



**Omar t/a Meat Magic Enterprises v Kalu (Appeal E088 of 2024)
[2024] KEELRC 1572 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1572 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E088 OF 2024**

**M MBARÚ, J
JUNE 20, 2024**

BETWEEN

**MOHAMED HUSSEIN OMAR T/A MEAT MAGIC
ENTERPRISES APPELLANT**

AND

KALU KOMBO KALU RESPONDENT

RULING

1. The appellant filed an application dated 16 May 2024 under the provisions of Order 50 Rule 6 of the [Civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#) seeking orders;

This court be pleased to extend the time for filing and service of the Memorandum of Appeal lodged on 15/5/2024 and served on the respondent on 16/5/2024 as properly filed.

Costs incidental to this application abide by the result of the said appeal.
2. The application is supported by the Affidavit of Mohamed Hussein Omar because judgment was entered in favour of the respondent on 28 March 2024 in Mombasa CMELRC No.E132 of 2020. Aggrieved, the appellant has an arguable appeal with good chances of success. The appellant filed the Memorandum of Appeal on 15 May which is 17 days out of time which was not deliberate but as a result of unforeseen circumstances.
3. In his affidavit, Mohamed aver that on the judgment date of 28 March 2024, his advocate was not in court when judgment was entered against the appellant. He only became aware of the same after auctioneers came to his premises and noted that he had not received notice of the judgment or notice for the process of execution. Upon obtaining a copy of the judgment, he noted that he should file an appeal and hence proceeded to file a Memorandum of Appeal on 17 May 2024 which was late by 17 days. The appeal is arguable on substantive points of law and determining it by way of a technicality would prejudice and deny the appellant a hearing on the merits.



4. In reply, the respondent filed his Replying Affidavit and aver that his advocates issued notice to the appellant when the judgment was delivered on 28 March 2024. The judgment was fair and reasonable and the Memorandum of Appeal was filed out of time without any plausible reasons. The application is in bad faith and if allowed, the appellant should be directed to deposit security for the due performance of the judgment in a joint interest-earning account held by both parties.
5. Both parties attended and filed written submissions and also attended court for oral highlights.
6. The appellant submitted that under Order 50 Rule 6 of the [Civil Procedure Rules](#), the court has the power to enlarge the time to file an appeal. Section 79G of the [Civil Procedure Act](#) allows the court to enlarge the time to file an appeal if an applicant has justified reasons for the delay. The appeal raises substantive questions of law and the court has the power to extend time to allow the appellant to be heard on the appeal.
7. The appellant submitted that in the case of [Michael Ntouthi Mitheu v Abraham Kivondo Musau HCA No.E052 of 2021](#), the court held that courts are enjoined to give effect to the overriding objective under the [Civil Procedure Act](#) in the interpretation of its provisions.
8. Order 50 rule 6 of the [Civil Procedure Rules](#) the court has discretion in the dispensation of justice. Under Section 79G of the [Civil Procedure Act](#), the court has the power to extend the time to file an appeal. An appeal can be filed out of time upon a party giving reasons for the delay. In the case of [Karney Zaharya & another v Shalom Levi, Civil Application No. 80 of 2018](#) the court held that when dealing with an application for an extension of time to file an appeal, the length of time taken, prejudice to be suffered, if any, must be addressed. In this case, there was no delay and the appellant will suffer great prejudice if not applied to urge its appeal.
9. The appellant submitted that the respondent in reply to the application is seeking a security deposit of Ksh.697, 041 but the appellant is a small business and such capital once removed will lead to closure. To avoid crippling the business, it is in the interests of justice not to be locked out of court and to allow the hearing of the appeal on the merits. The court should apply the oxygen principle under Article 159 of the [Constitution](#) and apply substantive justice and not technicalities.
10. The respondent submitted that under Rule 8 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) an appeal should be filed within 30 days from the date the judgment was delivered. The appellant filed an appeal and also an application seeking to appeal out of time which is inapplicable and cannot be granted. The Memorandum of Appeal filed out of time cannot be cured under Section 79G of the [Civil Procedure Act](#). The correct procedure would have been to file a motion seeking leave to file an appeal out of time before filing the instant appeal. The appeal herein is invalid to the extent that it is filed out of time and should be dismissed and the respondent allowed to proceed with execution.

Determination

11. The gist of the application dated 16 May 2024 is that the appellant is seeking for time extension for filing the appeal out of time.
12. The Memorandum of Appeal filed herein relates to the judgment delivered on 28 March 2024 in Mombasa CMELRC E132 of 2020.
13. Under Section 17 of the [Employment and Labour Relations Court Act, 2011](#) and Rule 8 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) an appeal should be lodged within 30 days from the date the impugned order was issued.



The Memorandum of Appeal herein was filed on 15 May 2024.

14. Taking into account the motions of Order 50 Rule (1) and (6) of the Civil Procedure Rules, from 28 March 2024, the Court Vacation dates from 21st March to 3 April 2024 were removed, taking into account 1st May 2024 was a Public Holiday, cumulatively, the appellant had until 17 May 2024 to file its appeal.

The appeal herein is filed within time.

15. Orders sought are unnecessary save for the issue of security for the due performance of the outcome of the appeal.
16. Indeed as addressed by the respondent, where the appeal may have been filed out of time, which is not the case here, the procedure to apply is under Section 79G of the *Civil Procedure Act*, through a miscellaneous application seeking leave to file appeal out of time and the reasons thereto. These procedures are lawful and covered under order 50(6) of the *Civil Procedure Rules* without the need to invoke the provisions of Article 159 of the *Constitution*. Where the law secures a right and the rules give the procedures to be applied, there is no need to invoke constitutional provisions.
17. The appeal is proper, I take it the application subject of the ruling is filed under the mistaken belief that the appeal was filed out of time. That addressed, the appellant has a right to secure its right of appeal, aggrieved by the judgment of the trial court. That right is secured in law. The appellant moved expeditiously to secure this right and should not be punished. The respondent too holds a valid judgment and should not be left without security that at the end of the appeal, the subject of the judgment will have dissipated.
18. In balancing each party's rights, the grounds of appeal noted, the appellant shall deposit the sum of Ksh.100, 000 in a joint interest-earning account held by both parties within the next 30 days.
19. Accordingly, the application dated 16 May 2024 is allowed to the extent that there is a proper appeal on record; the appellant shall secure the appeal by a deposit of Ksh.100,000 in a joint interest-earning account held by both parties within the next 30 days; file the Record of Appeal and attend court for taking hearing directions on 22 July 2024.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 20TH DAY OF JUNE 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

