



**Teachers Service Commission v Macharia (Miscellaneous Application  
E190 of 2023) [2024] KEELRC 1739 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1739 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E190 OF 2023**

**NJ ABUODHA, J**

**JULY 5, 2024**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPLICANT**

**AND**

**ZAKARIA KANYANJUA MACHARIA ..... RESPONDENT**

**RULING**

1. The Applicant filed application dated 15<sup>th</sup> September, 2023 brought under Articles 25,150,159 and 165(6) & (7) of the Constitution, Sections 1B,3A,75 79G of the Civil Procedure Act and Order 42 Rule 6(1) and 8 of the Civil Procedure Rules, Section 90 of the Employment Act and Section 12 of the Employment and Labour Relations Court.
2. The Applicant is seeking for orders of leave to appeal out of time against the order of Hon. Omodho (P.M) delivered on 12<sup>th</sup> July,2023 and order of stay of proceedings, further proceedings in Nairobi CM ELRC No. E1539 of 2023 and all consequent orders against the ruling of subordinate court delivered on 12<sup>th</sup> July, 2023 pending hearing and determination of the application and the intended appeal at the Employment and Labour Relations Court herein.
3. The application was supported by the Affidavit of Sylvia Ngere advocate on record for the Applicant herein who averred that the Respondent commenced this suit *vide* Nairobi Misc Civil App No. E588 of 2023 seeking leave to file Employment claim out of time.
4. The Applicant averred that in addition to the application the Respondent served them with a hearing Notice dated 17<sup>th</sup> May,2023 indicating the matter would come up for hearing on 7<sup>th</sup> June,2023. That on the said date counsel MS. Manyasa attended court where directions were issued.
5. The Applicant averred that the court directed the Applicant to file and serve its response within 14 days and appear in court on 12<sup>th</sup> July, 2023 for further directions. That unfortunately the counsel while



- diarizing the date given for further mention inadvertently indicated 14<sup>th</sup> July, 2023 instead of 12<sup>th</sup> July, 2023.
6. The Applicant averred that she proceeded to prepare her response in the matter but due to work exigencies she could not manage to file and serve within 14 days. However, the same was ready on 13<sup>th</sup> July, 2023 when the Applicant instructed her clerk to file and serve. That it is then they discovered that the matter had come up in court on 12<sup>th</sup> July, 2023 the previous day and had been marked as closed.
  7. The Applicant averred that the Application was heard and determined undefended and orders issued on 12<sup>th</sup> July, 2023 by Hon. G.Omodho(P.M). That the Applicant embarked immediately on establishing the outcome of the court including phone calls to the registry, requesting for the ruling *vide* letters which were unsuccessful.
  8. The Applicant averred that she was served with the order together with Memorandum of claim on 30<sup>th</sup> August, 2023. That the Applicant has an arguable appeal with high probability of success as it intends to raise substantial issues of law ranging from misapplication of the law to enlarge the time to file the claim when the same was time barred by dint of section 90 of *Employment Act* among others.
  9. The Applicant averred that the application is justified and ought to be allowed to enable the Applicant exercise its right of appeal. That Applicant will suffer irreparable loss and damage if the claim is heard and determined against provisions of section 90 of *Employment Act*.
  10. In reply the Respondent filed his reply sworn on 26<sup>th</sup> October, 2023 and opposed the Applicant's Application.
  11. The Respondent averred that the Application is incompetent, misconceived and abuse of court process. That the Applicant was in exceeding indolent instituting the application herein and was not entitled to the prayers sought.
  12. The Respondent averred that no tangible reason has been issued by the Applicant as to why it waited until 12<sup>th</sup> July,2023 to file its response when 14 days given lapsed on 21<sup>st</sup> June,2023. That no action was taken to peruse the file after the 12<sup>th</sup> July, 2023 despite knowing the matter was closed on 13<sup>th</sup> July, 2023.
  13. The Respondent further averred that no explanation as to why the Applicant took more than two weeks to request for the Ruling on 1<sup>st</sup> August,2023 despite being aware on 13<sup>th</sup> July,2023. That there was no explanation why the appeal was not filed in time despite knowledge of the closer of the matter.
  14. The Respondent averred that the Hon. Court in CM ELRC No.E1539 of 2023 acted within its powers in proceeding to hear the application for extension of time for filing the suit by virtue of section 59 of the *Employment and Labour Relations Court(Procedure) Rules* 2016.
  15. The Respondent averred that the appeal does not raise any triable issues. That the Respondent has sound grounds for not instituting his claim in time .That he will be highly prejudiced in the event the Application is allowed as he will be condemned unheard against Article 50 of the *Constitution*.
  16. The Respondent prayed that this application be dismissed with costs.
  17. The Application was disposed of by written submissions.



## Determination

18. Section 79G of the *Civil Procedure Act* is the guiding law in answering the question whether the prayer to enlarge time to file the appeal is merited which provides that the appeal ought to be filed within 30 days.

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 in time.

19. In *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR the court held as follows;

However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal.

20. In addition the above case relied on court of Appeal decision as follows on grounds the courts need to look at on such an application;

Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR. They include the following:

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.

21. In this particular case the application has been filed with a draft memorandum of Appeal. The order in this matter was delivered on 12<sup>th</sup> July, 2023 and the date was taken by consent in presence of all parties' advocates. The Applicant's advocates state that they did not attend court on the above date for further directions because they diarized the matter as coming up on 14<sup>th</sup> July, 2023 as opposed to 12<sup>th</sup> July, 2023. That they also did not file their response within the 14 days given but tried to file a day to its diarized date the 13<sup>th</sup> July, 2023.

22. The Applicant became aware of the courts direction on closing the matter on 12<sup>th</sup> July, 2023 when they tried filing their response on 13<sup>th</sup> July, 2023. The applicant states that their effort to get the order of the court was unsuccessful although it will go on record that the request of the said ruling was done on 1<sup>st</sup> August, 2023 two weeks after the knowledge of what transpired in the file.

23. Whereas I agree that the mistakes of counsels should not be met on clients. I note that the period of delay was barely two months since 30 days lapsed on 12<sup>th</sup> August, 2023. This instant Application was filed on 16<sup>th</sup> September, 2023. Counsel for the Applicant was served with the order by the Respondents on 30<sup>th</sup> August, 2023. I find counsel acted within two weeks after receiving the said order. I find this period not to be inordinate delay and counsel has explained the reason for the delay.



24. On the issue of an arguable Appeal I have looked at the draft memorandum of Appeal attached by the Applicant and I note it has grounds which may need to be addressed by the court on appeal more so on the time limitation of employment causes under section 90 of the [Employment Act](#).
25. This court is not in the habit of shunning away a litigant unheard when they approach a court within a reasonable time.
26. On the issue of prejudice to be suffered as much as the Respondent needs to prosecute his claim the same is challenged as time barred and I am also aware that the Applicant has approached the court on a point of law and it needs to be heard.
27. In the upshot I allow the Applicant to file the Appeal out of time.
28. On the other issue of stay orders the grounds upon which this Court exercises the discretion to grant a stay of execution are well governed by the [Civil Procedure rules](#) under Order 42 Rule 6 which stipulates as follows;

(2) No order for stay of execution shall be made under subrule (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.

29. In [Joseph Odide Walome v David Mbadia Akello](#) [2022] eKLR the court in support of the above provision held as follows;

An applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:

- a. Substantial loss may result to the applicant unless the order is made,
  - b. The application has been made without unreasonable delay, and
  - c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
1. In the case of [Halal & Another v Thornton & Turpin Ltd](#) [1990] eKLR citing the case of [Rasiklal Somabhai Patel v Parklands Properties Ltd](#) it was stated:

“that before a Court could decide the application (for stay of execution) it must have regard to the requirements of Order XLI rule 4(2) of the [Civil Procedure Rules](#) under which the applicant had to satisfy the court of two matters...Firstly, that substantial loss may result to the applicant unless the application is granted, which prima facie means that if the appeal succeeds, the respondent would not be in a position to make full restitution. Secondly, the applicant had to give such security as the court may order. Those are the requirements under Order XLI rule 4(2) of the [Civil Procedure Rules](#).

31. On the issue of substantial loss, this has been ably explained by Gikonyo J in the case of [James Wangalwa & Anor v Agnes Naliaka Cheseto](#) [2012] eKLR. Where the learned Judge observed:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution



has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#). This is so because execution is a lawful process...The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.

32. As observed in the cases cited above, having allowed the prayer for filing of appeal out of time it would be prejudicial to the Applicant if it succeeds on the Appeal yet the Respondent has already prosecuted his claim in the lower court. It would be in the interest of justice to stay the said proceedings in CMELRC NO.1539 of 2023 until the issues the Applicant has raised in its appeal are ventilated. This will avoid rendering the appeal nugatory.
33. On the second limb of approaching the court without unreasonable delay, the Applicant has approached this court without unreasonable delay as seen above.
34. On the issue of security for costs I am of the view that since the orders of the court were not in terms of any damages or amounts then the same may not be applicable in this case.
35. The Applicant has therefore met the conditions for grant of the orders of stay.
36. The application is therefore found with merit and is hereby allowed.
37. Costs shall be in the cause.
38. It is so ordered.

**DATED THIS 5<sup>TH</sup> DAY OF JULY, 2024**

**DELIVERED THIS 5<sup>TH</sup> DAY OF JULY, 2024**

**ABUODHA NELSON JORUM**

**JUDGE**

