



**Pinkerton's Kenya Limited v Chirima (Miscellaneous Application
E138 of 2023) [2024] KEELRC 1482 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1482 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E138 OF 2023**

**M MBARŪ, J
MARCH 14, 2024**

BETWEEN

PINKERTON'S KENYA LIMITED APPLICANT

AND

YUSUF MWINGO CHIRIMA RESPONDENT

RULING

1. The applicant filed an application dated 13 December 2023 on the provisions of Section 1A, 1B, 3, 3A, 79G, 95 of the *Civil Procedure Act*, Order 42 rules 6 and 7, Order 50 rule 1 of the *Civil Procedure Rules*, and Article 163(3) (e) of the *Constitution* and seeking for orders that;
 - a) Spent.
 - b) This court is pleased to grant the application leave to file an appeal out of time against the judgment and decree delivered by Hon. D.O. Mbeja (PM) on March 30, 2023 in MCELRC Cause No. E500 of 2021.
 - c) Spent.
 - d) This court be pleased to issue an order for a stay of execution of the judgment entered and delivered herein against the applicant on March 30, 2023 for Kshs. 1,011,768.63 and costs of the suit and interest thereon from the time of filing the suit pending hearing and determination of the intended appeal
 - e) This court be pleased to issue an order for security in case of order for execution of decree appealed from where the order for stay of execution of the judgment entered and delivered herein against the applicant on March 30, 2023 has been granted till the hearing and determination of the intended appeal.
 - f) Costs of this application be provided for.



2. The application is supported by the affidavit of Margaret L Omumia, Advocate for the applicant, and because the judgment was delivered on 30 March 2023 against the applicant for payment of Kshs. 1,011,768.63. The applicant was not represented during the hearing and only later became aware of the suit. aggrieved with the decision of the court, an application under Certificate of Urgency was filed dated 8 June 2023 seeking to set aside the judgment and the suit be reinstated for hearing. The matter came for hearing on 20 June 2023 before Hon. Mbeja but the same was placed before Hon. Kalo informed the parties that the file was not in court and communication would be issued on another date. efforts to follow up on the matter were not fruitful. There was a delay in filing this appeal due to the prevailing circumstances of the applicant.
3. In the Supporting Affidavit, Omumia aver that the only option the applicant had was to file an appeal to have the suit defended. The permitted time to file an appeal ran out as efforts were being taken to follow up before the lower court.
4. The intended appeal is arguable and meritorious and will be rendered nugatory if the extension of time is not granted. Unless a stay of execution is allowed and leave to appeal out of time permitted, the applicant will suffer substantial loss which will be injurious to its commercial interests and the respondent will be unable to refund the sums paid in the event the appeal is successful
5. There will be no prejudice suffered against the respondent if the orders sought are granted and the applicant is willing to comply with orders as to security as the court deems fit and proper in the given circumstances. The application is filed without inordinate delay and in the interests of justice, the same be allowed as prayed.
6. In response, the respondent filed his Replying Affidavit and aver that the applicant was served with all notices and summons but failed to attend court. There is evidence of receipt and acknowledgment of all served documents. The trial court proceeded with the hearing upon being satisfied that the applicant had been properly served but failed to attend court or avail a representative.
7. The allegations that the applicant was not aware of the suit are not honest.
8. The respondent aver that the applicant filed an application dated 8 June 2023 and obtained interim orders on 13 May 2023 directing them to serve the respondent for a hearing on 20 June 2023. The application and order were not served until 14 July 2023. By this time, there was no order stopping execution against the applicant given the judgment delivered on 30 March 2023.
9. In seeking leave to file an appeal out of time, the applicant has not advanced any sufficient reasons to explain the inordinate delay in filing an appeal in time. Although the applicant claims that the intended appeal raises arguable issues, no draft memorandum of appeal has been attached to the application listing any grounds on which they challenge the judgment.
10. The applicant has not denied being served with notices to attend the hearing. This application is overtaken by events. While the court is called to exercise its discretion, the same must be applied judicially. The applicant has moved the court in abuse of process and bad faith, the respondent should be allowed to enjoy the fruits of his judgment and hence the application should be dismissed with costs.
11. Both parties attended and filed written submissions and further oral submissions.
12. The applicant submitted that the applicant has met the threshold for the grant of the orders sought. extension of time to file an appeal out of time should be addressed on a case-by-case basis for the court to apply its discretion. The applicant was not represented in court during the hearing of the claim. The court has wide power to apply its discretion on the given facts.



13. The applicant submitted that there would be substantial loss occasioned to the applicant if not allowed time to file his appeal. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the court outlined the principles to be considered in an application seeking a stay of execution pending the hearing on an intended appeal. The respondent was earning a wage of Kshs. 18,000 per month and if the decretal sum is paid to him, he will not be able to refund when the appeal is successful. He was on a contract that lapsed and the respondent paid his full dues. The decretal sum is over one million, a huge variance. If paid, the applicant will not be able to recover.
14. At this stage, the applicant is seeking more time to file its appeal.
15. In response, the respondent submitted that an applicant must state the loss to be suffered if an application for a stay of execution is not granted. In the case of *Uzuri Industries Limited v Shilunji & another (Employment and Labour Relations Appeal E203 of 2022)* [2023] KEELRC 799 (KLR) (27 March 2023) (Ruling)

Determination

16. At the core of the application herein is whether the applicant should be granted more time to file the intended appeal; and intertwined, is whether pending the hearing of the intended appeal, an order of stay of execution of the trial court judgment delivered on 30 March 2023 should be issued.
16. An applicant seeking an extension of time to file an appeal out of time must show good and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. Whilst the first leg requires a satisfactory justification, the second leg only requires one to show that the grounds of appeal are arguable. It is upon satisfaction of both of the above that the court will use its discretion to grant the application.
17. The discretion of the court is required as held in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR. Extension of time is not a right. An applicant must demonstrate the specific circumstances as to why the right of appeal was not applied in good time. A good basis for the lapse must be demonstrated. Also, the court must consider whether by allowing for more time the respondent will be prejudiced in any manner.
18. Ultimately, the court must balance interests by ensuring access to justice for both parties as held in the case of *M/S Portraits Maternity v James Karanga Kabia* Civil Appeal No 63 of 1997. The respondent holds a valid judgment while the applicant has moved the court seeking discretionary orders.
19. The applicant moved the court immediately and judgment was delivered by the trial court on 30 March 2023 seeking to have the suit reinstated for hearing. This was done through an application dated 8 June 2023. This application was not heard and was moved from one judicial officer to the next. In the process, the time to file an appeal lapsed. This cannot be placed at the fault of the applicant. There is a demonstration of efforts to seek and secure justice and the rights due. The right to be heard.
20. On the other hand, the respondent filed suit and served all summons and notices. There was no attendance on the part of the applicant. One reason given by the applicant is that there was no legal representation.
21. The reasons given for the delay in filing the intended appeal are excusable. The applicant was delayed through the judicial system. This is a satisfactory explanation. This far, the court can properly apply its discretion. In the circumstances, it is fair and just to hear the applicant on the intended appeal.
22. Extension of time to file appeal out of time found justified, the twin issue for a stay of execution of the judgment in Mombasa CMELRC No.500 of 2021 is hereby justified.



23. The applicant is seeking payment of due costs. The application is found with merit, save, to accommodate the respondent, costs of this application should be awarded to the respondent. They are assessed at Kshs. 10,000 all-inclusive.
24. Accordingly, I allow the applicant's application dated 13 December 2023 and order that the intended appeal be filed and served within 30 days from the date of this ruling; Order of stay of execution of judgment delivered on 30 March 2023 in Mombasa CMELRC E500 of 2021 is hereby issued; the applicant to pay the respondent Kshs. 10,000 in costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 14 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

