



**Ali v Tarmal Wire Products (Miscellaneous Application E065 of 2024)
[2024] KEELRC 2723 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2723 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E065 OF 2024
M MBARŪ, J
NOVEMBER 7, 2024**

BETWEEN

SALIM GONGA ALI APPLICANT

AND

TARMAL WIRE PRODUCTS RESPONDENT

RULING

1. The applicant filed an application dated 11 July 2024 under the provisions of Order 42 Rule 6, Order 43 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules seeking orders
 1. The court be pleased to extend time and grant leave for the applicant to file an appeal out of time against the whole of the judgment delivered by Hon. M. S. Kimani on 6 February 2024 in Mariakani PMCC ELRC No.E044 of 2022.
 2. The court do grant leave to the applicant to file a Memorandum of Appeal and serve out of time.
 3. The Memorandum of Appeal annexed hereto be deemed as duty filed upon payment of the requisite court fees and thereafter served upon the respondent.
2. The affidavit of Mukongolo Ayieko supports the application, as the advocates for the applicant, on the grounds that the judgment in Mariakani PMCC ELRC No.e044 of 2022 was delivered on 6 February 2024 and sent via email on 8 February 2024 in the absence of the parties. The judgment was delivered when the advocate attending for the applicant had proceeded on maternity leave from 1 February 2024 due to pre-birth complications and delivered on 24 February 2024.
3. Ayieko avers in his Supporting Affidavit that the applicant instructed counsel to file an appeal after counsel resumed duty from maternity leave on 3 June 2024, at which time the time to file an appeal had lapsed.



4. There is an arguable appeal, and the applicant has applied for typed proceedings. If the application is not allowed, there will be substantial loss and damage.
5. In reply, the respondent filed the Replying Affidavit of Opolo Akinyi Advocate for the respondent, who aver that during the pendency of the matter at the lower court, the applicant was represented by Ms Mbaka Advocate from the firm of Mkongolo & Co. Advocate and not the applicant's advocate as stated in the application. The applicant, through Mbaka Advocate, was well aware of the judgment, and the failure to file an appeal within the statutory period purporting to rely on the advocate's maternity leave cannot apply.
6. Ms Opolo aver that on 6 February 2024, Ms Mbaka and I appeared before the trial court to pick up the judgment and was informed that it would be sent via email. The applicant confirms that the judgment was sent via email on 8 February 2024, but nothing was done until 7 July 2024, a period of 6 months. Where the judgment aggrieved the applicant, the applicant's advocate and Ms Mbaka, the associate who was well conversant with the matter, did not give any instructions to file an appeal, and the orders sought herein should be dismissed with costs.
7. Both parties attended and made oral submissions in court.
8. Ms Ombat represented the applicant, while Ms Opolo represented the respondent.
9. The applicant submitted that the applicant was not able to file an appeal in time as the advocate attending was on maternity leave. Unless the orders sought are issued, the applicant will suffer great prejudice, loss and damage. The applicant has attached a Memorandum of Appeal, and once it is granted leave, this will be filed and served.
10. In reply, the respondent submitted that the applicant was well represented before the trial court by Ms Mbaka, and both parties received the judgment on 8 February 2024, which was admitted by the applicant. There was knowledge of the judgment, and for 6 months, there was inaction, and the inordinate delay was not addressed. Under Rule 11(2) of the Employment and Labour Relations Court (Procedure) Rules, 2024, an appeal should be filed within 30 days from the date of the judgment. The question of maternity leave is common knowledge that it takes 3 months and not six, hence not a reasonable justification for the delay.

Determination

11. The applicant has relied on Orders 42, 43, and 51 of the Civil Procedure Rules. The core issue is the extension of time to file an appeal out of time against the judgment delivered on 6 February 2024 in Mariakani PMCC E044 of 2022.
12. The principles guiding the court on an application for the extension of time to file an appeal out of time are to the effect that the court's powers in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under these principles to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour as held 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) .
13. In applying its discretion, the court is guided by principles now addressed in many judicial pronouncements, including Etole v Akhwaba [2024] KEELC 7052 (KLR) and Mugacha t/a Galaxy Auctioneers v Global Trucks Limited [2024] KEHC 13099 (KLR) that the factors to consider are;

The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application



is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.

And that;

... first, the length of the delay; secondly, the reason for the delay, thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted. ...

14. In this case, there is an admission that the judgment delivered in Makiakani PMCC E044 of 2022 was issued to the parties on 8 February 2024. The advocate attending for the applicant was Ms Mbaka, not Mukongolo Ayieko, the Advocate who has supported the application herein and avers that instructions to appeal could not be issued since the counsel attending was on maternity leave from 1 February 2024 and only resumed duty on 3 June 2024.
15. The right holder for the appeal, if any, is the applicant. The need for appeal was for the applicant. The instructions given to counsel to appeal arose from the applicant, and hence, his circumstances are the overriding issue and not those of his advocate. Indeed, where the applicant was represented by Ms Mbaka and not Mukongolo's advocate, his affidavit became necessary to support his application and his circumstances.
16. Therefore, the delay in filing the appeal is not adequately addressed. The circumstances of counsel cannot sanitize the applicant's delay in filing an appeal.
17. This is apparent to the court in these proceedings.
18. The applicant is represented by Ms Ombat advocate and not Mukongolo's Advocate. The juxtaposition of advocates from Ms Mbaka, Ms Mukongolo, and Ms Ombat made it clear to the court that the applicant was being served by different advocates at all material times.
19. The applicant's conduct has been an issue in these proceedings. On 1st October 2024, the court directed the applicant to pay court adjournment fees and costs before 15 October 2024, but there was no compliance.
20. The standing of the applicant before this court is dented.
21. Where is the applicant in these proceedings? Is he interested in this litigation?
22. These questions can only be answered by the right holder, the applicant whose affidavit would have cleared the same.
23. Fundamentally, a third limb to an application as herein made is the nature of the appeal to be addressed. No draft Memorandum of Appeal is attached to the Affidavit in support of the applicant as stated. This is a crucial limb to an application seeking leave to file an appeal out of time. The basis of such an application is a Memorandum of Appeal that raises triable issues, and if allowed, the court will apply its mind to it fairly and judicially.
24. The court finds no reasonable basis to apply its discretion in favour of the applicant.
25. Accordingly, the application dated 11 July 2024 is without merit and is hereby dismissed with costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 7TH DAY OF NOVEMBER 2024.

M. MBARŪ



JUDGE

