



**Peter Mathenge t/a Imperial Water Services v Juma (Employment and Labour Relations Appeal E210 of 2023) [2024] KEELRC 1753 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1753 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E210 OF 2023**

**K OCHARO, J  
JUNE 28, 2024**

**BETWEEN  
PETER MATHENGE T/A IMPERIAL WATER SERVICES ..... APPLICANT  
AND  
JAMES MALOBA JUMA ..... RESPONDENT**

*(Appeal against the Judgment of the Chief Magistrates Court (Hon. B.M. Cheloti) given on 8th September 2023 in MCELRC NO. E051 OF 2023)*

**RULING**

**Background**

1. The Intended Appellant/Applicant moved this Court vide a Notice of Motion dated 23<sup>rd</sup> October 2023 for the orders: -
  - a. Spent.
  - b. That the Applicant be and is hereby granted an extension of time to lodge and serve a Memorandum of Appeal against the Judgment of the Chief Magistrates Court (Hon. B.M. Cheloti) given on 8<sup>th</sup> September 2023 in MCELRC No. E051 OF 2023 – James Maloba Juma v Peter Mathenge T/A Imperial Water Services.
  - c. That the Memorandum of Appeal lodged and served by the Applicant against the Judgment of the Chief Magistrates Court (Hon. B.M. Cheloti) given on 8<sup>th</sup> September 2023 in MCELRC NO. E051 OF 2023 – James Maloba Juma v Peter Mathenge T/A Imperial Water Services, be deemed to have been lodged and served within time and this Honourable Court be pleased to extend the duration for such lodging and service accordingly.
  - d. Spent.



- e. That the Honourable Court be pleased to stay execution of the Judgment and Decree against the Applicant pending the hearing and determination of the intended appeal.
  - f. The costs of this application be in the cause.
2. The Notice of Motion is premised on the Grounds thereof and the Supporting Affidavit of Peter Mathenge sworn on 23<sup>rd</sup> October, 2023.
  3. The Respondent opposed the application through an undated Replying Affidavit.
  4. In line with this Court's directions issued on 20<sup>th</sup> November, 2023 that the application be canvassed by way of written submissions, the Intended Appellant/Applicant filed submissions dated 4<sup>th</sup> December, 2023; and the Respondent filed submissions dated 6<sup>th</sup> December, 2022 (sic).
  5. The Intended Appellant/Applicant's application is brought under Order 22 Rule 25 and Order 42 Rule 6 of the Civil Procedure Rules 2010; Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of law.
  6. The Grounds upon which the Notice of Motion application is brought are that:
    - i. Judgment was delivered by the Honourable B.M. Cheloti on 8<sup>th</sup> September 2023 in MCELRC No. E051 OF 2023 – James Maloba Juma v Peter Mathenge T/A Imperial Water Services in favour of the Respondent. The Honourable Court entered judgment for a sum of Kshs. 895,383/- being terminal dues, costs of the suit and interest. The Judgment was delivered in the absence of counsel for the Intended Appellant/Applicant who had no notice of the same. The Intended Appellant/Applicant only became aware of the judgment after making a follow up at the registry.
    - ii. The Intended Appellant/Applicant is aggrieved by the Judgment and intends to appeal against the entirety of the same. They have a good appeal with chances of success. Unfortunately, the time for lodging the appeal has since lapsed.
    - iii. The Respondent has commenced the process of extracting the decree and is threatening to execute the same. Unless stay of execution is granted, the appeal will be rendered nugatory. The Intended Appellant/Applicant states that the Respondent will not be prejudiced by the grant of the orders sought.
  7. The Respondent opposes the application on the premise that the Intended Appellant/Applicant and his Advocates admitted to always having access to the e-filing CTS Portal hence could ascertain all upcoming dates in the matter and/or receive notifications on dates and actions taken in the matter. They, however, chose not to participate in the proceedings until the judgment was delivered in the matter. Notably, once the Judgment was delivered, the status of the case was updated on the e-filing portal as "Judgment delivered-case closed" and notifications to that effect sent to the parties. The Respondent also immediately served them with a copy of the Judgment and a draft copy of the certificate. It is therefore not true that they were unaware of the delivery of the judgment this this application is made in bad faith.
  8. Further, the Respondent states that following the delivery of Judgment on 8<sup>th</sup> September 2023, the Intended Appellant/Applicant was granted stay of execution for 30 days by the trial Court suo moto. The Decree which they sought to extract from the Court is yet to be signed, so there is no threat of execution. He attributes the Intended Appellant/Applicant's failure to lodge an appeal within good time to a deliberate effort to delay the him from realizing the fruits of his Judgment. He also disputes the averment that the Intended Appellant/Applicant has an appeal with high chances of success. However,



he concedes that should the Court be inclined to grant the orders sought, the Intended Appellant/Applicant should be ordered to deposit the entire decretal sum in a joint interest earning account in the names of the Advocates for the parties as security.

### **Analysis and Determination**

9. I have carefully considered the Notice of Motion dated 23<sup>rd</sup> October 2023, the Grounds thereof and Affidavit in Support thereof; the undated Replying Affidavit filed by the Respondent; the Submissions filed by both parties, and the authorities relied on. I return that the issues for determination is as follows: -
- a. Whether this Court should grant leave to the Applicant to file its appeal out of time.
  - b. Whether this court should grant stay of execution pending appeal.

### **Whether this Court should grant leave to the Applicant to file its appeal out of time.**

10. The intended appeal emanates from a Judgment and Decree of the subordinate court (Hon. B.M. Cheloti (P.M.)) delivered on 8<sup>th</sup> September 2023 in Nairobi MCELRC NO. E051 OF 2023 – James Maloba Juma v Peter Mathenge T/A Imperial Water Services.
11. Under Section 79G of the Civil Procedure Act 2010, an appeal of the said decision should have been filed before the Court within 30 days of the decision. Section 79G aforesaid provides:-

“79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: 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.”

12. On the form of appeals, Order 42 Rule 1 provides that:-

“1. Form of appeal [Order 42, rule 1.]

- (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
- (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”

13. To comply with the above set out provisions, therefore, the Intended Appellant/Applicant should have filed their Memorandum of Appeal before this Court within 30 days of the Subordinate Court’s decision. The Intended Appellant/Applicant failed to do so and justifies this failure by stating that they were unaware that judgment had been delivered, having received no notice of the same.
14. The Intended Appellant/Applicant approached this Court, on 23<sup>rd</sup> October 2023, 1 month and 15 days after delivery of the impugned decision, seeking leave to file its appeal assailing the decision.



15. The jurisdiction of this Court to enlarge time derives from Section 79G set out above; and Order 50 Rule 6 of the [Civil Procedure Rules](#) 2010 which provides that: -

“

“6. Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

16. The above means that the threshold which the Applicant ought to meet is satisfying the Court that they had a good and sufficient cause for failing to file the appeal in time; and they must show that the justice of the case favours the extension of time.
17. The Supreme Court in the case of [Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & Others](#) [2014] eKLR, considered at length and re – stated the principles which should guide a Court considering an application for leave to extend time. It stated: -

“From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

18. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
  - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
  - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



19. In *Kenya Ports Authority v Silas Obengele* Civil Application No Nai 297 of 2004 [2006] 2 KLR 112 the Court held that:

“Whereas it is now settled that whenever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted where there was material before the single judge from which he could and did conclude that the delay or the periods of delay...the full bench will not interfere”

20. I shall consider the factors set out by the Supreme Court in the *Nicholas Salat* case (*supra*) in relation to this case. The delay in the present case is short, spanning one and a half months. The reason advanced for the delay is that the Intended Appellant/Applicant was not aware that the judgment had been delivered. Is the reason for the delay given by the Intended Appellant/Applicant satisfactory? I find that it is. While it is true that parties to a case indeed have access to the Judiciary e-filing CTS portal and are able to determine the upcoming dates for a matter, this does not erase a Plaintiff/Claimant’s responsibility to serve pleadings, notices and court documents upon the other party. It is trite that service of court documents is a critical part of the court process to the extent it facilitates the other parties’ right to fair hearing, and impedes ambushes on him or her.

21. There is no contention on the part of the Respondent that either it, or the Court, served the Applicant with a notification in regard to the date for delivery of the Judgment. Therefore, the Applicant’s assertion that the delivery was done on a date that it had no prior notification of stood rebutted.

22. I have seen the letter from counsel for the Respondent under which a copy of the judgment and the draft decree were forwarded to the Intended Appellant/Applicant. The same is dated 16<sup>th</sup> October 2023, well over 1 month after the delivery of the judgment. This emboldens this Court more, to be persuaded that the Applicant was unaware of the existence of the Judgment until after the statutory time for lodging an appeal had lapsed.

23. In the up, I hold that the Intended Appellant/Applicant has sufficiently explained the reason for the delay in bringing the appeal before this Court to its satisfaction.

24. The next question that I must consider is whether the Respondent will suffer prejudice if the Intended Appellant/Applicant is granted leave to file their appeal out of time. I find that he will not, as he will be granted ample opportunity to defend the appeal.

25. On the issue of whether there has been undue delay in bringing this application, I am persuaded that there hasn’t. This is because the Judgment of the trial court (Hon. B.M. Cheloti) was delivered on 8<sup>th</sup> September 2023, and this application was filed on 23<sup>rd</sup> October 2023, one and a half months later, as already stated herein.

26. The Intended Appellant/Applicant seeks that their already filed Memorandum of Appeal be deemed to have been lodged and filed within time. This is an approach which has never been attractive to court. In the *Nicholas Salat* (*Supra*), the Supreme Court held:

“In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend



time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it.”

27. On strength of the holding, I return that the Memorandum of Appeal filed and served without leave of the Court was a nullity. The same shall have to be filed in an appeal file not a miscellaneous Application as it did herein, since the court hereby grants him leave to file its appeal out of time.

**Whether this court should grant stay of execution pending appeal.**

28. With regard to stay of execution pending appeal, the applicable provision of law is Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules 2010 which provides as follows:

“Stay in case of appeal [Order 42, rule 6.]

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (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.”

29. I have granted the Intended Appellant/Applicant leave to lodge their appeal out of time.



30. This Court's mandate, therefore is to analyze whether the Applicant has met the conditions for grant of an order of stay of execution, pursuant to Order 42 Rule 6 (2). Firstly, has the Applicant proved that they will suffer substantial loss if the orders are not granted? The Applicant insists that they will suffer substantial loss since the Respondents may commence execution proceedings against them at any time judging from the fact that they have applied for a Decree vide their letter dated 16<sup>th</sup> October 2023.
31. In *Timsales Limited v Hiram Gichobi Mwangi*, Civil Appeal Number 94 of 2008 (2013) eKLR the Court held that:-
- “The mere fact that the process of execution has commenced or is likely to commence does not amount to substantial loss for the reason that execution is a legal process and that the Appellant must establish other factors.”
32. In the instant case, the Appellant/Applicant has merely stated that execution will commence against them if the stay orders are not granted. Considering that the Judgment in this matter was entered all the way back on 8<sup>th</sup> September 2023, the Respondents cannot be faulted for wanting to enjoy the fruits of their judgment. In fact, the Court in the case of *Thomas M. Nguti & 196 Others v Kenya Railways Corporation* [2022] eKLR emphasized that, in considering whether stay orders ought to be granted, the Court must consider that a successful party should ordinarily be allowed to enjoy the fruits of their judgment. This same position had earlier been espoused in the case of *Machira T/A Machira & Co Advocates v East African Standard* No. 2 [2002] eKLR 63.
33. Be that as it may, the Appellant/Applicant herein has expressed that they are willing to deposit reasonable security for due performance of the decree, which sentiment is championed by the Respondent. In the case of *Michael Ntouthi Mitheu v Kivondo Musau* [2021] eKLR, the Honourable Court pronounced itself as follows on the reason why security pending appeal should be given: -
- “22. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event, it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.
34. Seeing as the present application was brought without unreasonable delay, having been filed on 23<sup>rd</sup> October 2023, one and a half months after the delivery of the impugned Judgment on 8<sup>th</sup> September 2023, and that the Respondents consent to the issuance of stay of execution orders on condition that the decretal sum is deposited in a joint interest earning account in the names of the Advocates for the parties, as security, I hereby grant stay of execution of the said judgment, pending the hearing and determination of the Appeal herein.
35. In the upshot, the Applicant's application dated 23<sup>rd</sup> October, 2023 is hereby allowed on the following terms:
- a. Leave is hereby granted to the Applicant to file and serve an appeal against the judgment in the Chief Magistrate Court Milimani Commercial Court MCELRC E051/2023 within 21 days of today.



- b. Pending the hearing and determination of the intended appeal, there shall be a stay of execution of the decree flowing from the judgment, subject to the Applicant depositing the judgment sum of Kshs. 895,383/- in a joint interest earning account in the names of Counsels for the parties herein within 45 days of the date of this Ruling.
- c. The Applicant to file a Record of Appeal within 45 days of the filing of the appeal pursuant to the leave hereby granted.
- d. In case of default of any of the conditions in (a) and (b) above, execution to proceed forthwith.

36. It is so ordered.

**READ, SIGNED AND DELIVERED THIS 28<sup>TH</sup> DAY OF JUNE, 2024.**

**OCHARO, KEBIRA.**

**JUDGE**

In the presence of:

Mr. Oyucho for the Appellant

Mr. Otieno for the Respondent

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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**OCHARO, KEBIRA.**

**JUDGE**

