



Saronge & another v Samco Holdings Limited t/a Eka Hotel (Employment and Labour Relations Appeal 264 of 2023) [2024] KEELRC 2486 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2486 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL 264 OF 2023**

**NJ ABUODHA, J
OCTOBER 11, 2024**

BETWEEN

THOMAS ODHIAMBO SARONGE 1ST INTENDED APPELLANT

FRANCISCA MUSIMBA ASAMBA 2ND INTENDED APPELLANT

AND

SAMCO HOLDINGS LIMITED T/A EKA HOTEL RESPONDENT

RULING

1. The Intended Appellants/Applicants herein filed an application dated 15th December, 2023 seeking for leave to file an appeal out of time and that the attached appeal be deemed as duly filed.
2. The application was supported by grounds on the face of the application herein and the Affidavit and supplementary affidavit of Thomas Odhiambo Saronge the 1st Intended Appellant/Applicant herein sworn on 15th December,2023 and 15th May,2024 respectively.
3. The Applicants averred that judgment in CMEL No. 860 of 2021, Thomas Odhiambo Saronge & Another vs Samco Holdings Limited T/A EKA Hotel was delivered on 21st Septemeber,2023 virtually and their advocates applied for a copy of the judgment and typed proceedings for the purposes of filing appeal having been aggrieved by the part of the judgment of Hon. Hosea Mwangi.
4. The Applicants averred that their advocates were yet to receive a copy of the decree or the typed proceedings hence the lapse in filing the appeal. That the typed proceedings were being prepared and once ready they will prepare and file record of appeal before the court. That the appeal had high chances of success and should be allowed to file the same out of time.
5. In response the Respondent filed its Replying Affidavit sworn on 9th January,2024 sworn by Lilian Chepkoech Langat, the Assistant HRM of the Respondent who averred that the appeal was



- presumptuous, incompetent and improperly before the court having been filed without leave of the court as the Applicants have sought leave in substantive appeal instead of Miscellaneous Application.
6. The Respondent averred that the Applicants had not offered any explanation why they failed to file an appeal on time. That delay of three months was inordinate and unexplained. That the Appeal was an afterthought made to vex the Respondent because at the delivery of the judgment on 21st September, 2023 their advocates did not make any indication that they were to appeal or request for typed proceedings orally.
 7. The Respondent averred that on 24th October, 2023 its advocates informed the Applicants Advocates that settlement cheque was ready for collection after the time for filing of appeal had lapsed. That the Applicants received their dues Kshs 37,370 and Kshs 46,917.34 respectively minus statutory deductions while accepting the lower court verdict.
 8. The Respondent averred that having accepted the terms of the judgment and enjoyed the fruits thereof the Applicants could not be heard to reopen and revisit the judgment as doing so would greatly prejudice the Respondent who had acted on the terms of the judgment and paid decretal sum in full.
 9. The Respondent averred that the letter dated 27th September, 2023 by the Applicants' advocates requesting for typed proceedings was relied in bad faith as the said letter was never uploaded on e-filing portal or paid for, or served upon the Respondent Advocates. That the letter was conveniently drafted at time of filing application to mask the Applicants' indolence.
 10. The Respondent averred that the Applicants should not blame the court for failure to file the appeal on time on the pretext of failure to supply typed proceedings which have never been requested for. That as a matter of practice the Applicants did not require typed proceedings to lodge an appeal on time bearing in mind that the judgment had been typed at the time of delivery of judgment and parties directed to collect the same from the registry.
 11. The Respondent averred that the prayer requested by the Applicants was discretionary on deserving parties. That failure to disclose to this court that they already enjoyed the fruits of the judgment meant that the Applicants came to court with unclean hands and not deserving of the discretionary orders and that the Appeal did not have any chances of success.
 12. In response to the Respondent's replying affidavit the Applicants swore a further affidavit dated 15th May, 2024 and averred that failure to adhere to strict timelines was not deliberate and or malicious by design. That the Respondent allegations that the delay of three months was inordinate and unexplained was grossly misguided because in his application he attached a letter requesting for the copy of the judgment, decree and typed proceedings which never bore fruit.
 13. That the appeal was not an afterthought as alleged by the Respondent as they have a right to appeal any part of judgment they feel aggrieved with. That the fruits of the Judgment they are said to have enjoyed were not subject matter of their application as alleged by the Respondent.
 14. The Application was dispensed of by written submissions.



Determination

15. It is correct that an application to enlarge time to file an appeal must not be brought inordinately late and the grounds upon which the application is based must be sound and excusable. In *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR the court held as follows;
- However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal.
16. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Tbuita Mwangi-v- Kenya Airways* [2003] eKLR. They include the following:
- i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.
16. In this particular case the application has been filed with the draft appeal. The Applicants state that they were aggrieved by part of the Judgment delivered on 21st September 2023 and they wrote and filed a letter in court seeking typed copies of the court's Judgment and proceedings for purposes of the Appeal. The Respondent has condemned the said letter for having not being filed on the e-filing portal, paid for or served upon its Advocates. The Applicants' Counsel in their supplementary affidavit ought to have rebutted these allegations by providing proof of payment for the same. Failure to rebut these allegations shows that the letter was drafted while filing this application to suit their convenience hence an afterthought as alleged by the Respondent.
17. The Court is guided by the grounds set out by the Court of Appeal above and notes that the delay on the part of the Applicant has been inordinate, the reasons for delay being that the Judgment and proceedings were not issued in good time is supported in the absence of proof that such request was made and filed in Court. The Memorandum of Appeal was filed three months after delivery of Judgment and no reasonable explanation has been offered for the delay. In event whatever reason the delay was premised has not been substantiated as the applicant has not supplied proof that the letter requesting proceedings was actually filed in Court. The court notes that the practice is usually that once a party gets the copy of judgment they can file their memorandum of appeal as await typed proceedings. The Respondent confirmed to the court that the judgment was already typed at the time of delivery and was ready for collection at the registry.
18. Although the Applicant states that the Respondent would not suffer any prejudice, the court notes that the Respondent already paid the decretal sum whose fruits the Applicants already enjoyed. The court has looked at the Memorandum of Appeal and notes that even though the Applicants averred that they were not appealing on the enjoyed sums, the appeal literally touches on the fairness of the termination and the sums the court declined to award after finding the termination was fair. This therefore means that allowing the Applicant's application will cause great prejudice to the Respondent who has complied with court's Judgment.



19. In conclusion the Applicants' Application dated December 15, 2023 is found without merit and is hereby dismissed with costs.
20. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024

DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2024

ABUODHA NELSON JORUM

Presiding Judge

Appeals

