



**Motrex Limited v Koech (Miscellaneous Cause E018 of 2024)
[2024] KEELRC 2333 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2333 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS CAUSE E018 OF 2024**

**AK NZEI, J
SEPTEMBER 24, 2024**

BETWEEN

MOTREX LIMITED APPLICANT

AND

HENRY KIPKORIR KOECH RESPONDENT

RULING

1. The application before me is the Applicant’s Notice of Motion dated 7th February 2024. The Applicant is seeking the following orders:-
 - a. That the Court be pleased to enlarge the time within which the Applicant herein is to file an appeal, and that the appeal herein be admitted out of time.
 - b. That the memorandum of appeal filed herein be deemed to have been filed within time.
 - c. That costs of the application be in the cause.

2. The application, expressed to be brought under Sections 1A, 1B, 3A, 63(e), 79G and 95 of the *Civil Procedure Act* and Order 51 Rule 6 of the *Civil Procedure Rules*, is based on the supporting and supplementary affidavits of Iqbal Ahmed Bayusuf sworn on 7th February 2024 and 27th February 2024 respectively. It is deponed in the said affidavits that the trial Court’s judgment was not delivered on the date reserved for delivery of the same, being 10/8/2023, as the said Court did not sit on the said date. That parties were informed at the said Court’s Registry that judgment would be delivered on notice. It is further deponed in the said supporting affidavit that the Applicant’s Advocates on record became aware of delivery of the trial Court’s judgment on 17/11/2023 when they received a letter from the Respondent’s Advocates tabulating their costs. That the Applicant’s Advocates applied to be furnished with certified copies of the Court’s proceedings and judgment for purposes of appeal, but had not been furnished with the same as on 18/12/2023 when the said Advocates’ offices closed for



- Christmas festivities. That judgment was delivered by the trial magistrate while on transfer at Nairobi and that the Court file was not availed immediately, hence delay in filing the appeal.
3. The application is opposed by the Respondent vide his replying affidavit sworn on 5th March 2024. It is deponed in the said affidavit that the trial Court's judgment was delivered on 16th November 2023 upon issuance of a notice (on 1st November 2023) in that regard. That after delivery of the judgment on 16th November 2023, the Applicant's Advocates were duly notified of the same on 17th November 2023, that the inordinate delay in seeking to pursue an appeal is unwarranted and the reasons for the delay being advanced by the Applicant are untenable. That the application is brought in bad faith.
 4. Section 79G of the Civil Procedure Act provides that every appeal from the 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.
 5. The proviso to Section 79G provides:-

“Provided 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.”
 6. By dint of Article 162(2) (a) of the Constitution of Kenya 2010, this Court is a Court of equal status with the High Court. Reference to the High Court in the foregoing section thus refers to this Court as well.
 7. Rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2024 on the other hand provides as follows:-
 - “(1) Where a written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified under that written law.
 - (2) Where an appeal is from a Magistrate's Court or where no period of appeal is specified in the written law referred in sub-rule (1), the appeal shall be filed within thirty days from the date the decision is delivered.”
 8. Rule 18 of this Court's said Rules provides as follows:-

“The Court may, if circumstances justify, extend the time prescribed for the filing of an appeal or any document relating to an appeal.”
 9. It is clear from the foregoing provisions of both the statute and this Court's Rules of Procedure that an Applicant seeking an extension of time and/or leave to file an appeal out of time must demonstrate that he or she had a good and sufficient cause for not filing the appeal in time. In other words, he or she must justify the reason advanced for not filing the appeal in time.
 10. In the present case, whereas the Applicant states that the trial Court's judgment was to be delivered on notice and that its Advocates on record became aware of its delivery a day after the judgment had been delivered, it does not deny having received and/or seen the notice on delivery of judgments by the trial Magistrate, exhibited herein by the Respondent and shown to have been published by the Court on 1st November 2023.
 11. I have, however, taken note of the deposition made on behalf of the Applicant to the effect that the trial Magistrate (D.O. Mbeja-PM) delivered the trial Court's judgment from Nairobi where he



had been transferred, that the Court file was not immediately sent back; and that it was not until 8/12/2023 and 18/12/2023 when certified copies of the proceedings and judgment respectively were ready for collection. That by this time, the Applicant's Advocates' offices had closed for Christmas festivities. The foregoing facts have not been controverted by the Respondent. I have perused the draft memorandum of appeal annexed to the Applicant's supporting affidavit, and in my view, the intended grounds of appeal are arguable and cannot be said to be frivolous.

12. In *Dilpack Kenya Limited -v- William Mutbama Kitonyi* [2018] eKLR, the Court stated as follows:-

“In an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the Court why the discretion should nevertheless be exercised in his favour, and the rule is that where there is no explanation, there is no indulgence. See *Ratman -v- Cumarasamy* [1964] 3. All Er 933...”

13. I am satisfied that the Applicant has demonstrated that it had good and sufficient cause for not filing the appeal in time, and the Notice of Motion dated 7th February 2024 is hereby allowed in the following terms.

- a. The applicant is hereby granted leave to appeal against the judgment of D.O. Mbeja – PM delivered on 16th November 2023 in Mombasa Chief Magistrate's Court ELR Case No. E083 of 2020, on condition that the judgment sum is deposited in this court within twenty-one (21) days of this Ruling.
- b. A memorandum of appeal and a record of appeal shall be filed contemporaneously within thirty days of this Ruling, and shall be served within the said period.
- c. Costs of the application shall be in the appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH SEPTEMBER 2024.

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Applicant

.....Respondent

