



**Atta (Kenya) Limited v Ngalama (Appeal E110 of 2024)  
[2024] KEELRC 2617 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2617 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E110 OF 2024  
M MBARŪ, J  
OCTOBER 24, 2024**

**BETWEEN**

**ATTA (KENYA) LIMITED ..... APPELLANT**

**AND**

**DANIEL NGALAMA ..... RESPONDENT**

**RULING**

1. The appellant filed an application dated 9 July 2024 under the provisions of Sections 1A, 1B, 3, 3A, 79G, and 95 of the *Civil Procedure Act*, Sections 3, 12, and 17 of the *Employment and Labour Relations Court (Procedure) Rules* and Order 50 rule 5 of the *Civil Procedure Rules* seeking orders;
  1. Spent.
  2. Spent.
  3. Seeking the hearing and determination of the appeal, the court be pleased to issue an order of stay of execution of the whole judgment/orders dated 18.04.2024 in Mombasa CMCC Civil Suit No.281 of 2020 – Daniel Ngalama v Atta (Kenya) Limited.
  4. The court be pleased to enlarge the time to appeal and deem the Memorandum of Appeal dated 21.05.2024 as duly filed on time.
  5. The costs of this application and appeal be provided for.
  6. The court be pleased to issue any other order or further orders as it may deem fit and just to grant.
2. Application by the appellant is on the grounds that the trial court delivered judgment on 18 April 2024 and allowed the claim with an award of 8 months' salary as compensation for unlawful termination of employment. The judgment was scheduled on 11 April 2024 but was rescheduled to be delivered



on notice. The appellant only learned later through the respondent's letter dated 17 May 2024 that judgment had been delivered. The time to file an appeal had lapsed and aggrieved, the appellant filed a Memorandum of Appeal. It has been more than 30 days since the judgment was delivered without notice to the appellant.

3. The appellant indicates that the application is supported by the Supporting Affidavit of Paul Munyao but on record is the Affidavit of Victor Ouma advocate.
4. The appellant has an arguable appeal and seeks that the Memorandum of Appeal be admitted out of time and pending the hearing of the appeal, the judgment of the trial court be stayed.
5. In reply, the respondent filed the Replying Affidavit of Muchai Lumatete Walubengo advocate who avers that he is in the conduct of the matter for the respondent. The application dated 9 July 2024 is supported by the affidavit of Victor Ouma. The judgment of the trial court was delivered on 18 April 2024 which had earlier been scheduled for 11 April 2024. The court issued notice to the parties. There was no attendance by the appellant and the court on its motion granted a stay for 30 days.
6. The indolence of the appellant should not prejudice the respondent. Despite being served with letter and judgment on 17 May 2024 the appellant did nothing to secure the right of stay of judgment or appeal. The application should be dismissed with costs.
7. The appellant filed a Further Affidavit of Victor Ouma who aver that the court allowed an interim stay of execution on 10 July 2024 and extended on 16 July 2024 but the respondent has gone ahead to instruct auctioneers to proclaim the appellant's goods.
8. Both parties attended and agreed to file submissions and attend oral hearings which are analyzed and the issues for determination are;
  1. Whether the court should allow the appellant more time to file an appeal;
  2. Whether the court should issue orders for a stay of execution pending the hearing of the appeal;
  3. Who should pay costs.
9. The instant application dated 9 July 2024 is based on the grounds that the trial court in Mombasa CMCC 281 of 2020 had scheduled judgment on 11 April 2024 but rescheduled the same for delivery on notice. The appellant only learned later that this was done on 18 April 2024 without their knowledge.
10. The body of the application is that the Affidavit of Paul Munyao Advocate supports the same. However, the appellant filed the affidavit of Victor Ouma.
11. The respondent made note of this variance and said no more.
12. An application filed under the provisions of Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules* must be supported by an Affidavit. The grounds of the application and the affidavit filed thereof are at variance. The application is without a supporting affidavit. See [\*Daniel N Mutua; Alfred Wambua Muange v Agnes Ndila Kanua \(Civil Case 146 of 2002\)\*](#) [2004] KEHC.
13. The foundation of the application is lost.
14. This renders a fatal blow to the application.
15. On whether time should be extended to file an appeal out of time, the appellant well relies on the provisions of Section 79G of the *Civil Procedure Act*, Section 17 of the [\*Employment and Labour Relations Court Act\*](#), and Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*.



However, whereas a party has a right of appeal, such right should be exercised within the time limitations under the law. An appeal should be filed within 30 days from the date of the impugned judgment.

16. Where no appeal is filed within the time for any reason, a party is allowed a chance to move the court seeking leave to appeal out of time. The practice is to initiate that process through a miscellaneous application, give reasons upon which the court should allow and allocate more time and if not, dismiss and end that process at the stage.
17. The practice of filing an appeal first and then seeking more time to file the appeal should not be allowed to take root. Such would negate the purpose of Section 79G of the *Civil Procedure Act*. To file a draft Memorandum of Appeal would well support a miscellaneous application seeking to enlarge time to file an appeal out of time. See *Makori v Barasa; Faulu Microfinance Bank Limited (Third party)* (Environment and Land Appeal E017 of 2023) [2023] KEELC. See also Supreme Court in application No. 16 of 2014 *Nicholas Kiptoo Arap Korir Salat v the Independent Electoral and Boundaries Commission & 7 others*.
18. In the case of *DIM v FWM (Misc. Application 33 of 2017)* [2018] eKLR, the court held that through a miscellaneous application, a party is allowed to explain the reasons leading to delay in filing an appeal in time and the court has the chance to allocate more time, limited or unlimited. However, it must be borne in mind that leave to appeal out of time is not a matter of right. The applicant must satisfy the court that the application is deserved for the court to exercise its unfettered discretion. An applicant must therefore satisfy the court that the delay is justified and excusable in the circumstances.
19. In this case, the appeal is invalid. It is filed out of time before the appellant can enjoy the court's discretion to grant more time to file the appeal.
20. The appellant is seeking that The court be pleased to issue any other order or further orders as it may deem fit and just to grant. The application is without a Supporting Affidavit, the appeal is filed without leave being secured.
21. The appellant was notified of the trial court judgment on 17 May 2024 but failed to expedite the process of securing its rights until 9 July 2024. The delay is not explained.
22. Application dated 9 July 2024 is hereby dismissed. Costs to the respondent. The appeal is dealt with. Orders accordingly.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 24 DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

