



Brothers Clobal Limited t/a Snack Attack Restaurant v Musungu (Appeal E177 of 2024) [2024] KEELRC 2709 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2709 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E177 OF 2024
M MBARÚ, J
OCTOBER 31, 2024**

BETWEEN
BROTHERS CLOBAL LIMITED T/A SNACK ATTACK RESTAURANT APPELLANT
AND
MULE MUSUNGU RESPONDENT

RULING

1. The respondent, Mule Musungu filed a Notice of Preliminary Objections dated 30 September 2024 seeking that the Memorandum of Appeal filed on 26 August 2024 is incompetent and should be dismissed with costs for the reasons that;

The Memorandum of Appeal dated 25 March 2023 and filed on 26 August 2024 has been filed contrary to the provisions of Rule 12(2) of the Employment and Labour Relations Court (Procedure) Rules.

2. Both parties attended and agreed to make submissions. The parties filed skeleton written submissions.
3. The respondent submitted that in the case of Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696 the court held that a party can raise a question of law at any point of the proceedings. In this appeal, the appellant has violated Rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2024 by filing the appeal out of time without leave. Where time lapsed and the appellant was not able to file an appeal, there is no application seeking more time to do so.
4. The respondent submitted that the judgment of the trial court was delivered on 14 March 2024 in Mombasa CM ELRC E626 of 2022. The Memorandum of Appeal was filed on 26 August 2024 out of time. The appellant has abandoned the right of appeal when they failed to file an appeal in time or seek the court to extend time. The appeal before the court is incompetent and should be dismissed.



5. The appellant submitted that the Memorandum of Appeal was filed on 26 August 2024 against the judgment delivered on 14 March 2024 in Mombasa CM ELRC No.626 of 2022 but in the case of Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696, a preliminary objection should be purely on points of law. The court should not be called to decide on facts. Under Rule 12 of the Court Rules, an appeal should be filed within 30 days from the date of the judgment. In this case, the court cannot address the objections without delving into the facts of the case hence this is not purely a point of law.

Determination

6. The single issue for determination of whether the appeal is incompetent and filed contrary to Rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2024 (Court Rules).
7. Indeed, as submitted by the respondent in the case of Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696, a preliminary objection should consist of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.
8. In this case, the appellant filed the Memorandum of Appeal on 26 August 2024 challenging the judgment delivered on 14 March 2024 in Mombasa CM ELRC E626 of 2022. Under Section 17 of the *Employment and Labour Relations Court Act*, the appellant had a right of appeal. under Rule 8 of the Employment and Labour Relations Court (Procedure) Rules applicable as of March 2024, the appellant was allowed to file the Memorandum of Appeal within 30 days. This rule is similar to Rule 12 of the Court Rules, 2024.
9. There is no good cause demonstrated by the appellant why the appeal was not filed in time.
10. Under the Court Rules, where the appellant realised that time had lapsed, recourse was to move the court and seek leave to file the appeal out of time and give reasons.
11. In the case of Stanley Kahoro Mwangi, Timothy Njoroge & Joseph Mwangi (suing on their own behalf and on behalf of Twendane Company Limited) v Kanyamwi Trading Company Limited [2015] KECA 967 (KLR) the court held that an applicant seeking to file an appeal out of time must have a plausible and satisfactory explanation for the delay for the court to address. Hence cannot file an appeal out of time simply because they enjoy such right. The right of appeal must be exercised within the rules of procedure applicable to ensure justice for all parties.
12. In this case, there is no reason why the appellant waited from 14 March 2024 to 26 August 2024 to file the appeal well aware that the right of appeal had lapsed 30 days from the date the trial court rendered judgment. Upon the Notice of Preliminary Objections, the appellant was notified of the breach of procedure that renders the appeal incompetent but still urged on the appeal.
13. An appeal filed out of time cannot be cured under any other law or procedure save to dismiss it. It cannot stand or be urged.
14. Objections dated 30 September 2024 are with merit and the appeal is filed contrary to Rule 12(2) of the Employment and Labour Relations Court (Procedure) Rules and is hereby dismissed. Costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 31ST DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

