



**Nzama v Sunny Hauliers Limited (Miscellaneous Application
E120 of 2021) [2024] KEELRC 2717 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2717 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E120 OF 2021
CN BAARI, J
NOVEMBER 7, 2024**

BETWEEN

BONIFACE KITHUNGU NZAMA APPLICANT

AND

SUNNY HAULIERS LIMITED RESPONDENT

RULING

1. For determination, is the ex-parte Applicant's Notice of Motion Application dated 2nd July, 2021, brought pursuant to Sections 3A, 79G and 95 of the [Civil Procedure Act](#), wherein, the Applicant seeks leave to appeal the Judgment of Hon. Kagoni (P.M) dated January 21, 2021 in MCELRC No. 251 of 2019 out of time.
2. The Application is supported by grounds on the face of the Motion and the Affidavit sworn by the Applicant's Counsel Ms. Sheila Alusiola on 1st July, 2021.
3. The Applicant Counsel avers that the Applicant is aggrieved by the amount of the decretal sum awarded by the trial Magistrate in her Judgment. It is her argument that the Applicant has an arguable appeal that raises serious trial issues, and will suffer irreparable loss and damage if the application is not allowed.
4. It is Counsel's further position that the Respondent will not suffer any prejudice if the application is allowed, and that it is in the interest of justice that it be allowed.
5. The Respondent opposed the motion vide a Replying Affidavit sworn by one Anthony Njuguna dated 11th July, 2024.
6. The Respondent avers that the Claimant's application is incompetent as it has been sworn by the Applicant's Advocate and contains contentious issues, therefore it should be struck out.



7. It is the Respondent's case that the Applicant has not given any reason for the delay in lodging the Appeal. It further avers that the Applicant has failed to annex a draft memorandum of appeal for the Court to interrogate whether or not the intended appeal is arguable.
8. The Respondent avers that the claim that the Applicant will suffer irreparable loss and damage if the Application is unsuccessful has not been substantiated. It is the Respondent's prayer that the Court ought to dismiss the application with costs as the Applicant has not established the threshold for granting the prayers sought.
9. The Application was canvassed by way of Written Submissions. The Respondent filed submissions dated October 7, 2024. The Court notes that the Applicant did not file any submissions to the application.

The Respondent's Submissions

10. The Respondent relying on the provisions of Section 79G of the *Civil Procedure Act*, and the case of Mombasa County Government vs Kenya Ferry Services & anor (2019) eKLR, submitted that the Claimant has not demonstrated sufficient cause to warrant the grant of leave to appeal out of time.
11. It is the Respondent's further submission that the Claimant did not give any plausible explanation for the 6-month delay in the lodging of the appeal, and did not annex a draft notice of appeal in support of the application for consideration on merits by the Court, and on this basis, argues that the application is incompetent and should fail.
12. It is further submitted for the Respondent that the Claimant failed to demonstrate the prejudice it stands to suffer if the application is unsuccessful. The Respondent further states that the trial court heard all the parties and made its determination in favour of the Claimant/Applicant and therefore, the Claimant cannot allege that it will suffer irreparable loss and damages.
13. It is the Respondent's submission that it is bound to suffer prejudice if the application is allowed as the matter had already been determined by the trial court, and the Respondent duly complied with the Judgment.
14. On the issue of costs, the Respondent submits that it is trite law that costs follow the event. It is the Respondent's position that the Claimant should bear the costs of the application as it failed to meet the threshold for the grant of the prayers sought.

Analysis and Determination

15. I have considered the Motion, the grounds and affidavit in support, the Respondent's Replying Affidavit together with the Respondent's written submissions. The issue for determination is whether the Applicant has met the threshold for grant of leave to file an appeal out of time.
16. Section 79G of the *Civil Procedure Act* provides thus on filing of appeals out of time:-

“Every appeal from a 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 delivery of a copy of the decree or order:

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



17. By dint of the foregoing provision, to extend or not extend time to file an appeal is a discretionary power of the court, and the Court in exercising this discretionary power requires that the Applicant satisfies the court that it has good and sufficient cause for the delay in filing an appeal within the statutory period.

18. In the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR, the Supreme Court of Kenya enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that: -

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.”

19. Similarly, in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the notice of appeal out of time, had this to say:-

“It is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

20. In the instant case, the trial Court Judgment was delivered on 21st January 21, 2021 and the Applicant filed the motion herein on 2nd July 2021. This is more than three (3) months outside the 30 days’ statutory period. Whereas the delay may not be prima facie inordinate, the court must further consider other factors such as the reason for the delay and whether or not the appeal is arguable.

21. The Court notes that the Claimant/Applicant did not at all give reasons for his failure to file his appeal within time. It is also true that a draft notice of the appeal not having been annexed to the motion herein, the Court cannot gauge whether or not the Applicant’s intended appeal is arguable.

22. The Court has also notes that upon filing the instant motion, the Applicant lost interest in the suit which fact is evidenced by his and his counsel’s non-attendance at various occasions when the suit was



before court. The Applicant did not also file submission on the instant motion which then means the he failed to prosecute his application.

23. The Applicant has also failed to demonstrate any substantial loss that might be occasioned upon him if the application is disallowed.
24. In the upshot, I find and hold that the Applicant has not satisfied the requirements for extension of time to file an appeal out of time, and the motion is for dismissal.
25. The Claimant/Applicant's application dated 2nd July, 2021, is hereby dismissed with costs.
26. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024.

C. N. BAARI

JUDGE

Appearance:

N/A for the Claimant/Applicant

Mr. Njenga present for the Respondent

Mr. Kirui - C/A

