



**Mason Services Limited v Kanja (Miscellaneous Case E032 of 2024)
[2024] KEELRC 1621 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1621 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE E032 OF 2024**

**K OCHARO, J
JUNE 24, 2024**

BETWEEN

MASON SERVICES LIMITED APPLICANT

AND

PETER KANJA RESPONDENT

RULING

Background

1. By a Notice of Motion dated 12th February 2024 expressed to under Article 50 (1) of the *Constitution* of Kenya 2010; Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules 2010*; and Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 of the Laws of Kenya, the Applicant seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That this Honourable Court be pleased be to grant leave and extend the time limited for filing an appeal against the lower Court's (Hon. Becky M. Cheloti, PM) Judgment delivered on 28th November 2023 in MCELRC No 890 of 2019 Peter Kanja v Mason Services Limited.
 - e. That costs of the Application be in the cause.
2. The application is premised on the grounds set out of the face thereof, and the Supporting Affidavit sworn by one Stephen Njoroge, a Director of the Applicant, sworn on 12th February 2024.
3. Despite being duly served with the application, the Respondent didn't resist the Application in any manner as recognized by the law.



4. The Application is anchored on the prime grounds that; the Learned Trial Magistrate entered an expert Judgment in the above-stated suit on 28th November 2023 against the Applicant for the sum of Kshs. 2,205,016.47, interest and costs; aggrieved by the Judgment it intends to appeal against the same; the Judgment was so entered even though no summons to enter appearance was ever served on it; and that the existence of the suit and the Judgment only dawned on it, on the 8th February 2024, when Auctioneers seized its properties in execution of the decree that flowed from the Judgment.
5. The Applicant states further that on realising the existence of the Judgment, it filed an application dated 9th February 2024 before the trial court for setting aside the exparte Judgment, which application the Learned Trial Magistrate declined to certify urgent notwithstanding the fact that the execution process on the execution process had been commenced.
6. It was further stated that the Respondent became aware of the suit and Judgment long after the statutory time for appealing against the Judgment had lapsed. Further, the intended appeal has a high chance of success.

Analysis and Determination

7. I have carefully considered the Notice of Motion, the grounds on which it is anchored and the affidavit in support thereof, and the following issues emerge for determination: -
 - a. Whether this Court should grant the Applicant leave to file its appeal out of time.
 - b. Whether this Court should grant the Applicant stay of execution of the decree in the above-stated suit.

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

8. The Intended appeal seeks to challenge the Judgment and Decree of the subordinate Court (Hon. Becky M. Cheloti, P.M.) delivered on 28th November 2024 in Nairobi CMELRC No 890 of 2019.
9. Under Section 79G of the *Civil Procedure Act* 2010, an appeal against such Judgment and Decree should have been filed 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.”

10. Therefore, to comply with the above set out provisions, the Intended Appellant/Applicant should have filed its Memorandum of Appeal within 30 days of the subordinate Court’s decision. They did not. It justifies the failure by contending that it was unaware of the suit and the Judgment therein until it was ambushed with execution against its goods.
11. The Appellant/Applicant has approached this Court seeking leave to file its appeal out of time, about one and a half months after the timeframe for filing the appeal lapsed.



12. For an applicant to benefit from an exercise of the court’s discretion for enlargement of time under the above-stated provision, he or she must demonstrate that there existed a sufficient cause as the basis for the failure to file the appeal within the stipulated time, further that the justice of the case demand for an order for enlargement.
13. 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 restated 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 the 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.

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 underlying principles that a Court should consider in the 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.”

14. I shall consider the instant application using the lens set out by the Supreme Court in the *Nicholas Salat Case* (*supra*). Firstly, I note that the delay in the present case is not lengthy, being a delay of about one and a half months. The reason advanced for the delay is that the Applicant was not notified of the existence of the suit and the delivery of Judgment, by being served with the pleadings and notice of entry of judgment. The Respondent didn’t rebut these vital assertions. In the upshot, I am persuaded that a sufficient reason has been presented for the failure to file an appeal within time.
15. I now turn to consider the next question, whether the Respondent will suffer prejudice if the Applicant is granted leave to file its appeal out of time. The Intended Appellant has indicated that they are ready and willing to deposit security, should the Court deem it fit to direct for provision of the same. Shortly hereinafter, I shall for reason[s] direct the Respondent to provide security. In my view, the Applicant will not be prejudiced by grant of the leave, therefore.
16. I am persuaded that the instant application was filed timeously. The Judgment of the lower court was delivered on 28th November 2023, and this application was filed on 12th February 2024, about two and



a half months later, and about one and a half months after the lapse of the 30-day period within which the Applicant was required to file their appeal.

17. For the reasons set out above, I allow the Applicant’s application for leave to file their appeal out of time.

b. Whether this Court should grant the Applicant stay of execution of the Decree.

18. Order 42 Rule 6 (1) and (2) of the [Civil Procedure Rules 2010](#) provides:

“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.”

19. The Court’s discretion to grant an order for a stay pending appeal is not unfettered. It is grantable only upon the Applicant satisfying the conditions set out in the above-stated provision. First, it must be demonstrated that if the order is not granted the Applicant will suffer substantial loss. On what is considerable in determining whether substantial loss will be suffered or not, the Court in the case of [Century Oil Trading Company Ltd v Kenya Shell Limited](#) Nairobi (Milimani) HCMCA No 1561 of 2007 held:

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

20. In the present case, the Intended Appellant/Applicant has averred that the Respondent has begun execution proceedings against it. Its properties were proclaimed on 8th February 2024. However, it is pertinent to point out that a mere commencement of an execution process does not amount to



substantial loss, as execution is a lawful process. This was aptly stated in the case of *James Wangalwa & another v Agnes Naliaka* Misc Application No 42 of 2011 [2012] eKLR. I have carefully considered the Applicant's supporting affidavit, in my view as regards substantial loss, it only and generally alleges that if the orders sought are not granted, the Applicant will suffer substantial loss. How and why, has not been brought out. This leads to an inescapable conclusion that the Applicant has not satisfactorily demonstrated that it will suffer substantial loss if the stay of execution is not granted.

21. As a result, I decline to grant the stay order sought.
22. In the upshot, the Applicant's application dated 12th February 2024 is allowed in the following terms:
 - a. The Applicant is hereby granted leave to file an Appeal against the lower Court's Judgment within 30 days of this ruling.
 - b. The costs of this application shall abide by the outcome of the intended appeal.
23. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24th DAY OF JUNE, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Mwangi for Respondent

Mr. Manyara for the Applicant

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 15th March 2020 and subsequent directions of 21st 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.

OCHARO KEBIRA

JUDGE

