



**Chando v Tarmal Wire Products (Miscellaneous Application
E070 of 2024) [2024] KEELRC 2739 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2739 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E070 OF 2024**

M MBARŪ, J

NOVEMBER 7, 2024

BETWEEN

RASHID GUBE CHANDO 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;

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.

The court do grant leave to the applicant to file a Memorandum of Appeal and serve out of time.

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 advocate for the applicant on the grounds that 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. In the Supporting Affidavit, Ayieko avers that the applicant instructed counsel to file an appeal after counsel resumed duty from maternity leave on 3 June 2024. At this time, the time to file an appeal had lapsed.



4. There is an arguable appeal, and the applicant has applied for typed proceedings. There will be substantial loss and damage if the application is not allowed.
5. In reply, the respondent filed the Replying Affidavit of Opolo Akinyi Advocate for the respondent, who avers 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. Through Mbaka Advocate, the applicant 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 said that on 6 February 2024, Ms Mbaka and I appeared before the trial court to pick up the judgment and were informed that it would be emailed. The applicant confirms that the judgment was emailed on 8 February 2024, but nothing was done until 7 July 2024, 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.

Both parties attended and made oral submissions in court.

Determination

7. The applicant is seeking leave to file an appeal out of time from the Judgement delivered on Hon. M. S. Kimani on 6 February 2024 in Mariakani PMCC ELRC No. E044 of 2022.
8. The records in Mariakani PMCC No. E044 of 2022 relates to a different party, Salim Gongga Ali, not the applicant herein, Rashid Gube Chando.
9. The applicant has no affidavit explaining why he wishes to prefer an appeal for a third party. His advocates, particularly Mukongolo Ayieko, who has filed the Supporting Affidavit, did not explain why the applicant cannot attend and file his affidavit and the circumstances under which he needs to file an appeal for a third party.
10. The only explanation the court can discern is the intention to abuse the court process.
11. The doctrine of abuse of process, based upon the inherent authority of every court to control its process and those persons who come before it, is an incidental power necessary to exercise substantive jurisdiction. That power, together with rules of court and statutory provisions, enables the court to dismiss or strike claims which are frivolous and vexatious. In addition, it may be exercised to discipline litigants and lawyers guilty of misconduct. Regrettably, this power has been used only grudgingly, sparingly and in blatant cases, as held in the case of *Satya Bhama Gandhi v Director of Public Prosecutions, Chief Magistrates Court, Kibera, Inspector General of the National Police Service & United Bank of Africa (Kenya) Limited* [2018] KEHC 6100 (KLR) that;

The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. ...
12. The case at hand is one as defined above. This application was filed for no good cause, save to waste court time and public resources. The court should not sanction such a matter.
13. Accordingly, the application dated 11 July 2024 is an abuse of the court process 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

