



**Jilag Limited v Mbui & another (Civil Application
E037 of 2024) [2024] KECA 612 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 612 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E037 OF 2024**

M NGUGI, JA

MAY 24, 2024

BETWEEN

THE JILAG LIMITED INTENDED APPELLANT

AND

ROSELYN NDAVU 1ST RESPONDENT

KAGWIRIA ESTHER MBUI 2ND RESPONDENT

*(Being an application for leave to appeal out of time against
the judgment of the Employment and Labour Relations Court
(Abuodha, J.) dated 22nd September, 2023 in ELRC No. 122 of 2019)*

RULING

1. By its application dated 31st January 2024, the applicant, The Jilag Limited, seeks leave to file its appeal out of time against the judgment of the ELRC (Abuodha J.) dated 22nd September, 2023 in Nairobi ELRC 122 of 2019; It further seeks an order that upon granting of the said leave, its Notice of Appeal dated 30th January, 2024 and filed on the same date be deemed to be duly filed and served on time; that the Court be pleased to issue timelines on filing and serving of the intended appeal; and that the Court do grant any other orders that it might deem fit. The application is expressed to be brought under Article 50(1) of the Constitution of Kenya, 2010, sections 3, 3A and 3B of the Appellate Jurisdiction Act and rules 4, 41, 42 and 43(1) and (3) of the Court of Appeal Rules, 2010.
2. The application is based on the grounds set out on its face and on an affidavit sworn by Lorna Nandi, the Managing Director of the applicant. The applicant avers that the impugned judgment, which was supposed to be delivered on notice, was delivered on 22nd September, 2023. It contends that its counsel did not receive any notice despite checking constantly and diligently. As a result, it was unaware of the said judgment until its advocates in exercising caution, searched at the www.kenyalaw.org website.



3. The applicant contends that the failure by the registry to notify the applicant's advocates caused them to learn of the judgment when the statutory time limit to file an appeal had lapsed. It contends that the 1st respondent has since filed a party and party Bill of Costs dated 12th October, 2023 and a notice of taxation dated 17th October, 2023 in furtherance of execution of the impugned orders.
4. The applicant avers that it is ready and willing to lodge and file its intended appeal in this Court in order to defend its interest, and it has attached a Notice of Appeal and Draft Memorandum of Appeal, both dated 30th January 2024. It is its contention that the intended appeal has a high probability of success and it is desirous of defending its interests. It contends that it will be prejudiced unless the orders sought are granted, its right to fair hearing under Article 50 will be violated, and its intended appeal will be rendered nugatory.
5. The applicant further avers that it is willing to deposit such security as the court orders for the due performance of such decree or order as may ultimately be binding on it; that while it stands to suffer substantial loss in the absence of the orders sought, the 1st respondent will suffer no prejudice if the orders are granted.
6. The 1st respondent, Kagwiria Esther Mbui, has filed a replying affidavit which she swore on 15th February, 2024. Ms. Mbui avers that contrary to the applicant's averment that the judgment was to be delivered on notice, the trial court had directed that judgment would be uploaded on the E-filing portal. She further avers that the applicant's advocates wrote a letter dated 16th August, 2023 seeking to know when the judgment would be uploaded as directed by the court. It is her averment that the judgment was uploaded on 21st September, 2023, and that the applicant is intentionally trying to deceive the Court that by the time it was served with the Notice of Taxation on 19th October, 2023, the statutory timeline, being 30 days had lapsed.
7. The 1st respondent further avers that the applicant has stated that it learnt of the judgment from the Kenya Law website prior to being served with the Notice of Taxation; that it is guilty of laches for failing to file the appeal on time; that with full knowledge of the judgment, it failed to act for almost two months before filing an application for stay at the trial court on 15th December, 2023.
8. It is the 1st respondent's case that the applicant's explanation does not amount to sufficient reason to enable this Court exercise its discretion in the applicant's favour. It is her averment further that the applicant has not explained to this Court why it has taken almost four months, from when it learnt of the delivery of the judgment, to bring the present application. Further, that the applicant has not demonstrated the loss that it alleges it will suffer if the orders sought are not granted.
9. The 1st respondent avers that should the Court be inclined to exercise discretion in favour of the applicant, it should direct that the decretal sum be deposited in a joint interest earning account and that the appeal be expedited in view of the fact that the appeal emanates from a 2019 suit.
10. I note that an affidavit sworn by the 1st respondent on 3rd March 2024 has been placed before me. It adverts to an application filed by the applicant, being Miscellaneous Civil Application No. E139 of 2024, in which the applicant seeks stay of execution of the judgment of the trial court. This application is not before me and cannot be properly placed before a single judge in view of rule 55(2)(b) of the [Rules](#) of this Court.
11. The application properly before me is the one dated 31st January 2024 seeking extension of time to file a notice of appeal. Under rule 4 of this Court's [Rules](#), the Court has discretion to extend the time



prescribed for the doing of any act under the Rules. In exercising such discretion, the Court is required to consider, as was held in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA 231:

“...first, the length of the delay; second, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

See also *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR.

12. I have considered the application, the affidavits of the parties and the submissions dated 10th and 12th April respectively. The judgment that the applicant seeks to file a notice of appeal in respect of is dated 22nd September 2023 and was uploaded onto the e-portal, according to the 1st respondent, on the same day. There’s a letter from the applicant’s counsel, Kithi & Company Advocates dated 16th August 2023 in which counsel indicates that the firm had been informed that the judgment would be uploaded on the judiciary e-portal. An extract from the e-portal annexed to the 1st respondent’s replying affidavit indicates that it was uploaded on 21st September 2023. There is nothing before me that indicates that the judgment was to be delivered on notice.
13. The applicant avers that it found that the judgment had been uploaded in the e-portal sometime in October 2023, before it was served with the 1st respondent’s bill of costs and notice of taxation.
It does not indicate when it found the judgment in the e-portal, but it is clear that it was before, at the very latest, 19th October 2023. The applicant did not take any action with respect to its intended appeal then, nor for a further three months. It filed the present application on 31st January 2024.
14. I find that the delay of four months from the date the judgment was delivered is inordinate, and it has not been sufficiently explained. The applicant was aware that the judgment was to be uploaded on the e-portal. It did not follow up until some date prior to 19th October 2023. Even after it was served with a notice of taxation on that date, it still took another two months before approaching this court on an application for extension of time.
15. Does its appeal have high chances of success, as the applicant avers? I remind myself that it is not for a single judge on an application such as this to inquire into the merits of an intended appeal. I note, however, that the trial court found that the applicant was found to have unfairly terminated the 1st respondent’s employment. In its draft memorandum of appeal, the applicant sets out three grounds: that the learned judge erred in law and in fact in finding that the appellant failed to prove the reasons for terminating the 1st respondent’s service as required under section 43 as read together with section 47(5) of the *Employment Act*; in failing to find that the 1st respondent failed to deliver on her job description and expected outcomes; and in failing to find that the applicant did everything possible to equip the 1st respondent with the skills necessary for the job and to assist her to achieve her expected outcomes. Looked at against the findings of the trial court, I have serious reservations about the possibility of success of the applicant’s appeal. However, having found that the delay by the applicant is inordinate and finding that the reasons advanced for it are untenable, I find that the application dated 31st January 2024 is devoid of merit. I accordingly dismiss it with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY, 2024.

MUMBI NGUGI

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JUDGE OF APPEAL



I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

