



**Ready Consultancy Limited v Mosomi (Appeal E075 of 2024)
[2024] KEELRC 2383 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2383 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E075 OF 2024
NJ ABUODHA, J
SEPTEMBER 27, 2024**

BETWEEN

READY CONSULTANCY LIMITED APPELLANT

AND

CHRISTOPHER NYAMARI MOSOMI RESPONDENT

RULING

1. The Appellant filed application dated 22nd March, 2024 brought under Article 48 of *the Constitution*, Sections 1A,3A, 79G of the *Civil Procedure Act* and Order 50 Rule 6 and Order 22 Rule 22(1) of the Civil Procedure Rules.
2. The Appellant sought for orders that pending the hearing and determination of this Application and the intended Appeal there be an order of stay of execution of the Judgment of the lower Court issued in CM ELRC NO. 409/18 and stay the proclamation of the Applicant's goods by M/S Nairobi Connection Service Ltd and the Memorandum of Appeal filed herein be deemed as properly filed.
3. The application was supported by the grounds set out in the Application herein and the Affidavit of MOHAMED ISSA DUCALE the Managing Director of the Appellant Company who averred that upon being notified of the contents of the Judgment in this case he instructed its Advocates to get a fully typed copy of the Judgment with a view of appealing the same since they were dissatisfied with the Judgment. That this was early in December 2023 before the court went on recess.
4. The Appellant averred that in January, 2024 before he left the country for a series of business engagements trying to find labour for Kenyans in the Arab World he was advised by his advocates that they had not yet managed to get a typed judgment.
5. The Appellant averred that in March this year their advocates called him and informed him that the file seemed to have moved to decree section hence a need to file a holding Appeal before they got a full Judgment. That they analyzed the Judgment notes and filed their Memorandum of Appeal herein.



6. The Appellant averred that he had been keenly following up this matter and sought leave to file the Appeal against the Judgment.
7. The Appellant averred that before they made their application they were served with a proclamation by M/S Nairobi Connections Ltd, Auctioneers with a warrant calling for a whopping sum of Kshs 2,643,181/= and they wondered how a judgment of about Kshs 957,069/= could have grown to such an amount in three months and that the decree was never served upon the Appellant before execution for the inconsistencies to be noted.
8. The Appellant averred that their company is a labour outsourcing and placement company which earns minimal margins on the employee placed or managed and payment of such colossal sum could lead to the collapse of their operations.
9. The Appellant also averred that the court should allow them file their Appeal which was late by three months which delay was explained and excusable and that costs could compensate the Respondent.
10. In reply the Respondent filed his Replying Affidavit sworn on 18th April, 2024 and opposed the Appellant's Application. The Respondent averred that on 30th November, 2023 he obtained Judgment in his favour for the decretal sum of Kshs 2,430,132.81/= plus cost and interest of Kshs 149,78.83/= making a total of Kshs 2,579,922.14/=
11. That his advocates wrote a letter to the Respondent's Advocates informing them to pay the decretal amount and even attached a typed copy of the Judgment and that the Respondent refused to comply with the court order by paying thus necessitating him to instruct his advocates to start execution proceedings against the Appellant.
12. The Respondent averred that his Advocates instructed the firm of Nairobi Connection Services to execute the decree, warrants were extracted and a proclamation carried out. That when the day to actual attachment arrived the Auctioneers were barred from accessing the premises.
13. The Respondent averred that the Application herein lacks merit, it is frivolous, vexatious and an abuse of the Court process. That the Appeal was time barred having been filed four months after the judgment was delivered and that litigation must come to an end this being a 2018 matter.
14. The Respondent further averred that the Appellant was not coming to court with clean hands hence his prayers should not be entertained.
15. The Respondent stated that if the court was inclined to award the orders sought by the Appellant the Respondent prayed that half of the decretal amount of Kshs 1,289,961.07/= be paid to the Claimant through his advocates and the remaining balance be deposited in a joint interest earning account in the name of advocates of the parties.
16. The Respondent averred that the Appellant had not sought any proposal with his advocates on whether the matter could be negotiated while fostering ADR hence the Appellant was not ready to pay the decretal sum which is against Article 159 of *the Constitution*.
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. 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 Judgment in this matter was delivered on 30th November, 2023 and this application herein filed on 22nd March, 2024. This is almost 4 months after delivery of the Judgment. The court further notes that the Judgment was delivered in presence of Advocates for both parties on 30th November, 2023 and not 29th November, 2023 as alleged by the Appellant.

22. The said Judgment was never attached by the Appellant who has explained that they did not manage to get the said Judgment at the time of filling this application and that the Managing Director was outside the Country for work related assignments.

23. The court notes that the Respondent attached a typed copy of the Judgment in his Replying Affidavit sworn on 18th April, 2024. The Respondent also averred that his advocates wrote a letter to the Appellant's Advocates attaching the typed Judgment requesting them to pay. The Respondent has not attached the said letter so this court is left with no evidence of when this was done. The Respondent has also not adduced evidence of serving their decree to the Appellant.

24. This court also notes that nowadays most judgments are posted on the CTS for advocates to access them. The Appellant has also not attached any letter to the Court requesting the same from the court. The court therefore concludes that the Appellant is simply trying to deny knowledge of the judgment when in actual fact he knew about it. The Appellant is therefore not approaching the Court with clean hands.

25. The court notes that the period of delay was around four months since 30 days lapsed on 30th December, 2023. The Court has further noted the reasons given by the Appellant and finds the delay



- unreasonable but in the interest of justice the court will give the Appellant a right to be heard on his intended appeal. In the upshot the Appellant's draft Memorandum of Appeal is deemed duly filed upon payment of requisite court fee.
26. On the 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.
27. In *Joseph Odide Walome v David Mbadi 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.
28. 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.
29. As observed in the cases cited above, having allowed the prayer for filing of appeal out of time it would be prejudicial to the Appellant if it succeeds on the Appeal yet the Respondent has already executed the decree in the lower court. The Court therefore grants a stay of execution on condition that the applicant deposits half the decretal sum in a joint interest earning account in the name of the advocates within 30 days of this ruling.
30. The matter is set for mention on 11th November, 2024 for mention to confirm compliance and directions on the hearing and disposal of the appeal.
31. Costs shall be in the cause.
32. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2024

DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2024



ABUODHA NELSON JORUM
PRESIDING JUDGE-APPEALS DIVISION

