



Jubilee Insurance Company Limited v Nangira (Employment and Labour Relations Appeal E008 of 2022) [2023] KEELRC 138 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 138 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E008 OF 2022
DN NDERITU, J
JANUARY 26, 2023**

**BETWEEN
JUBILEE INSURANCE COMPANY LIMITED APPELLANT
AND
MAXWELL OGENG'O NANGIRA RESPONDENT**

(Being an application arising from the ruling of Hon. K. I. Oenge (Principal Magistrate) delivered on 16th February, 2022)

RULING

I. Introduction

1. In a Notice of Motion dated 4th May, 2022 (the application) filed under a certificate of urgency the Appellant (Applicant) prays for -
 - a. This Application be certified urgent and be heard exparte in the first instance.
 - b. Pending hearing and determination of this Application, this Honourable Court be pleased to issue orders staying further proceedings in Nakuru CM ELRC Cause No.40 of 2020 – Maxwell Ogeng’o Nangira v Jubilee Insurance company Limited.
 - c. Pending hearing and determination of the Applicant’s intended Appeal, this Honourable Court be pleased to issue orders staying further proceedings in Nakuru CM. ELRC Cause No.40 of 2020 – Maxwell Ogeng’o Nangira v Jubilee Insurance Company Limited.
 - d. This Honourable Court be pleased to grant the Appellant/Applicant leave to lodge an Appeal out of time against the Ruling delivered on 16th February, 2022 by Honourable K.I. Oenge (Mr) Principal Magistrate in Nakuru CMELRC Cause No. 40 of 2020 – Maxwell Ogeng’o Nangira v Jubilee Insurance Company Limited.



- e. Upon grant of leave to appeal out of time, the memorandum of Appeal filed herewith be deemed as duly filed within time.
 - f. This Honourable Court be pleased to issue any other orders it deems appropriate in the circumstances.
 - g. The costs of and incidental to this application be provided for:
2. The said application is based on the grounds on the face of it and supported by the affidavit of Patience Mirara, a legal claims officer in the Applicant, with several annexures thereto.
 3. In opposition to the application the Respondent filed a replying affidavit sworn by himself on 2nd June, 2022.
 4. Miss Mutua, Advocate, instructed by Oraro & Co. Advocates appeared for the Applicant while Miss Cheloti, Advocate, instructed by Wamaasa, Masese, Nyamwange & Co Advocates appeared for the Respondent.
 5. On 18th May, 2022 this court issued an order staying proceedings in Nakuru CMCC 40 of 2020 pending the hearing and determination of this application and the court further ordered that the application be heard by way of written submissions.
 6. Counsel for the Applicant filed her written submissions on 17th May, 2022 and Counsel for the Respondent filed on 7th June, 2022. Counsel for Applicant, with leave of court, filed supplementary submissions on 26th July, 2022.

II. Issues For Determination

7. As noted above prayers (a) and (b) of the application are spent. The issues left to this court for determination are therefore –
 - a. Should this court issue an order staying proceedings in Nakuru CMCC 40 of 2020 – Maxwell Ogeng’o Nangira v Jubilee Insurance Company Limited, pending the hearing and determination of the intended appeal to be filed by the Applicant?
 - b. Should this court grant the Applicant leave to appeal out of time against the ruling of Hon. K. I. Orange (PM) delivered on 16th February, 2022 in Nakuru CMCC 40 of 2020?
 - c. Costs.

III. Applicant’s Case

8. The Applicant’s position as espoused through the supporting affidavit, the written submissions and the supplementary thereto is that the Respondent filed Nakuru CMCC 40 of 2020 against the Applicant claiming various remedies arising out of an alleged termination of employment. A copy of the Memorandum or statement of claim in the said case has not been provided or availed to this court but the prayers sought have been set out in paragraph 2 of the supporting affidavit of Patience Mirara.
9. The Applicant entered appearance in the said cause but did not and has not, as far the court can discern from the proceedings in this application, filed a defence.
10. The Applicant provides that it filed a notice of motion dated 22nd June, 2021 in which it prayed for various orders as set out in paragraph 3 of the supporting affidavit, that is, the statement of claim filed by the Respondent herein be struck out, the proceedings in Nakuru CMCC 40 of 2020 be stayed, and that the case be referred to arbitration.



11. The Respondent opposed the said application. In a ruling delivered and dated on 16th February, 2020 (sic!) the trial magistrate dismissed the application with costs and found that there existed an employer-employee relationship between the Applicant and the Respondent during the material time.
12. The Applicant is now complaining that the trial magistrate did not make a finding on the prayer that sought to have the cause referred to arbitration and hence did not stay the proceedings. It is against that ruling that the Applicant is seeking an extension of time within which to file an appeal to this court and also a stay of proceedings in the lower court pending the hearing and determination of the intended appeal.
13. A copy of the said ruling is attached to the instant application but there is no formal order extracted from the said ruling.
14. The Applicant has annexed a draft Memorandum of appeal in which it raises nine (9) grounds of appeal and prays that –
 1. The Appeal be allowed as a consequence whereof, the Ruling dated 16th February, 2022 be set aside and be substituted with an order allowing the Appellant’s Notice of Motion dated 22nd June, 2021 i.e. referring the dispute between the parties to arbitration or striking out the Statement of Claim dated 5th November, 2020.
 2. The costs of this Appeal be awarded to the Appellant.
15. The Applicant alleges that the contract between it and the Respondent provides for arbitration in case of a dispute, but curiously neither of the parties, and more so the Applicant, has availed a copy of the said contract to this court as evidence and for evaluation that indeed there is an arbitration clause in the same that would call for a bar to court proceedings before the arbitration takes place. As it turns out, this court is in darkness as to whether there is such a contract and if indeed it provides for arbitration as a condition precedent before a dispute arising therefrom is filed in court.
16. The Applicant gives two reasons for failing to file the appeal within 30 days as provided for in law. One, that the Counsel in conduct of the case fell sick and could not act on the matter, and medical records have been annexed, and two, that the Applicant was at the material time in the process of merging with another insurance firm, Allianz SE, which process allegedly affected the internal operations of the Respondent including recruitment and re-designation of staff.
17. The Applicant states in the supporting affidavit that by the time the dust settled the time for appeal had lapsed. The Applicant pleads that the period of two months or so, between the time of the ruling and the filing of the instant application, is neither inordinate, excessive, nor unreasonable and hence prays as per the prayers set out above.
18. It is important at this point to note that the ruling that gave rise to this application, as per the copy provided on record and annexed to the supporting affidavit, is curiously indicated in the last page to have been delivered, dated, and signed at Nakuru on 16th February, 2020. The court shall shortly revisit this issue in the determination.

IV. Respondent’s Case

19. In the replying affidavit the Respondent takes issue with the Applicant for failing to provide a formal order extracted from the ruling intended to be appealed against and states that this is against the law and more so Section 79G of the *Civil Procedure Act*.



20. The Respondent states that the delay in filing of the appeal is inordinate, unreasonable, and inexcusable and that the reasons given for delay are neither genuine nor good enough to invoke this court's discretion in granting the Applicant the prayers that it is seeking.
21. Further, the Respondent alleges that Patience Mirara, the deponent in the supporting affidavit, has not demonstrated that she obtained the authority to swear the said affidavit before filing the same and as such the application is unsupported as required in law and hence should be struck out or dismissed with costs.

V. Determination

22. As noted in an earlier part of this ruling Counsel for both sides addressed the court by way of written submissions and the said submissions shall be considered in this section along with the reasoning of the court in regard to the issues identified above for determination.
23. For a more methodical flow of the ruling I will deal with the second issue first. That is, whether this court should grant the Applicant leave to appeal out of time, in essence extending time within which the Applicant may file an appeal.
24. First things first. There is unexplained mix-up in various dates material to the application before the court. A copy of the memorandum or statement of claim or plaint in Nakuru CMCC 40 of 2020 has not been availed to this court. However, in paragraph 3 of the supporting affidavit the Applicant states that the said statement of claim is dated 5th November, 2020. Logically, if that be the date of the statement of claim, the same must have been lodged in court after that date. In paragraph 3 of the said affidavit the Applicant states that it entered appearance dated 21st June, 2021 and also filed a notice of motion dated 22nd June, 2021 which gave rise to the ruling that is now the subject matter of the application herein and this ruling.
25. From the foregoing there is clearly an error apparent on the face of the date of the said ruling which is indicated as 16th February, 2020. None of the parties or Counsel has explained this disparity or sought to rectify the same. No formal order arising from the said ruling has been provided which would have clarified the date on which the ruling was made or delivered.
26. Be that as it may, the prayer sought for extension of time to appeal is discretionary and among the factors to consider include the length of delay, the reason(s) given for the delay, the chances of the appeal succeeding if the application is allowed, the prejudice that the Respondent may suffer in the event that the application is allowed, and to some extent the element of public interest in the matter – See *Leo Sila Mutiso V Hellen Wangari Mwangi* (1999) 2 EA 231 and *Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & Another* (2018) eKLR.
27. By and to a large extent the factors for consideration as mentioned in the foregoing paragraph are cumulative and should be considered along together and Counsel for both parties have made their submissions on this issue.
28. The matter before this court is not of public interest in nature but of private contract between the parties. Going by the assumption that the ruling that is intended to be appealed against was delivered on 16th February, 2022 (not 2020) this court takes the view that the delay of less than two months, after expiry of 30 days within which to appeal, before filing the instant application and for the reasons given, is neither inordinate, unreasonable, nor inexcusable.
29. Although there is no evidence of the alleged amalgamation, acquisition, or merger of the Applicant by or with another company, the other reason given of sickness on the part of the Counsel for the



Respondent, who is an officer of the court, resonates with this court to view the same as a genuine and honest reason for the delay, notwithstanding that another lawyer from the same law-firm should have taken up the matter and filed the application earlier.

30. However, this court has been denied an opportunity by the Applicant to weigh in on the probability or likelihood of success of the intended appeal. First, the Applicant has admittedly not filed a defence in the lower court in Nakuru CMCC E40 of 2020 to enable this court to discern what defence the Applicant intends to raise and if the issue of arbitration as a prerequisite to filing of the case in court shall be raised as a defence. Secondly, the contract between the parties has not been availed to this court and hence this court is prima facie not in a position to determine if there is an arbitration clause in the contract as alleged by the Applicant.
31. By reason of the foregoing, it is in the considered view of this court that this is not an appropriate case for granting leave to appeal out of time. As noted, the Applicant has not found it fit to defend the case in the lower court and has deliberately or otherwise failed to disclose and or avail the contents of the contract between the parties that is in contest.
32. The Applicant should put efforts and focus on defending the case in the lower court to logical conclusion and may then appeal if dissatisfied with whatever outcome that may flow therefrom. This court, based on the materials presented before it, finds no probability or likelihood of success of the intended appeal.
33. In the circumstances, and for the foregoing reasons, the second issue, stay of proceedings in the lower court pending the hearing and determination of the intended appeal, shall fail as well. In any event, such an order for stay of proceedings would be highly prejudicial to the Respondent whose case should be heard and determined on merits without unnecessary delays and or hindrances.
34. It is important to comment on the manner in which the application was filed and presented to this court. The heading appears to allocate this matter a reference as an appeal when in fact this should be a miscellaneous civil application as no appeal has been accepted for filing or one filed within time allowed. For avoidance of doubt, there is no appeal presented to or pending before this court in this regard.
35. Counsel for both parties also submitted at length on the issue of whether the deponent in the supporting affidavit to the application had or needed authority from the Respondent before filing the said affidavit. As noted above, the matter before this court is properly a miscellaneous application and not an appeal or a proper cause as to invoke the provisions of Order 4 Rule 1 of the Civil Procedure Rules. This objection should be best raised in the case in the lower court in regard to the pleadings filed therein if the Respondent feels that the Applicant has not complied with the law cited above.
36. The upshot of all the foregoing is that the application by the Applicant herein is denied in totality and dismissed.

VI. Costs

37. Costs follow event and the Respondent is awarded costs of the application.

VII. Orders

38. This court orders that - The application by the Applicant dated 4th May, 2022 be and is hereby dismissed with costs to the Respondent.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 26TH DAY OF JANUARY 2023.



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DAVID NDERITU
JUDGE

