



Ongere v Babito General Contractors Limited (Miscellaneous Application E059 of 2023) [2024] KEELRC 2536 (KLR) (18 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2536 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E059 OF 2023**

**AK NZEI, J
OCTOBER 18, 2024**

BETWEEN

HERMAN MTUNDO ONGERE APPLICANT

AND

BABITO GENERAL CONTRACTORS LIMITED RESPONDENT

RULING

1. The application before me is the Applicant’s Notice of Motion dated 11th December 2023 and expressed to be brought under Section 12 of the *Employment and Labour Relations Court Act*, Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the *Civil Procedure Rules*. The application seeks the following orders:-
 - a. That the court be pleased to grant leave to the applicant to appeal out of time against the Judgment delivered by Honourable G. Kiage, Senior Resident Magistrate, on 6th January 2023 in Mombasa MC ELR Case No. 290 of 2021 as per the attached draft Memorandum of Appeal.
 - b. That the costs of the application do abide the outcome of the intended appeal.
2. The application is based on the Applicant’s supporting affidavit sworn on 11th December 2023. It is deponed in the said affidavit that Judgment in the aforesaid suit was delivered on 6th January 2023 in the absence of all the parties and their Advocates and without notice. That the Applicant’s Advocate learnt from the Judiciary portal that Judgment had been delivered, but could not peruse the court file and advise the Applicant accordingly as the same remained in (the Court’s) Chambers until 14th February 2023 when the Advocate learned that the court file had been received at the Court’s Registry and that the Judgment was not in the Applicant’s favour.
3. It was further deponed in the supporting affidavit that delay in filing an appeal was not occasioned by the Applicant’s mistake or that of his counsel, and that the intended appeal has high chances of success.



That unless the application herein is allowed, the Applicant's rights will be prejudiced as the intended appeal seeks to raise substantial issues of both law and fact; and that the Respondent does not stand to suffer any damage that cannot be compensated.

4. The application is opposed by the Respondent. Both parties filed Written Submissions for and against the application, which I have considered.
5. 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 delivering to the applicant of a copy of the decree or order.
6. The proviso to Section 79G above provides as follows:

“Provided an appeal may be admitted out of time if the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

7. 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 of the *Civil Procedure Act* refers to this Court, as well.
8. 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 to in Sub-Rule (1), the appeal shall be filed within thirty days from the date the decision is delivered.”

9. 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.”

10. 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 has a good and sufficient cause for not filing the appeal within time. In other words, he or she must justify the reason advanced for not filing the appeal in time.

10. I am satisfied that the Applicant herein has demonstrated good and sufficient cause for not filing the intended appeal in time, and I will exercise the court's discretion in his favour.

10. I have noted from the annexures annexed to the Applicant's affidavit sworn in support of the application that the Lower Court's Judgment sought to be appealed against is dated 3rd January 2023 and was delivered on 6th January 2023. I have also noted from the draft Memorandum of Appeal that the intended appeal is not frivolous.

10. I allow the Notice of Motion dated 11th December 2023 in the following terms:-

- a. The Applicant is hereby granted leave to appeal out of time against the Judgment of G. Kiage (Senior Resident Magistrate) dated 3rd January 2023 and delivered on 6th January 2023 in



Mombasa Chief Magistrate’s Court Employment Case No. 290 of 2021 (*Herman Mtundo Ongere -vs- Babito General contractors Limited*).

- b. A Memorandum of Appeal and a record of appeal shall be filed contemporaneously within thirty (30) days of this Ruling.
 - c. Costs of the application shall be in the appeal.
10. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 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 Court fees.

Appearance:

.....Claimant

.....Respondent

