



Muravvej Holdings Limited v Mwadzoya (Miscellaneous Application E015 of 2024) [2024] KEELRC 792 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 792 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E015 OF 2024**

**M MBARŪ, J
APRIL 11, 2024**

BETWEEN

MURAVVEJ HOLDINGS LIMITED APPLICANT

AND

RASHID JUMA MWADZOYA RESPONDENT

RULING

1. The applicant filed an application dated 29 January 2024 under the provisions of Order 42 Rule 6, Order 22 Rule 51 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act seeking orders that;
 1. Spent.
 2. There be a stay of execution of the judgment in Mombasa CMEELRC No.318 of 2018 delivered by Hon. F. Kyambia, Senior Principal Magistrate Mombasa, on 3rd September 20-21.
 3. This court be pleased to grant leave to the applicant to appeal out of time.
 4. Costs of this application to abide by the outcome of the intended appeal.
2. The application is supported by the affidavit of Gathu Elijah Advocate for the applicant and on the grounds that judgment in Mombasa CMEELRC No.318 of 2018 was delivered on 3 September 2021 and the applicant obtained leave to appeal out of time in ELRC Misc. Application No. E060 of 2021.
3. Shortly thereafter the applicant went through a restructuring of the firm and several of its files were misplaced. The applicant has since retrieved the file and noted that even the notices were served upon another firm Soni & Company Advocates.
4. The applicant is desirous of prosecuting his appeal and had already lodged a Record of Appeal with a view of expediting the matter but this was struck out. The court clarified the doctrine of res judicata



did not apply to the applicant and hence the orders sought to be issued to allow the applicant to file its appeal out of time.

5. In reply, the respondent filed his Replying Affidavit and aver that judgment in Mombasa CMELRC No.318 of 2018 was delivered on 3 September 2021. On 7 October 2021, his advocates notified the applicant's advocates of the judgment. On 29 November 2021, the applicant filed Misc. Application No.E060 of 2021 and allowed 30 days to file its appeal from the date of the ruling on 28 April 2022. No appeal was filed.
6. The respondent aver that the stay of execution was allowed to enable the applicant to file its appeal out of time but none was filed. The applicant deposited the sum of Ksh.357, 978.88 in court as security but failed to comply with the order to file an appeal.
7. On 12 October 2023, a year later, the applicant filed ELRCA No.E108 of 2023 which was dismissed on 23 October 2023. The applicant's advocates have been the same in all the suits filed. The case of reorganization is not sufficient to allow the applicant to fail to file its appeal. An indolent litigant cannot be assisted by the court and this application should be dismissed with costs.
6. Both parties attended and made oral submissions.
7. The applicant reinstated the application and the grounds thereto and the failure to file an appeal in time is explained and resulted from restructuring in the firm and such mistake should not be allowed to prevent the applicant from filing his appeal for good cause.
8. The respondent submitted that under Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 read together with Section 17 of the *Employment and Labour Relations Act*, 2011 an appeal should be lodged within 30 days from the date the impugned judgment was issued. The delay to file the appeal herein is inordinate and not justified and the respondent should be allowed to enjoy the fruits of his judgment.
9. The respondent submitted that he will suffer prejudice as over the year since the termination of his employment he has not been paid his terminal dues. The record is replete with various applications by the applicant seeking the same orders and once granted, there is a lapse in securing its rights and the instant application is without merit and should be dismissed with costs.

Determination

10. The sole purpose of a miscellaneous application is to address its single purpose. In this instance, the applicant is seeking a stay of execution to allow the court to address its application seeking to appeal out of time.
11. What are the reasons for seeking such orders?
12. The applicant was granted leave to appeal out of time in ELRC Miscellaneous Application No. E060 of 2021 but there was restructuring in the firm and change of advocates and the file was misplaced. When the file was traced, the time to file an appeal had lapsed.
13. in the case *Nicholas Kiptoo Korir arap Salat v IEBC and Others* [2014]eKLR the court held that, where a party is not able to file an appeal within time, on a reasonable cause, the court is allowed to enlarge the time for filing the appeal out of time. This is reiterated in the case of *Gerald M'Limbine v Joseph Kangangi* [2008] eKLR, where the court held that;

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 period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period.

14. Therefore, upon an application seeking time extension to file an appeal out of time, all that an applicant is required to demonstrate is to show good cause and substantial reasons for the delay, and, prima facie good cause why the intended appeal should be heard. While the first part requires a satisfactory justification, the second part only requires the applicant to demonstrate that the grounds of appeal are arguable. It is upon this basis that the court's discretion to grant more time to file an appeal out of time can be invoked as held in the case of Nicholas Kiptoo Korir arap Salat, cited above.
15. The applicant instructed its advocates to file an appeal. Leave was granted and there was restriction. No appeal was filed within the allocated timelines. Another application was filed but under an appeal without leave being obtained. These records are admitted by the applicant in its application herein. The reasons given as to why no appeal has been filed within time put into account, that the applicant should not be prejudiced due to matters taking place at the firm of advocates he chose to represent its interests. The explanations given give an honest and proper account of events.
16. There is a Record of Appeal ready and pending filing. This should be activated within 14 days.
17. However, the respondent should not be prejudiced by the inaction of the applicant in seeking to secure its rights. As much as there was a security deposit of the decretal sum, the respondent is justified in seeking to enjoy the fruits of his judgment.
18. In balancing rights, the applicant shall pay the costs of this application to the respondent all at Ksh. 20,000 to allow the applicant 14 days time extension to file an appeal out of time.
19. Accordingly, the application dated 29 January 2024 is allowed on the following conditions;
 - a. Leave is granted to the applicant to file an appeal out of time against judgment delivered in Mombasa CMELRC No.318 of 2021;
 - b. The applicant is to file and serve the Memorandum of Appeal together with the Record of Appeal within 14 days;
 - c. Judgment and decree in (a) above is hereby stayed;
 - d. In default (b) above, the orders herein shall lapse;
 - e. The applicant is to pay Ksh.20,000 to the respondent in costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 11 DAY OF APRIL 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

