



**Rono v Amritlal S Shah Wholesalers Limited (Employment and Labour Relations Appeal E027 of 2023) [2024] KEELRC 2508 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2508 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E027 OF 2023  
MA ONYANGO, J  
OCTOBER 17, 2024**

**BETWEEN**

**ABRAHAM K RONO ..... RESPONDENT**

**AND**

**AMRITLAL S SHAH WHOLESALERS LIMITED ..... APPLICANT**

**RULING**

1. This is a ruling on the application dated 6<sup>th</sup> December 2023 and filed in court by the Applicant on 18<sup>th</sup> December 2023. It seeks the following orders:
  - i. That the Honourable court be pleased to grant the Respondent leave to file a cross-appeal out of time
  - ii. That the costs of this application be provided for.
2. The application is supported by the sworn affidavit of the Applicant's Director dated 6<sup>th</sup> December 2023. In that affidavit, it is averred that Judgment in Eldoret ELRC Cause No. 8 of 2020 was delivered on 28<sup>th</sup> September 2023 where the Applicant was ordered to pay Kshs 208,782.40 and each party to bear its own costs of the suit. The deponent contends that he received the notification of the aforesaid judgment when he was out of town and could not give proper instructions at the time with regard to the filing of an appeal. He further states that he instructed his counsel on record to file an appeal but the time for filing the appeal had already lapsed and that the Respondent herein had already filed an appeal.
3. The Applicant avers that it now seeks to file a cross appeal. It contends that the instant application has been filed without inordinate delay as the delay in filing the appeal is excusable and has been explained. It is also contended that the cross-appeal intended to be lodged has high chances of success.
4. The Replying Affidavit of the Appellant/Respondent was filed on 20<sup>th</sup> February 2024 in opposition to the motion. According to the Respondent, the application before court has been brought as an



afterthought as evidenced by the contents of the letter dated 8<sup>th</sup> November 2023 attached to the Respondent's application. It is said that from that letter, annexure KAS1, it is the advocate who was requesting for instructions to file a cross appeal from the client as opposed to the client instructing the advocate to appeal because of being aggrieved by the decision of the court. Further, the Respondent states that the Applicant's intended cross appeal is only against the decision on costs which ordinarily is discretionary especially on labour relations matters. The Respondent has also stated that the ground of appeal on the finding of the court on the award of Kshs 208,782.40 has been overtaken by events as the Applicant has already made payments through a cheque on the 17<sup>th</sup> October 2023 and therefore the intended ground of appeal will only be for purposes of conjecture and an academic exercise.

5. The Respondent has also contended that there has been no explanation in the Applicant's application for the delay as from the date of judgment up to the date the letter dated 8<sup>th</sup> November 2023 was written.
6. The Respondent has thus urged the court to strike out the application before it with costs.
7. On 6<sup>th</sup> March 2024, the court directed parties to dispose of the application by way of written submissions.
8. In its submissions dated 20<sup>th</sup> April 2024, the Applicant submits that the reason for the delay in filing a cross appeal on time is because Applicant's director was out of jurisdiction and therefore could not be able to give proper instructions with regard the filing of the appeal.
9. While citing the case of Wako Adan & Another vs Phyllis Wanjiru Mwangi (2020) eKLR, the Applicant submits that it seeks to have its appeal heard on merits as some key considerations were left out by the trial court in its judgment. According to the Applicant, the Claimant's claim ought to have been dismissed with costs but instead the trial court proceeded to hear the claim in the existence of a certificate of resolved dispute. For this reason, the Applicant argues that the intended cross-appeal is arguable.
10. It is also the Applicant's submission the Respondent will suffer no prejudice if the extension is granted.
11. In the end, the Applicant urged the court to consider its reasons for delay and allow the application dated 6<sup>th</sup> December 2023 with or without conditions.
12. On his part, the Respondent in his submissions dated 21<sup>st</sup> May 2024 delved on one issue only, that is, whether the Applicant has given sufficient reason for not filing the appeal in time. He avers that the explanation given, that the Applicant's director was out of town when judgment was delivered and the Applicant could not file an appeal within the requisite period, does not hold any water.
13. According to the Respondent, the Applicant has not given any sufficient reason for the delay as is required by section 75G of the *Civil Procedure Act*.
14. The Respondent has also submitted that the grounds put forth in the proposed cross appeal which is the issue of costs, can be dealt with in the present appeal and thus the intended cross appeal is unwarranted.
15. It is the Respondent's submission that the Applicant is unworthy of the orders sought and sought for the application dated 6<sup>th</sup> December 2023 be dismissed with costs.

### **Determination**

16. From the Notice of Motion, the rival affidavits as well as the submissions of the parties, the only issue for determination in my view, is whether leave to file a cross appeal out of time should be issued.



17. The law governing appeals from subordinate courts to the High Court is provided under, Section 79G of the *Civil Procedure Act* which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown.
18. Section 95 of the Act further bestows this court with discretion to enlarge time. It stipulates:

“95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
19. In the instant case, there is no dispute that there has been inordinate delay between the date the judgment was delivered, that is on 23<sup>rd</sup> September 2023 and the 18<sup>th</sup> December 2023 when this application was filed.
20. In support of the application for leave to file a cross appeal out time, the Applicant has contended that the delay in lodging its cross appeal was necessitated by its director being out of jurisdiction when judgment was delivered. The Respondent on the other hand avers that the reason given for the delay is not excusable and further, that the major ground of the cross appeal is on costs which is discretionary.
21. I have considered the grounds raised in the draft Memorandum of Cross Appeal and apart from the issue of costs, the Applicant has faulted the trial court for entertaining the claim even after finding that there was a certificate of resolved dispute.
22. The fact that the filing of the application herein was inordinately delayed is not denied. However, in my view, the issues raised in this application will be determined to finality if the Applicant is allowed to lodge the cross appeal.
23. Also, from a perusal of the record, it is worth noting that the Respondent’s appeal has not been set down for hearing. The cross-appeal may be canvassed together with the appeal and thus no prejudice will be suffered by the Respondent.
24. Consequently, I allow the application dated December 6, 2023 on the following terms:-
  - i. The Applicant is granted leave to file a cross appeal out of time.
  - ii. The Memorandum of Cross Appeal shall be filed within 14 days.
  - iii. The costs of this application will be in the Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 17<sup>TH</sup> DAY OF OCTOBER 2024**

**MAUREEN ONYANGO**

**JUDGE**

