



**Eastern Produce (Kenya) Limited Kapsumbeiywa Tea Estate v Nyambari (Miscellaneous Application 3 of 2024) [2024] KEELRC 2509 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2509 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
MISCELLANEOUS APPLICATION 3 OF 2024  
MA ONYANGO, J  
OCTOBER 17, 2024**

**BETWEEN**

**EASTERN PRODUCE (KENYA) LIMITED KAPSUMBEIYWA TEA  
ESTATE ..... APPLICANT**

**AND**

**PATRICK NYAMANGA NYAMBARI ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 15<sup>th</sup> February 2024 and filed in court on 16<sup>th</sup> February 2024, the Respondent seeks the following orders:
  - a. Spent
  - b. Spent
  - c. This court be pleased to grant leave to the Applicant to file an Appeal out of time against the judgment in Kapsabet PMCC No. 285 of 2011 delivered on 29<sup>th</sup> November 2023
  - d. Spent
  - e. The court be pleased to grant temporary orders of stay in terms of prayer (d) above pending hearing inter-partes and/or pending further orders of the court.
  - f. Such other orders be made as are just and expedient
  - g. Costs be in the cause
2. The application is based on the grounds on the face of the motion namely:-
  - i. That the Applicant is aggrieved by the judgment of the Magistrate Court in Kapsabet PMCC No. 285 of 2011 delivered on 29<sup>th</sup> November 2023



- ii. That the Applicant and/or its advocates were unaware of the judgment having been delivered on 29<sup>th</sup> November 2023 as the same was delivered without notice and in the absence of the Applicant and/or the Applicant's Advocates on record.
  - iii. That the matter initially came up for judgment on 27<sup>th</sup> November 2023 with both counsel present, however it was not delivered on that day as the trial magistrate indicated it was not ready and the same would be delivered on notice
  - iv. That notice was never issued to the applicant by the registry prior to delivery of judgment.
  - v. That the Applicant's Advocates only came to be aware of the judgment on 31st January 2024 when being served with the Plaintiff's advocate party to party bill of costs.
  - vi. That the Applicant is a company with offices based in Nairobi and consultations were necessary to give way forward on the case once informed on the delivery of judgment.
  - vii. That it was also necessary to obtain a copy of judgment from the court for perusal by the Applicant and their Advocates before deciding on preferred way forward which process took time.
  - viii. That the Applicant has a good Appeal with overwhelming chances of success.
  - ix. That the length of time taken to approach this court seeking leave to appeal is not inordinate as the time limit to appeal lapsed on 23rd January 2024 given the End year recess period was in place within the time which appeal should have been filed.
  - x. That this Application has therefore been brought in good faith and has been lodged expeditiously.
  - xi. That it is fair, just and expedient that this application be allowed.
3. The application is supported by the affidavit of Denis Gitaka sworn on 15<sup>th</sup> February 2024 and a further affidavit sworn by E.K Ruto on 15<sup>th</sup> February 2024. These affidavits reiterate the ground upon which the application is made.
  4. The Respondent opposed the application and filed a Replying Affidavit sworn by himself on 22<sup>nd</sup> February 2024. In that affidavit, the Respondent contends that the Applicant's intended appeal fails to raise triable issues of law and fact and has no overwhelming prospects of success as required by the law. Further, that the Applicant will not suffer substantial loss in case the Applicant satisfies this judgment pending the intended appeal since he is a man of means and a business man capable of refunding the decretal sum if paid to him in the unlikely event that the intended appeal succeeds and also, that the court has the discretion to make orders that the Applicant herein do provide security in the terms binding on the Applicant.
  5. It is the Respondent's position that should the court allow the instant application, then it should order the Applicant to pay half of the decretal sum and half of the costs be deposited in a joint interest earning account in the names of both counsel on record within seven days; that the other half of the decretal sum and half of the costs be paid to him and that execution do issue in default of any one condition therein, should it allow this application.
  6. Parties were directed by the court to canvass the application by way of written submissions which were duly filed by the Applicant. I have perused the court file and it seems that the Respondent did not file his submissions.



7. The Applicant in its submissions identified the issues for determination to be;
  - i. Whether leave to appeal out of time ought to be granted
  - ii. Whether stay pending the intended appeal ought to be granted
8. On the first issue, the Applicant while citing the decision in Nairobi Court of Appeal Civil Application No. 243 of 2020, submitted that in granting leave to file an appeal out of time, the court has to balance the competing interests of the applicant with those of the Respondent.
9. Firstly, the Applicant submitted inter alia, that the Judgment was delivered on 29<sup>th</sup> November 2023 and the Applicants ought to have filed their appeal by 23<sup>rd</sup> January 2024. That they only learnt of the judgment on 31<sup>st</sup> January 2024 and thereafter approached the court with the present application on 15<sup>th</sup> February 2024. It is the Applicant's case that judgment was originally scheduled for delivery on 27<sup>th</sup> November 2023 but the same was not delivered and no notice was issued to the applicant's on the new judgment date.
10. Secondly, the Applicant submits that the appeal has high chances of success as there exists gross errors in both fact and law with respect to liability and quantum where the court failed to appreciate or take into account the Appellant's evidence and or submissions. In this regard, the Applicant has cited the decision in Geoffrey Ng'ang'a Gitau & Another v Wilfred Muigai Muturi & Another (2018) eKLR.
11. Lastly, with regard to prejudice that may be suffered by the Respondent should the Application be allowed, it is the Applicant's submission that there has been no demonstration by the Respondent in his Replying Affidavit that he will suffer any prejudice.
12. On the second issue for determination, it is the Applicant's submission that the judgment sum which is the subject of Appeal is Kshs 351,500 which is a substantial sum of money and if paid to the Respondent and the Appeal thereafter succeeds; the Respondent may not be able to pay it back. In this regard, the Applicant has submitted that it is willing to deposit the amount in a joint interest earning account as security for due performance.
13. In the end, the court was urged to allow the application before it.

### **Determination**

14. I have carefully considered the application, the affidavits both in support and against, the submissions on record and the authorities cited as well as the pleadings herein. The issues which arise for determination are:
  - i. Whether the Applicant has met the threshold for extension of time to appeal out of time
  - ii. Whether, the Applicant has met the threshold for grant of stay of execution.
15. Section 79G of the *Civil Procedure Act* provides:-

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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 the preparation and delivery of a copy of the decree or order:

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.”



16. From the wording of above provision of the law, before the court considers an application for extension of time, the Applicant must satisfy the court that it has good and sufficient cause for filing the appeal out of time.
17. In the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR, the Supreme Court stated as follows:
  - “The underlying principles a court should consider in exercise of such discretion should include:-
    - a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
    - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
    - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
    - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
    - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
    - f. Whether the application has been brought without undue delay.”
18. In summary, the principles upon which the court should exercise discretion and grant leave to appeal out of time are; that the court should take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted.
19. As for the length of the delay, judgment in this matter was delivered on 29<sup>th</sup> November 2023 while the application herein was filed on 16<sup>th</sup> February 2024 which is almost two and a half months from the date of the delivery of the said judgment.
20. The Applicant gave reasons for the delay in filing an appeal on time to the trial court delivering judgment without notice. I have looked at the judgment which is annexed to the Application, marked EK1 and noted that it was delivered on 29<sup>th</sup> November 2023 in the presence of the Respondent’s counsel. The Applicant was not represented on the said date. From this material evidence, I am persuaded that the delay herein was not deliberate but excusable.
21. As for the chances of the intended appeal succeeding, I have perused the draft memorandum of appeal and the judgment of the trial court and noted that the appeal is not does raise pertinent issues of law. In the circumstances, I am convinced that there are good reasons for enlargement of time.
22. As for the prejudice which the Respondent stands to suffer should leave be granted for the applicant to file an appeal out of time, no evidence has been put forth by the Respondent to indicate the prejudice that would him that cannot be compensated by way of costs.
23. with regard to the issue of stay of execution pending appeal, I have noted that both parties are amenable to having the decretal sum deposited in a joint interest earning account. In this regard, an order of conditional stay will serve the interests of both parties.



24. In the end, it is my considered view that in the interest of justice, the application should be allowed with the following orders:
- i. That leave be and is hereby granted to the Applicant to file intended appeal out of time.
  - ii. That the Memorandum of Appeal be filed within 14 days.
  - iii. That the Applicant files and serves the Record of Appeal within 60 days from the date of this Ruling.
  - iv. The Applicant deposits the decretal sum into a joint interest earning account in the names of the advocates for the respective parties.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON HIS 17<sup>TH</sup> DAY OF OCTOBER 2024**

**MAUREEN ONYANGO**

**JUDGE**

