



**Sunwood Enterprises v Mulatya (Miscellaneous Application
E047 of 2024) [2024] KEELRC 1961 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1961 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E047 OF 2024**

M MBARÚ, J

JULY 4, 2024

BETWEEN

SUNWOOD ENTERPRISES APPLICANT

AND

SAULO MUSYOKA MULATYA RESPONDENT

RULING

1. The applicant filed an application dated 15 May 2024 under the provisions of Articles 40, 50 and 159 of the *Constitution*, Rule 8(2) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and Section 1A, 3A, 79G of the *Civil Procedure Act* and Order 51 rule 1 of the *Civil Procedure Rules* seeking;
 1. Spent.
 2. Spent.
 3. This court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by Hon. D.O. Mbeja at Mombasa on 16 November 2023.
 4. The court be pleased to grant an Order of status quo of the decretal sums deposited in the joint account of counsels at Diamond Trust Bank pending the hearing and determination of the intended appeal.
 5. Costs of the application be provided for.
2. The application is supported by the affidavit of Jasmine Shah a director of the applicant on the grounds that the trial court delivered judgment on 16 November 2023 and dissatisfied with the same, the applicant applied ELRCA No.E015 of 2024 seeking to appeal out of time. The appeal and application were struck out on the grounds that the appeal was invalid and filed without leave. The conditional orders for stay granted under the struck-out appeal have been complied with.



3. In the Supporting Affidavit, Jeshmine avers that the respondent has sought to access the funds deposited as security whereas the applicant is seeking to be heard on appeal and should the findings be released, the intended appeal will be rendered nugatory. The respondent will not be in a position to refund the decretal sum if paid before the intended appeal is heard.
4. The applicant was not able to file an appeal at the time since there was late communication of the judgment upon delivery on 16 November 2023. The judgment was delivered a few days before Christmas festivities when offices were closing for the holidays.
5. In reply, the respondent filed Grounds of Opposition and that the instant application is *res judicata* following the ruling delivered on 9 May 2024 in ELCRA E015 of 2024 which dismissed a similar application. There is also no reason given for the delay in filing the appeal in time. The delay is inordinate and inexcusable. There is no basis for seeking a time extension to file an intended appeal as the application contravenes the mandatory provisions of Rule 8(2) of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#).
6. The respondent's other grounds are that the instant application does not meet the threshold needed for the grant of leave to extend time, it is vexatious and an abuse of court process. The same should be dismissed with costs.
7. Both parties attended court for oral submissions and the applicant filed written submissions.
8. The issues for determination are whether the application is *res judicata*; whether the applicant should be allowed to file the intended appeal out of time; whether the *status quo* of the decretal sums deposited should be maintained; and whether the applicant should be awarded costs.

Determination

9. A matter is *res judicata* if it is filed contrary to the provisions of Section 7 of the [Civil Procedure Act, 2010](#) which provides;
10. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
11. The applicant has admitted to filing ELRCA No.E015 of 2024. This matter has since been struck out. It ceased. It thus allowed the applicant a clean record to move the court as herein done.
12. The matter is not *res judicata*.
13. Under Section 79G of the [Civil Procedure Act](#) read together with Section 17 of the [Employment and Labour Relations Court Act, 2011](#) and Rule 8 of the [Employment and Labour Relations Court \(procedure\) Rules, 2016](#) an applicant is allowed the right of appeal and where such right is not addressed within the statutory limits, an application seeking time extension is allowed. However, an applicant seeking time extension to file an intended appeal falls into the ambit of Section 79G of the [Civil Procedure Act](#) which makes it discretionary to the court to grant or disallow more time.
14. Indeed, the applicant relied on the case of [Mombasa County Government v Kenya Ferry Services & another](#) [2019] eKLR where the court applied the principles outlined in the case of [Nick Salat v IEBC](#) where the Supreme Court laid down the conditions to be met by an applicant. Extension of time is not a right of a party and the party who seeks extension of time has the burden of laying a basis, to the



satisfaction of the court... where there is a reasonable cause for the delay, the same should be expressed to the satisfaction of the court.

15. Fundamentally, the court should look at the interests of both parties. On the one hand, a respondent who holds a valid judgment should be allowed to enjoy the fruits thereof. The time within which the application is filed is relevant because inordinate delay should not be allowed due to the prejudice of a respondent who had nothing to do with such delay.
16. In this case, the applicant asserts that judgment by the trial court was delivered on 16 November 2023 but due to the Christmas festivities, no appeal was filed. Christmas vacation per the provisions of Order 50 of the *Civil Procedure Rules* only took effect on 21st December 2023 and not before. The time from 17 November 2023 to 20 December 2023 is not accounted for. Further, from 14 January 2024 to 14 May 2024 is not accounted for. These periods cannot form part of the alleged Christmas festive season. Applying such averments to the mandatory motions of Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* would conflate the definition of justice to the prejudice of the respondent.
17. The above is put into account, that the ends of justice will only be met if the court allows the applicant to ventilate its appeal but on condition that the intended appeal is filed within the next 14 days and the Record of Appeal is filed within 30 days. Equally, the respondent is now forced to accommodate the applicant going back and should hence pay the due costs. For the appeal, costs are assessed at ksh.20,000.
18. On whether the status quo concerning the decretal sum should be maintained, the applicant well appreciates that ELRCA No.E015 of 2024 was struck out. It ceased to exist.
19. This fact has allowed the applicant to file the instant application seeking to file an appeal out of time.
20. Hence, the applicant cannot rely on orders that issued under struck-out proceedings. It would negate the very essence of such a fact.
21. What is sought herein is to continue enjoying the benefit that accrued in a matter struck out. The applicant has not applied for any orders of stay here to allow them to be heard on the intended appeal. To seek the Order of status quo of the decretal sums deposited in the joint account of counsels at Diamond Trust Bank pending the hearing and determination of the intended appeal, in these proceedings is to rely on a non-existent order herein.
22. The record herein has no such Orders.
23. On costs, this is the precise moment where an applicant such as the applicant should offer to pay the respondent costs. The rationale is that the applicant is seeking a discretionary order. To file an intended appeal out of time after the respondent has commenced execution proceedings and now wishes to be accommodated to file an appeal out of time. To claim that the respondent should meet the costs due is abuse of process.
24. The applicant should meet costs due to the respondent. These should be assessed by the court in this instance all at Ksh.20,000 to be paid within 14 days after which the same shall accrue interests at court rates from this date until paid in full.
Total costs due to the respondent Ksh.40,000.
25. Accordingly, an application dated 15 May 2024 is allowed on the conditions;
 - a. File appeal and serve within 14 days from the date hereof;



- b. File and serve Record of Appeal within 30 days from the date hereof;
- c. Pay the cost of Ksh.40, 000 to the respondent within 14 days.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

