



**Josiah v Youth Enterprise Development Fund Board & another (Civil Application E255 of 2021) [2023] KECA 1430 (KLR) (24 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1430 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E255 OF 2021  
AK MURGOR, S OLE KANTAI & KI LAIBUTA, JJA  
NOVEMBER 24, 2023**

**BETWEEN**

**MORIASI ARABU JOSIAH ..... APPLICANT**

**AND**

**YOUTH ENTERPRISE DEVELOPMENT FUND BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE CHAIRMAN, YOUTH ENTERPRISE DEVELOPMENT FUND**

**BOARD ..... 2<sup>ND</sup> RESPONDENT**

*(An application to strike out the Notice of Appeal from the Ruling of the Employment and Labour Relations Court of Kenya at Nairobi (H. Wasilwa, J.) dated 25th June, 2020 in ELRC Petition No. 65 of 2020)*

**RULING**

1. By Motion on notice brought under Sections 3A and 3B of the *Appellate Jurisdiction Act* and rules 82(1), 82(2), 83 and 84 of the *Court of Appeal Rules* we are asked in the main to strike out Notice of Appeal dated June 25, 2020 and lodged on 26<sup>th</sup> June, 2020 for want of appeal. In grounds in support of the motion and in a supporting affidavit of Moriasi Arab Josiah for the applicant it is said in essence that the Employment and Labour Relations Court (ELRC) had delivered a ruling on 25<sup>th</sup> June, 2020 in ELRC Petition No. 65 of 2020 where the respondents (Youth Enterprise Development Fund Board and The Chairman, Youth Enterprise Development Fund Board) had been found guilty of contempt of court of an order made on 4<sup>th</sup> May, 2020; that order's effect had stayed the respondents' decision of dismissing and/or terminating the applicant's/petitioner's (Moriasi Arab Josiah) employment as the Chief Executive Officer of the respondents; the respondents had filed a Notice of Appeal to appeal that decision and an application to this Court for stay of execution of that ruling. This Court on August 7, 2020 had issued an order of stay of execution of the decision of ELRC pending appeal. Further, that the respondents had not filed an appeal for the last 1 year (the Motion is dated 22<sup>nd</sup> July, 2021)



and according to the applicant rule 82(1) of the Court of Appeal Rules requires that an appeal be instituted within 60 days from when Notice of Appeal is lodged. The applicant further says that the respondents continue to enjoy the stay orders issued by this Court when he should be performing his duties as the respondents Chief Executive Officer – the delay in filing appeal is unreasonable; inordinate and inimical to justice and fairness and that it is demonstration that the respondents lack interest in pursuing the appeal. For all that we should strike out notice of appeal.

2. In a replying affidavit by Dr. Victor Mwongera, the Chairman of the respondents it is deponed amongst other things that the respondents were granted by this Court stay of execution pending appeal; at paragraphs 11 and 12 of the said affidavit:
  11. Counsel on record for the intended appellants made a request in writing to the Registrar of the Employment and Labour Relations Court to avail proceedings which are necessary for the preparation of the record of appeal. However, the same is yet to be processed by the Court to date. (A copy of the request of proceedings is attached at page 6 of the Exhibit).
  12. I am advised by the Advocate on record for the Respondents herein whose advice I verily believe to be true and correct that there is a proviso that freezes time pending receipt of court proceedings under Rule 82 of the Court of Appeal Rules 2010 that states that: Provided that where an application for a copy of proceeding in the superior court has been made in accordance with sub-rule 2, within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is instituted, be excluded such a time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy”.
3. It is further deponed that the Motion was filed about 1 year after lodgment of the Notice of Appeal; that the Motion offends rule 84 of the *Court of Appeal Rules* that requires that an application of this nature be filed within 30 days of service of Notice of Appeal; that he and his lawyers have made constant follow up with the Court Registry but proceedings have not been availed; that the suit at ELRC has not been heard as the applicant has not fixed it for hearing.
4. We have seen and perused written submissions and case digest filed and we are grateful to counsel on both sides for this.
5. We note that Notice of Appeal was lodged with the Registrar of ELRC on June 26, 2020 indicating intention to appeal against such parts of the decision that allowed the petitioner’s application dated May 7, 2020 and overruled the respondents’ preliminary objection dated May 20, 2020. Notice of Appeal was received by the applicant’s advocates on July 2, 2020.
6. On June 25, 2020 lawyers on record for the respondents applied to the Deputy Registrar of ELRC for copies of proceedings to enable them appeal. We are told, and this is not controverted, that ELRC has not supplied those proceedings and that is why an appeal has not been filed. We have seen follow up letters to ELRC on the issue of supply of proceedings.
7. As noted earlier the Motion is dated July 22, 2021 while Notice of Appeal was served on July 2, 2020 about 1 year after service of that Notice of Appeal.
8. The proviso of rule 84 of the *Court of Appeal Rules* allows party affected by an appeal to apply for it or Notice of Appeal to be struck out within 30 days of service of Notice of Appeal.



9. That issue – when a party may apply for striking out of an appeal – has been considered in many decisions of this Court such as *Salama Beach Hotel Limited & 4 Others v Kenyariri & Associates Advocates & 4 Others* [2016] eKLR where it was held that the applicant was bound to comply with the time required in rule 84 of the said rules.
10. It will also be noted that whereas it is required by rule 82 of the said rules that an appeal be instituted within 60 days of the date when the notice of appeal was lodged, where an application for a copy of the proceedings in the High Court has been made within 30 days of the decision of that court time taken to prepare proceedings is excluded in computation of time. The respondents here applied for proceedings, they have made constant follow ups but ELRC has not furnished them with proceedings. It seems to us that when proceedings are eventually supplied to the respondents they will be entitled to time-exclusion in terms of rule 82 of the said rules.
11. The Motion has no merit and we dismiss it with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**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**

