



**Abdulla v Crown Petroleum (K) Limited (Miscellaneous Civil Application
E050 of 2023) [2024] KEELRC 364 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 364 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E050 OF 2023**

M MBARŪ, J

FEBRUARY 22, 2024

BETWEEN

ABDULJIHAD WARIO ABDULLA APPLICANT

AND

CROWN PETROLIUM (K) LIMITED RESPONDENT

RULING

1. The applicant filed an application dated 27 October 2023 under the provisions of Section 3A, 63(e), and 79G of the [Civil Procedure Act](#) and seeking orders that;
 1. Spent.
 2. Pending the hearing and determination of this application, there be a stay of execution of the judgment in Mombasa MCELRC Cause No. E016 of 2022 delivered on 8/9/2022;
 3. This court be pleased to grant leave to the applicant to lodge/or file an appeal out of time against the judgment in Mombasa MCELRC Cause No. E016 of 2022 delivered on 8/9/2022.
 4. Costs be in the cause.
2. The application is supported by the applicant's affidavit because on 4 August 2023, he attended court and was informed that judgment would be delivered on 17 August 2023 but this was not done and the court gave another date on 8 September 2023. On the due date, the trial magistrate informed him that his case had been dismissed with costs, and the advocate attending asked to be supplied with copies of the judgment and proceedings. The court gave a stay of execution for 30 days but since, despite visiting the court for certified proceedings a copy of the judgment, these were not provided. The applicant was not able to read the judgment and be able to process the appeal.
3. On 13 October 2023, a copy of the judgment was issued by which time the time to file an appeal had lapsed. Unless time is extended to file an appeal, the applicant will suffer irreparable loss and damage.



4. The applicant has prepared a draft Memorandum of Appeal, there is a good appeal with high chances of success and unless the applicant is given more time within which to file an appeal, he will be prejudiced.
5. In reply, the respondent filed the Replying Affidavit of Mohamed Abubakar the human resources secretary and the applicant filed his claim before the lower court and judgment delivered on 8 September 2023 and the case was dismissed with costs in the presence of his advocate. The court granted 30 days stay of execution. Such time lapsed and no appeal was filed. The physical copy of the judgment was uploaded on the E-filing portal on 8 September 2023. The applicant cannot justify his claim that he had no access to the judgment and hence unable to file his appeal. The delay in filing an appeal is not explained to justify the enlargement of time within which to file an appeal.
6. Both parties attended and agreed to address the appeal by way of written submissions.
7. The applicant submitted that under rule 28(2) and (3) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 allow a party aggrieved by a judgment to file an appeal. A judgment must be delivered in open court and signed. Where a party is not able to file an appeal within time, on reasonable cause, the court is allowed to enlarge time to file an appeal out of the allowed time as held in *Nicholas Kiptoo Korir arap Salat v IEBC & 7 others* [2014] eKLR. The applicant was not able to file an appeal in time after applying for certified copies of the judgment and proceedings and these were only supplied after the time to lodge his appeal had lapsed.
8. In reply, the respondent submitted that order 42 rule 6(2) of the *Civil Procedure Rules* allows a party to file an appeal on condition there is substantial cause, no delay and there is a deposit of security for the due performance of the judgment pending appeal as held in *Chris Munga N. Bichange v Richard Nyagaka Tongi & 2 others*. The applicant has failed to address these conditions and to proceed and seek leave to file an appeal out of time will not serve the purpose as there exists no good cause to file an appeal in the first instance as held in *Njoroge v Kimani* Civil Application Nai E049 of 2022. The judgment of the lower court having been uploaded on the E-filing portal, it was available to both parties and where the applicant was desirous of filing his appeal, he had access to such record and he failed to address it. His application seeking to have more time to file his appeal has no merit and should be dismissed with costs.

Determination

9. The instant application is filed under the provisions of Section 3A, 63(e), and 79G of the *Civil Procedure Act*. The core of the application is seeking leave to file an appeal out of time.
10. The applicant has admitted that judgment in Mombasa MCELRC E016 of 2022 was delivered on 8 September 2023 in the presence of his advocate. His claim was dismissed with costs. His advocate asked for 30 days stay of execution and this was granted. He did not file his appeal for lack of certified copies of proceedings and the judgment.
11. The instant application was filed on 27 October 2023.
12. Under Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 read together with Section 17 of the *Employment and Labour Relations Court Act*, 2011 a party is allowed 30 days to file an appeal. From 8 September 2023, 30 days lapsed on 7 October 2023. The instant application is filed 20 days late.
13. The delay in filing the appeal in time is attributed to the failure of the trial court to issue certified copies of the judgment and typed proceedings. The respondent has challenged such matter because



the subject judgment was available on the E-filing portal from 8 September 2023 the same day the judgment was delivered.

14. In *Gerald M'Limbine v Joseph Kangangi* [2008] eKLR, the court held that;
15. My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court’s leave to have such an appeal admitted out of the statutory time. The proviso does not mean that an intending appellants first seeks the court’s permission to admit a non-existent appeal out of the statutory period
16. As addressed by the Supreme Court in the case of Nick Salat, cited above, the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension and whether any extenuating circumstances can enable the Court to exercise its discretion in favour of the applicant.
17. In this case, the availability of the judgment delivered on 8 September 2023 online does not make it available as a certified copy. Even where the subject judgment is ready, to file an appeal, a Record of Appeal is necessary including all the pleadings submitted before the lower court including typed proceedings.
18. The applicant has attached his draft Memorandum of Appeal to his Supporting Affidavit, it is only fair that his right of appeal is secured and time extended to allow him to urge his appeal.
19. Accordingly, the application dated 27 October 2023, is hereby found with merit and the following conditions issued;
 1. Leave is granted to the applicant to file an appeal out of time against the judgment delivered in Mombasa MCELRC No. E016 of 2022;
 2. The applicant to file and serve his Memorandum of Appeal within fourteen (14) days hereof;
 3. Judgment/decree in (a) above is hereby stayed pending the hearing and determination of the appeal;
 4. In default of complying with order number four (2), the orders on leave and stay granted shall automatically lapse.
 5. Costs of Kshs. 5,000 awarded to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 22 DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

