



Hatari Security Guard Limited v Kahihi (Miscellaneous Application E001 of 2024) [2024] KEELRC 598 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 598 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION E001 OF 2024
ON MAKAU, J
MARCH 8, 2024

BETWEEN

HATARI SECURITY GUARD LIMITED APPLICANT

AND

SAMUEL MWAI KAHIMI RESPONDENT

RULING

1. The matter for consideration is the applicant’s notice of motion dated 15th February, 2024 which is brought under Article 159 (2) and 50 (1) of *the Constitution*. It seeks the following orders: -
 - a. That this Honourable court be pleased to grant leave to appeal out of time within which the Applicant/Appellant can file and serve its notice of appeal against the ruling delivered on the 19th of December 2023.
 - b. That the court sees fit to grant a stay of execution of judgment delivered on the 19th of December, 2023.
 - c. That costs of the application be in the cause.
2. The motion is supported by Affidavit sworn by Applicant’s Advocate Mr. Gerald Kiti on 15th February 2024. In brief the affiant admits that there was delay in filing appeal by 25 days after the delivery of the impugned judgment on 19th December 2023. He contended that the judgment was delivered on the day his law firm closed shop for Christmas festivities. He further contended that he resumed work on 19th January 2024 and has since worked diligently towards filing the intended appeal.
3. He argued that the failure to file Notice of Appeal is excusable, justifiable and unavoidable owing to the challenges of obtaining typed proceedings. He further argued that the delay in filing the appeal was not intentional but due to delays in getting typed proceedings and certified copy of judgment. He



- also deposed that the delay is not inordinate and urged the court not to visit the mistake of counsel on his client.
4. He further referred to the attached record of Appeal and contended that the intended appeal is arguable and has overwhelming chances of success. He contended that it is fair and in the best interest of the court to extend the time for filing and serving Notice of Appeal. He argued that, the respondent will not suffer any prejudice if the application is allowed. Finally, he urged for the application to be allowed to prevent the intended appeal from being recorded nugatory.
 5. The Respondent has opposed the motion vide his Replying Affidavit sworn on 26th February, 2024. In brief he deposed that the motion together with the Supporting Affidavit is a non-starter, fatally and incurable, defective, grossly incompetent, misconceived, scandalous, frivolous, vexatious and intended to delay him from reaping the fruits of his judgment.
 6. He deposed further that the supporting affidavit is fatally and incurably defective as it offends the mandatory provisions of Section 4 (1) of the Oath and Statutory Declarations Act Cap 15 Laws of Kenya since it is signed by the same advocate handling the matter on behalf of the applicant.
 7. He further deposed that the applicant has not proffered good justifiable grounds as to why he failed to file his appeal within the statutory period. He also argued that the applicant has not demonstrated that the intended appeal is arguable and has high chances of success.
 8. He further argued that the application has been made after an inordinate delay and the applicant has not offered to deposit any security for due performance of the decree pending the outcome of the appeal. Finally, he contended that the applicant has not demonstrated that he is a man of straw and that he may not repay the decreed sum if the appeal succeeds. In his view, allowing a late filing of appeal will prejudice him by delaying the enjoyment of his judgment.
 9. During the hearing, Mr.Kiti alleged that his client's vehicle had already been attached illegally and urged that it be released. He further urged court to allow his client deposit as security, 50% of the decreed sum which totals to Kshs.386,000.00. he regretted the mistake he committed by commissioning his own affidavit which is in support of the motion. He contended that the said defect does not go to the merit of the application. Finally, he contended that he applied for and obtained typed proceedings which are now part of the record of appeal annexed to the application.
 10. Mr.Magua strongly opposed the application and submitted that it was fatally defective since the supporting affidavit was incurably defective and incompetent. He urged the court to strike out the supporting affidavit which eventually makes the motion incompetent without a supporting affidavit.
 11. Finally, Mr.Magua submitted that the delay in filing the appeal has not been explained adding that the applicant was only woken from slumber by the auctioneer and as such the application should be dismissed..

Issues for determination

12. I have considered the application, Affidavits and submissions by counsel. The issues falling for determination are: -
 - a. Whether the application is fatally defective and incompetent.
 - b. Whether the leave to appeal out of time is merited.
 - c. Whether stay of execution pending appeal is merited.



Fatally defective

13. I have perused the supporting affidavit dated 15th February, 2024. It is sworn by Mr.Gerald Kiti Advocate and commissioned by himself. Section 4 (1) of the Oaths and Statutory Declaration Act provides that; -

“Provided that a Commissioner for Oaths shall not exercise of the power given by this section in any proceedings or matter in which he is the advocate for any of the parties to the proceedings or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

14. The emerging jurisprudence from our courts is that any Affidavit made in contravention of Section 4 of the said Act is fatally defective. In Election Petition No.2 of 2017, Stephen M.Mogaka v IEBC & 2 others [2017] eKLR, and ELRC Petition No.226 of 2010, Maureen Nyambura Ngigi Warui v The Board of Directors, Kenya Power and Lighting Co.Ltd and 2 others [2020] eKLR the courts struck out the petitions because the supporting affidavits were commissioned by counsel working in the firm which was representing the affiant.

15. In this case, matters are worse because the affiant has also commissioned his own affidavit. I am unable to comprehend how the counsel drafted his own affidavit, signed, took his own stamp and sealed it, and then filed in court. That is quite amazing.

16. The counsel gave a spirited fight urging that the defect is not fatal. However, I am not persuaded. Section 4 of the Act is couched on a mandatory term and the parliament in its wisdom saw that an advocate should not exercise the powers of a commissioner for oaths on matters where he is the advocate for the parties to the proceedings.

17. The counsel herein has prepared the bed by swearing the supporting affidavit before himself. He must therefore lie in it in peace, the application supported by the offending affidavit will not see the light of the day. I have said enough on the said defect. Consequently, I strike out the supporting Affidavit together with Notice of Motion dated 15th February, 2024. Costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF MARCH, 2024.

ONESMUS N MAKAU

JUDGE

ORDER

This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

