. Therefore, that the Application herein is a non-starter.
22. On delay, it was submitted that the timeline of events leading to filing of this application unequivocally demonstrates unexplained inordinate delay on the part of the Applicant. That from the face of the Certificate of Delay herein, it is apparent that the proceedings were ready for collection on 30th January, 2020 yet it took nearly two years for the Applicant to secure a Certificate of Delay, which was only issued on 14th October 2022. The substantial gap between the readiness of proceedings and action taken by the Applicants herein is indicative of the lack of urgency in pursuit of the appeal. Moreover, that upon obtaining the Certificate of Delay, it took another One and a half years to file the Application herein. That even though the Certificate of delay was obtained late, from the circumstance of this case, it can be inferred that the Applicant lost interest of the Appeal and the Application herein is an afterthought.



23. It was submitted that Applicant’s case was muddled further by counsel’s attempt to shift blame onto the Employment and Labour Relations Court Registry for not notifying him of the Certificate of Delay’s availability, an assertion that directly contradicts his assertions of regular follow-up. That if there had been a genuine commitment to prosecuting their appeal, counsel would have undoubtedly taken proactive steps to inquire about the status of the Certificate of delay during this protracted period. Notably that the last action by the applicant was the letter by counsel dated 13th May, 2019, being a reminder sent to the Deputy Registrar for purposes of securing proceedings. Thus, it is untenable for the Applicants and their counsel to now impugn the registry staff when it was their responsibility to vigilantly advance their cause.
24. To this end, it was submitted that the Applicant have not displayed due diligence in pursuit of their appeal which would have seen them promptly engage with court officials to address his predicament. That in any event, if at all the Applicant had been truly committed to the prosecution of their appeal, they would have seized the generous window of opportunity to inquire about the status of their appeal. It was argued that the proceedings herein were ready on 30th January, 2020 and the Applicant had 60 days from then to prepare their Record of Appeal and serve the record of appeal pursuant to Rule 84 of the Court of Appeal Rules. It is argued that upon receipt of the Proceedings from the court, nothing would have prevented the Applicant from filing the Record of Appeal. Hence, the Application herein has been filed to sanitize the further delay. Moreover, that even if the prayer sought is allowed, the Certificate of delay will not serve any purpose as the days of filing the appeal are computed as from the date the proceedings were ready for collection. To support this, the Respondent relied on the case of Company for Habitat and Housing in *Africa (Shelter Afrique) v Sunset Paradise Apartments Limited (Civil Appeal (Application) E131 of 2022)* [2024] KECA 30 (KLR) (26 January 2024) (Ruling) where the Court of Appeal stated;
- “We need not over emphasise the primary objective of the certificate of delay, which is to aid the Court in computing and reckoning the strict timelines prescribed for filing the record of appeal after supply to the appellant of the requisite copies of the proceedings and the impugned decision. As observed by this Court in *Michael Mwalo vs. Board of Trustees National Social Security Fund* [2014] eKLR – “A certificate of delay is prima facie evidence that the court took the period it relates to prepare and deliver the proceedings. A certificate of delay has always been relied upon unless salient and cogent reasons are set out to challenge it... The respondent has not explained why it elected to ignore the certificate of delay issued on 31st March 2021. To our mind, its move to procure another certificate of delay dated 6th October 2021, whose date its counsel sought to be amended to read 21st November 2022, was undoubtedly designed to sanitise the delay in filing the record of appeal that was a whopping 19 months out of time. Yet, nothing stood in the respondent’s way to file the record of appeal within 60 days next following the 15th day of March 2021 when the requisite proceedings were supplied. In our considered view, counsel’s explanation that the delay was occasioned by the time taken to rectify the date of the certificate of delay does not hold. The delay was inordinate and unexplained. Accordingly, the respondent’s appeal is, in our considered view, incurable, and for good reason.”
25. In conclusion, it was submitted that it is manifestly clear that the Applicant has neither acted with due diligence nor in good faith, hence this Application should be dismissed with costs.
26. I have examined the averments and submissions of the parties herein. There is only one issue for this court’s determination which relates to reissuance of a certificate of delay in this matter.



27. What I gather from this case is that this case was heard and concluded on 1/2/2019 almost 6 years ago.
28. The applicant proceeded to file a notice of appeal and sought for issuance of proceedings of the court. The proceedings must have been typed and a certificate of delay issued on 14/10/2022. It is not clear whether this certificate of delay was served upon the Respondents' counsel but there was inaction on the part of counsel until 25th April 2024 when Mugumya & Co. Advocates came on record for the Claimant instead of P Sang & C. Advocates and this application filed.
29. What I gather from the record is that the Claimant's counsel failed to move the court for action until this year 2024 whereas a certificate of delay had been issued way back in 2022. The mistake I can attribute to counsel which should not be vented upon the Claimant.
30. There is not prejudice indicated which the Respondent will suffer if the application sought is granted. I exercise my discretion and allow the application for ends of justice to be met and order a certificate of delay be issued today. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 18TH DAY OF JULY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Mugumya for Claimant – present

Kipkorui for Respondent – present

Court Assistant - Fred

