



REPUBLIC OF KENYA



KENYA LAW
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**Kenjap Company Limited v Mulatya (Civil Application
E088 of 2023) [2023] KECA 931 (KLR) (9 June 2023) (Ruling)**

Neutral citation: [2023] KECA 931 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E088 OF 2023**

KI LAIBUTA, JA

JUNE 9, 2023

BETWEEN

KENJAP COMPANY LIMITED APPLICANT

AND

MUTUA MULATYA RESPONDENT

(Being an application for extension of time to file a Notice of Appeal, Memorandum of Appeal and Record of Appeal out of time from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (O. Kebira, J.) delivered on 31st January 2023 in E.L.R.C No. 1417 OF 2017)

RULING

1. Before me is a Notice of Motion dated March 13, 2023 made under rules 4 and 5(2) of the [Court of Appeal Rules](#) in which the applicant, Kenjap Company Limited, prays for: stay of execution of the judgment of the ELRC (Ocharo Kebira, J.) dated January 31, 2023 in ELRC Cause No. 1417 of 2017 pending determination of the intended appeal; orders that the time limited for the applicant to file and serve the respondent with its notice of appeal, memorandum and record of appeal be enlarged and/or extended to allow the filing and service thereof within such time as the court shall deem fit; and that costs of the application be provided for.
2. The applicant's Motion is supported by the annexed affidavit of Rachel W. Watitu (learned counsel for the applicant practicing in the firm of M/s. Gathara Mahinda & Company) sworn on March 13, 2023. The relevant paragraphs thereof merely depose to the grounds set out on the face of the Motion in support of the applicant's prayers for extension of time under rule 4 of this [Court's Rules](#), namely: that the impugned judgment was delivered on January 31, 2023 in favour of the respondent, Mutua Mulatya; that the applicant was aggrieved by the judgment and decree of the ELRC and wishes to appeal therefrom; that the applicant did not file its notice of appeal within the requisite period of fourteen (14) days; that the delay was occasioned by inadvertent mistake of counsel who was at the



time overwhelmed by immense workload following departure of her colleague in February 2023; that the court should not visit the inadvertent mistake of counsel on her client; that the intended appeal is meritorious with a high chance of success; that it is only fair and just that the applicant be given an opportunity to be heard; and that the applicant's Motion has been filed without inordinate delay. I need not address myself to the remaining grounds intended to back the applicant's Motion for stay of execution of the impugned judgment and decree.

3. In addition to the affidavit in support of the application, counsel filed written submissions dated April 6, 2023. The applicant's Motion is opposed vide the respondent's replying affidavit sworn on March 23, 2023, but to whose contents I need not address myself for the following obvious reasons.
4. A quick look at the applicant's Motion reveals that, apart from the undated and unsigned draft memorandum of appeal annexed to the application for extension of time and stay of execution, no notice of appeal has been lodged and served in compliance with the mandatory provisions of rules 77 and 79 of the *Court of Appeal Rules, 2022*.
5. Addressing itself to the mandatory requirement to file and serve a notice of appeal, the Supreme Court in *University of Eldoret and another v Hosea Sitienei and three others* [2020] eKLR observed at para 36:

“The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal.”
6. On the authority of the *University of Eldoret and Sitienei case* (ibid), it is true to say that, in the absence of a notice of appeal properly on record, the applicant herein is yet to express its intention to appeal. Citing the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR, this court had this to say in *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission and 2 others* [2018] eKLR:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”
7. In so far as a notice of appeal is a jurisdictional pre-requisite, nothing flows from a non-existent notice to invoke this court's jurisdiction to grant the orders sought pursuant to Rule 4 or any other Rule. In effect, its hands are tied, so to speak. I so hold cognisant of the general principle that it is only in exceptional circumstances that this court would raise its hand to slam shut the door to justice on the face of a litigant despite the constitutional guarantee of access to justice as enshrined in article 48.
8. In addition to the foregoing, I must also add that the jurisdictional pre-requisite for a notice of appeal is not merely a technicality of procedure curable by invoking the provisions of article 159(2) (d) of the *Constitution*, which mandates courts to administer justice without undue regard to technicalities of procedure, and which I have taken to mind. In this regard, the cases of *Jaldesa Tuke Dabelo v IEBC & another* [2015] eKLR; *Raila Odinga and 5 others v IEBC & 3 others* [2013] eKLR; *Lemanken Arata v Harum Meita Mei Lempaka & 2 others* [2014] eKLR; *Patricia Cherotich Sawe v IEBC & 4 others* [2015] eKLR, among others, are a constant reminder that article 159(2) (d) is not a panacea for all procedural ills even though “the exercise of the jurisdiction under article 159 of the *Constitution* is unfettered especially where procedural technicalities pose an impediment to the administration of justice, save that article 159(2) (d) of the *Constitution* is not a panacea for all procedural ills” It matters not that the overriding objectives set out in sections 3A and 3B of the *Appellate Jurisdiction Act* (cap. 9) confer powers on this court to dispense justice with greater latitude (see *City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli v Orient Commercial Bank Limited* Civil Appeal No Nai 302 of 2008 (UR No 199 of 2008) (Unreported).



9. Having found that there is no notice of appeal properly on record, I find and hold that I have no jurisdiction to determine the applicant’s Motion or grant any of the orders sought. Accordingly, I find that the applicant’s Motion dated March 13, 2023 seeking extension of time in terms of prayer No. 4 is incompetent and is hereby struck out.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

