



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Juma v Macharia (Miscellaneous Application E169 of 2023)
[2024] KEELRC 247 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 247 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E169 OF 2023
NJ ABUODHA, J
FEBRUARY 9, 2024**

BETWEEN

PRISCILLA CHEPKEMOI JUMA APPLICANT

AND

JOHN IRUNGU MACHARIA RESPONDENT

RULING

1. The Applicant filed application dated 15th August, 2023 brought under Section 3A and 75G of the *Civil Procedure Act* and Order 42 and Order 51 of the *civil Procedure Rules* 2010. The Applicant is seeking for orders of leave to file a Memorandum of Appeal out of time and order of stay of execution of Decree from the Judgment and Decree issued by Hon. Caroline Cheptoo Kemei delivered on 16th June,2023 in Milimani CMEL No. 1551 of 2019 pending hearing and determination of the application and the intended appeal at the Employment and Labour Relations Court herein.
2. The application was supported by the Affidavit of Priscilla Chepkemoi Juma the Applicant herein who averred that she was explained by her advocates the implications of the judgement of Hon.Caroline Cheptoo Kemei delivered on 16th June,2023. That the judgment determined the matter in favour of the Respondent and awarded him costs of the suit.
3. The Applicant averred that she was aggrieved by the said judgment however time for filing an appeal has since lapsed and this court has power to enlarge time to file her appeal.
4. The Applicant averred that the intended Appeal is merited and it raises pertinent points of law with overwhelming chances of success including there being no employer- employee relationship among other grounds.
5. The Applicant averred that the delay in filing the Appeal was explainable and excusable as the same was occasioned by the fact that the said judgment was brought to her attention late. That she did not have a mobile phone and had moved upcountry hence her advocates were not able to contact her in time.



6. The Applicant averred that the Judgment was brought to her attention on 11.08.2023. On review of the same with her advocates she was dissatisfied and instructed her advocates to appeal against the Judgment.
7. That the Applicant's advocates applied for certified copies of proceedings and judgment for purposes of the appeal on 30th June, 2023.
8. That the Respondent has since applied for the decree and once issued execution shall be imminent rendering this application and Appeal nugatory.
9. The Applicant averred that if the prayers herein are not granted she stands to suffer substantial loss because she was terminated from employment by the Respondent in 2018 and she since not secured another source of income. That it will occasion her injustice and hardship. That the court should allow her exercise her right of appeal. That the Respondent will no prejudice if the prayers herein are granted.
10. In reply the Respondent filed his reply sworn on 8th September, 2023 and opposed the Applicant's Application for lack of merit. That the Applicant has not demonstrated the prejudice or substantive loss that she will suffer if the orders sought are not granted. That the Applicant has not demonstrated by way of evidence the reasons or circumstances that precluded her from filing the appeal in time.
11. The Respondent averred that the application is premised on misrepresentation of facts to the court in order to elicit the court's sympathy. That the Applicant has sworn that the Respondent was awarded costs of the suits which is lie and misrepresentation of facts amounting to perjury. Hence the Applicant comes to court with unclean hands and court should not offer her any equity.
12. The Respondent averred that he has not applied for any decree against the Applicant and neither he sought to apply for execution against the applicant which was another blatant misrepresentation deponed by the applicant.
13. The Respondent averred that equity aides the vigilant and not the indolent. She failed to demonstrate valid reasons for failing to file appeal in time provided by the statute. That the Applicant will not suffer any prejudice or loss if the orders sought are not granted.

Determination

14. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited which provides that the appeal ought to be filed within 30 days.

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

15. In *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR the court held as follows;

However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal.

16. In addition the above case relied on court of Appeal decision as follows on grounds the courts need to look at on such an application;

Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR. They include the following:



- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.

17. In this particular case the application has been filed with a draft memorandum of Appeal. The judgement in this matter was delivered on 16th June,2023. The Applicant's advocates applied for the certified typed proceedings and judgment on 30th June,2023. This was done within the 30 days period for appeal. This application is dated 15th August,2023 which is roughly two months from the delivery of the judgment and one month past the statute time for filing an appeal.
18. The Applicant on the other hand became aware of the delivery of the judgment on 11th August,2023 and on 15th August,2023 filed this application which was an immediate action in my view.
19. I find this period not to be inordinate delay and the Applicant has explained the reason for the delay that she had no phone and had moved to upcountry.
20. On the issue of an arguable Appeal I have looked at the draft memorandum of Appeal attached by the Applicant and I note it has grounds which may need to be addressed by the court on appeal more so on establishing employer-employee relationship.
21. I also note it is not the habit of court of sending away a litigant unheard when they approach a court within a reasonable time.
22. On the issue of prejudice to be suffered as much as I am aware to the fact that the Respondent has to enjoy the fruits of his judgment I am also aware that the Applicant has approached the court and she needs to be heard.
23. In the upshot I allow the Applicant to file the Appeal out of time.
24. On the other issue of stay orders the grounds upon which this Court exercises the discretion to grant a stay of execution are well governed by the [Civil Procedure rules](#) under Order 42 Rule 6 which stipulates as follows;
- (2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) 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.
25. In this case I note that the Applicant's claim was dismissed with no orders as to costs. This means that the Applicant has misrepresented these facts to court. There is nothing here to stay in my opinion.



No wonder the Respondent averred that there was no decree or execution proceedings against the Applicant because there is nothing to execute in the first place.

26. The application is therefore found with merit and is hereby allowed only on filing the Appeal out of time.

27. Costs shall be in the cause.

It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024 DELIVERED VIRTUALLY 9TH DAY OF FEBRUARY, 2024

ABUODHA NELSON JORUM

JUDGE

