



REPUBLIC OF KENYA



**Devyani Food Industries Limited v Kanga (Miscellaneous Application
E074 of 2023) [2024] KEELRC 311 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 311 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E074 OF 2023
HS WASILWA, J
FEBRUARY 22, 2024**

BETWEEN

DEVYANI FOOD INDUSTRIES LIMITED APPLICANT

AND

NANCY AWUOR KANGA RESPONDENT

RULING

1. Before me for determination is the applicant's notice of motion dated 1st of November, 2023, filed pursuant to sections 3A and 79G of the *Civil Procedure Act*, order 42 rule 6, order 50 rule 6 and order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law, seeking for the following orders; -
 1. Spent.
 2. That leave be and is hereby granted to the applicant to file a memorandum of appeal out of time against the Judgement of the Hon. Lina Akoth delivered on July 20, 2023.
 3. Spent.
 4. That pending the hearing and determination of the the Appeal, there be stay of execution of the Judgement and Decree in Nakuru ELRC case number 102 of 2022; *Nancy Awuor Kanga v Devyani Food Industries Kenya Limited*.
 5. That costs of this Application abide the outcome of the intended Appeal.
2. The application is premised on the fact that the Honourable Lina Akoth delivered judgement in Nakuru CMELRC case number 102 of 2022; *Nancy Awuor Kanga v Devyani Food Industries Kenya Limited*, on July 20, 2023 in favour of the claimant against the Respondent.



3. That the respondent/applicant herein is aggrieved by the entire decision of the court and it is seeking to appeal the same but the time within which an Appeal can be filed before this Court has lapsed.
4. It is stated that the appeal is meritorious with high chances of success because the respondent herein was not unfairly terminated as held by the Court.
5. On delay, it was stated that though the judgment was delivered on July 20, 2023, a copy of the judgement was made available to the parties on October 12, 2023, despite a request made on July 21, 2023 as such the decision to Appeal could only be made after reading the entire judgement.
6. The Applicant stated that as soon as judgement and decree were issued, the Respondent herein instructed Direct "O" Auctioneers on November 1, 2023 to proclaim goods from the Applicant and instead of serving the Notice they left a receipt showing the costs of the proclamation at the gate.
7. The Applicant is therefore apprehensive that the Respondent will proceed with execution of the Decree, when they intend to file an Appeal, which will be rendered nugatory in the event execution proceedings are not stayed.
8. The Application herein is also supported by the Affidavit sworn on November 1, 2023 by Paul Maina, the legal officer of the Applicant who reiterated the grounds of the Application.
9. The Application is opposed by the Respondent who filed a replying affidavit sworn on the November 17, 2023 by George Korongo, the advocate ceased of the conduct of this matter on behalf of the Respondent. In his affidavit, the affiant stated that the Judgement delivered by Honourable Lina Akoth was for the payment of one month's salary, off duties, over time, statutory deductions and compensation.
10. He stated that the Judgement in the trial court matter was delivered on July 20, 2023 in presence of advocates for both parties and the Court granted stay for 30 days. Therefore, that the leave sought herein is not made in good faith but done in laxity and carelessness.
11. He stated that the stay of execution orders being sought is an afterthought, because the Applicant herein had been granted 30 days stay, which he would have filed the intended Appeal as such the delay is inordinate and the same should be declined. Moreover, that the Respondent had send the Applicant several reminder letters for payment of the decree, an indication that they were aware of the Judgement and import thereof.
12. The Respondent maintained that the termination was unfair because the Applicant terminated the Respondent's contract when she was on maternity leave with expectation of returning back to work on 2nd April, 2022 only to be met with non-renewal of contract letter of 2nd April, 2022. Therefore, that the award made by the trial court was justified in the circumstances.
13. The deponent maintained that the delay in filling the Application herein is not justified but full of mere excuses, which are aimed at delaying and denying the Respondent enjoyment of the fruits of her Judgement. He thus prayed to be allowed to proceed with execution of the Decree towards realization of the Judgement herein.
14. The affiant stated that in the event the Court grant the Orders for stay of execution, to order for the deposit of half of the decretal sum with the Respondent's Advocates and the other half be deposited in an interest earning account in joint names of the advocate herein.
15. The Application herein was canvassed by written submission, with the Applicant filling on the 31st January 2024 and the Respondent filed on January 24, 2024.



Applicant's Submissions.

16. The Applicant submitted on four issues; whether the Respondent's Advocate can make affidavits on behalf of the Respondent on contentious matter, whether the Applicant's prayer for extension of time is merited, whether there has been unreasonable delay in filling the Application and whether the Respondent will suffer prejudice if the Orders sought are granted.
17. On the first issue, the Applicant submitted that rule 8 of the *Advocates (Practice) Rules, 1966* precludes an advocate from swearing affidavits for a client if they will be required to give evidence or testify as witnesses in the matter. Similarly, that the Respondent's Advocate should not have sworn the replying affidavit for his client without giving reason why the client could not swear the affidavit by herself. In this they relied on the case of *Oxbridge Limited v Guaranty Trust Bank(Kenya) Limited* [2021] eKLR where that Court held that;-

“Without belabouring the issue, I think the point is answered by the Court of Appeal in *Kamlesh Mansbuklal Damji Pattni v Nasir Ibrahim Ali and 2 others* Nai CA Civil Appl No 354of 2004 [2005] eKLR it observed that: Muite is of course right in his concession that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so. It accords with the spirit of the best evidence rule and, in view of the provisions of order XVIII r 2, with common sense. It would otherwise be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one, to become a witness. There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information and the sources of which he can disclose and state the grounds for believing the information. On both counts we do not find Muite's remaining affidavit offensive. As we stated earlier he is possessed of the facts stated therein and secondly he has explained, and we believe him in the circumstances of this case, that his clients were not readily available. The affidavit in reply in Kenya Horticultural Exporters Ltd case (*supra*) was sworn by the advocate. It was however not struck out for that reason, but because the advocate could not prove all the statements of information and belief that he had stated even if he was to be cross-examined on them.”

18. The Applicant submitted that the Respondent has not given reason for swearing the affidavit instead of his client, therefore without such an explanation, the affidavit should be disregarded and expunged from record.
19. On whether the prayer for extension of time is merited, it was submitted that the application is premised on section 79 G of the *Civil Procedure Act*, which provides for time for filing appeals from subordinate courts to be done within 30 days from the date of the decree or Order. However, that Appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filling the appeal out of time. In support of this they relied on the case of *Omar Shurie v Marian Rashe Yafar*[2020] eKLR where the Court relied on the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 is the *locus classicus* which laid down the parameters as follows:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, 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.”

20. On reason for delay, it was submitted that the Applicant herein despite requesting for a copy of the Judgement in advance only received the same on 12th October, 2023 and its upon perusing the entire judgement that they made a decision to appeal the decision of the trial Court, therefore that the delay is excusable and prayed for this Court to find as much. To support this position, the applicant relied on the case of *Tonui v s National Bank of Kenya* (Misc. Application Civil Appeal No E002 of 2022) [2022] KEHC 2977 (KLR) 20th June, 2022, where the Court found a delay for one and half months to be excusable.
21. They also cited the case of *Kenya Power and Lighting Company Ltd v Rose anyango & another* [2020] eKLR and the case of *Paul Njage Njeru v Karija JK Mugambi*[2021] eKLR where the court found the delay for 2 months and one and half months respectively excusable and not inordinate.
22. Accordingly, that in this case, the judgement was delivered on July 20, 2022, which the Applicant ought to have filed the Appeal on August 20, 2023 but filed on October 30, 2023, about two months’ delay, which they urged this Court to consider the explanation given and find that the delay was not inordinate.
23. On whether the Respondent will suffer any prejudice, this was submitted in the negative. He added that if any prejudice could have been eminently visited on the Respondent, they could have raised it in the Repling affidavit and since none was raised, no prejudice will be visited on her.
24. On the chances of the Appeal succeeding, the Applicant submitted that they have annexed a draft memorandum of Appeal that raises four salient issues with high chances of success. Furthermore, that they are guaranteed a right to access Justice and be heard under articles 48 and 50 of the *Constitution*. In support of this, they relied on the case of *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR where the Court held that; -

“The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. In the instant case, the applicant filed the appeal one day late and has approached this court for extension of time as stipulated in section 79G of the *Civil Procedure Act*, the proviso thereof. Reasons or no reasons for that delay, it is before the court seeking to be granted a chance to agitate its appeal challenging the judgment of the lower court. There is no evidence that the application is an afterthought or how the same is intended to abuse court process. Further, it is not uncommon for clients to instruct their counsel who procrastinate on filing court processes and only wake up when time for such filing has elapsed. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time.”

25. To buttress their arguments, they relied on the case of *Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 others* [2015] eKLR, where the Court held that;-

“It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of article 159 (1) of the *Constitution* which succinctly states that “judicial authority



is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial Officers are also State officers, and consequently are enjoined by article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity are upheld. For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”

26. Accordingly, that this Court is clothed with the requisite jurisdiction to extend time within which the intended Appeal can be filed, he urged the Court to exercise its discretion in their favour.
27. In conclusion, the Applicant prayed to be granted Orders as prayed and added that they are willing to abide by any conditions that the Court will set in granting the Orders.

Respondent’s Submissions

28. The Respondent submitted from the onset that the Application herein is frivolous, vexatious and an abuse of Court process because, order 42 Rule 6 is clear on the conditions that an applicant must meet before an order for stay is granted, which the Applicant has not met. In support of this, he relied on the case of G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another [2018] eKLR, where the Court held that:-

“In the cases of Kiplagat Kotut v Rose Jebor Kipngok [2015] eKLR, Kenya Commercial Bank Limited v Sun City Properties Limited & 5 others [2012] eKLR and Kenya Shell Limited v Kibiru (supra), the common thread was that a stay of execution will not be granted unless the conditions in order 42 rule 6 of the Civil Procedure Rules are satisfied on substantial loss may result to the applicant unless the order was made; The application was made without unreasonable delay; and Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
29. Conversely, that to grant or refuse an application for stay of execution is discretionary and the Court has to balance the interest of the rival parties. On that basis, the Respondent submitted on the merit of the Application and argued that he application has not met the threshold under order 42 rule 6 for the reason firstly that the Applicant has not demonstrated the substantial loss it will suffer if the Orders are denied. In fact, that the application has been filed on unreasonable delay of over 4 months.
30. On security for due performance, the Respondent submitted that the Applicant has not furnished and or suggested any security for due performance of the decree when the same is a requirement under order 42 rule 6(2) of the Civil Procedure Rules.
31. On the argueability of the Appeal, the Respondent submitted that the decision of the trial Court was sound and the ground of appeal has indicated in the draft memorandum of Appeal is not arguable and are without any chances of success. In fact, that it’s a sham and not supported by any good grounds, hence is only filed to delay the execution process for the respondent to enjoy the fruits of her Judgement.



32. It was submitted without prejudice to the foregoing, that in the event this Court is inclined to allow the Application, then to direct the Applicant to deposit half of the decretal sum with the Respondent and the other half in an interest earning account in the joint names of the advocates for the parties.
33. On costs of the Application, the Respondent referred this Court to *Judicial Hints on Civil Procedure*, 2nd Edition, where Retired Justice Kuloba authoritatively states as follows;

“The law of costs as it is understood by courts in Kenya , is that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs the court has no discretion and cannot take away the Plaintiff’s right to costs. If the Defendant, however innocently, has infringed a legal right of the Plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course.”
34. On that basis, he prayed to be awarded costs of the application.
35. I have examined all the averments and submissions of the parties herein.
36. The applicant seeks leave to file an appeal out of time on the ground that they received the judgment of this case late when the time for filing an appeal had lapsed.
37. They also aver that an appeal could only be made after reading the entire judgment.
38. In opposing this application, the respondents aver that this application is an after thought because the judgment was read in the presence of the applicants and they were granted 30 days stay within which time they would have filed an appeal.
39. They contend that the delay is inordinate and should be declined.
40. I have looked at the court proceedings from the lower court, the judgment was delivered on 20/7/23 in the presence of Juma for the claimant and Maina for the respondent.
41. For the reasons that the applicant’s counsel was present when the judgment was delivered, the issue of not knowing the content of the judgment cannot arise. In any case, a party would not need a physical judgment in order to file a Notice of Appeal.
42. That notwithstanding, the applicant has submitted that he has an arguable appeal and seeks court’s intervention to prosecute the same.
43. It is trite law that a man should not be condemned unheard.
44. If I was to disallow this application, the applicants right to access justice was definitely be hampered.
45. In order to allow determination of this appeal on merit, I will therefore allow the application seeking filing of this appeal out of time and also order that there be stay pending the determination of the appeal on condition that the entire decretal sum be deposited in an interest earning account held in the joint names of counsel on record within 60 days.
46. In default execution to proceed.
47. The costs of this application shall be in the appeal.

RULING DELIVERED VIRTUALLY THIS 22ND DAY OF FEBRUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA



JUDGE

In the presence of:-

Maina for Applicant – present

No appearance for Respondent – absent

Court Assistant – Fred

