



Raiply Woods (K) Limited v Wekesa (Employment and Labour Relations Appeal E022 of 2022) [2023] KEELRC 39 (KLR) (20 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 39 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E022 OF 2022**

**NJ ABUODHA, J
JANUARY 20, 2023**

BETWEEN

RAIPLY WOODS (K) LIMITED APPLICANT

AND

DENNIS WEKESA RESPONDENT

RULING

1. The Applicant vide a Notice of Motion dated April 28, 2022 brought under Article 159(2)(d) of the Constitution of Kenya 2010, Section 3 and 20(1) of the Employment and Labour Relations Court Act, Rule 8 of the Employment and Labour Relations Court Procedure) Rules 2016 and all enabling provisions of the law) seeks the following orders:-
 - i. Spent
 - ii. That this Honorable Court be pleased to issue orders of extension of time for filing of memorandum of Appeal and service thereof in relation to decisions of Hon C Menya dated March 18, 2022, ELRC No 91 of 2020.
 - iii. That upon grant of prayer (b) above, this Honorable court be pleased to direct and /or order that the Memorandum of Appeal dated April 20, 2022 to be deemed to have been timeously and properly filed and served.
 - iv. That the Appellant/Applicant be granted leave to appeal out of time against the whole judgment of Hon C Menya dated March 18, 2022, ELRC No 91 of 2020.
 - v. That further, this Honourable court be pleased to order and/or direct that the application for stay of execution dated April 28, 2022 and filed on April 28, 2022 be deemed to have been properly filed and thus properly on record.
 - vi. That the cost of this application be in the cause.



2. The application is grounded on the grounds set out in the body of the application and on the affidavit sworn in support of the application by the applicant. The applicant has set out the following grounds in support of the application;
- i. That the intended appellant herein seeks orders for enlargement of time to file a Memorandum of Appeal and to appeal out of time.
 - ii. That the Honorable court is allowed(sic) to extend on such terms as it deems just upon a party seeking extension establishing the basis upon which the court should exercise its discretion in his/her favor.
 - iii. That there is need to protect the Intended Appellant's opportunity to fully agitate their dispute owing to the fact that the intended appeal has huge chances of success and not mere frivolity.
 - iv. That the honorable court through a judgment delivered on March 18, 202 in Eldoret CM ELRC No 91 of 2020 ordered the Respondent (then claimant) was unlawfully terminated and consequently awarded Kshs 268,334.04 as compensation.
 - v. That the court informed parties that they would get copies of the said judgment after the same had been typed.
 - vi. That ELRC No 91 of 2020 was part of a series of file together with ELRC No 88 and 89 of 2020.
 - vii. That the applicant was supplied with copies of judgment in ELRC No 88 and 89 of 2020, however the staff at the registry informed the appellant that ELRC No 91 of 2020 was missing hence they could not supply the applicant with a copy of the judgment.
 - viii. That the applicant's advocate went ahead to file a Memorandum of Appel and application for stay in ELRC No 88 and 89 of 2020.
 - ix. That the applicant's advocates made follow ups on the missing file, until April 20, 2022 when the registry availed a copy of the judgment.
 - x. That the time allowed under rule 8 of the employment and labour relations court procedure rules, 2016 for filing of a memorandum of appeal had already expired.
 - xi. That the intended appellant has a good and sufficient cause for not filing the appeal in time.
 - xii. That the obvious intention of section 3 and 20(1) of the *Employment and Labour relations court Act* was to provide a mechanism for a party who did not, for good cause, file an appeal out on time, to approach the court to be allowed to file such an appeal.
 - xiii. That the memorandum of appeal annexed to the supporting affidavit shows that the intended appeal is arguable, which is the duty of an applicant to show at this stage of its arguability -not high probability of success.
 - xiv. That the applicant has easily met that standard and discharged this burden
 - xv. That there is no substantial adverse effects in granting this order that will have on the respondents other than permitting the applicants to exercise a preciously cherished right of appeal.
3. The Respondent filed a replying affidavit sworn on June 17, 2022 where he depones that; no reason has been offered by the Appellant as to why it took them over two months to file the instant application



and that the delay to file a competent appeal is inexcusable; that the appellant has not demonstrated that they have paid any deposit to the subordinate court to facilitate the typing of proceedings and judgment for any intended appeal whatsoever; that the delay in filing the intended appeal is inordinate as the provisions of section 79G of the *Civil Procedure Act* provides for filing an appeal within 30 days of delivery of judgment.

4. The respondent has averred that he shall be greatly prejudiced should the application before court be allowed as he is a successful litigant who should be allowed to access the fruits of his judgement and the court should not aid the indolence of the appellant by sanctioning the application now before court.
5. The application was disposed of by way of written submissions. The applicant's submissions were filed on July 22, 2022. The respondent's written submissions were filed on August 3, 2022.
6. I have perused the application, the rival affidavits as well as the submissions of the parties and I find that the only issue for determination is whether sufficient cause has been made by the applicant for leave to file an appeal out of time from the Judgment of trial court in CM ELRC No 91 of 2020.
7. Section 79G of the *Civil Procedure Act* provides;
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 to the appellant 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.
8. In the instant case, I note that the judgement that is being sought to be appealed against was delivered on March 18, 2022 whereas the instant application was filed on April 28, 2022 almost one and a half months later after delivery of the said trial court's judgment.
9. In the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi*, the Court of Appeal held that:
"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: 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."
10. In the case of *Raila Odinga vs Independent Electoral and Boundaries Commission & 4 Others* [2013] eKLR the supreme court held:
"The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best outcome."
11. The applicant in this case has submitted that the delay in filing an appeal on time was occasioned by the loss of the trial court's file.



12. I am satisfied that the applicant has given a good and reasonable explanation for the delay; the application has been brought without undue delay and from the annexed draft Memorandum of appeal, the proposed appeal is arguable.
13. As a result, I exercise my discretion under Section 3A of the *Civil Procedure Act* in the interest of justice and allow the Notice of Motion dated April 28, 2022 and filed on May 4, 2022 on the following terms:
 - i. The applicant is granted leave to appeal out of time
 - ii. The Memorandum of Appeal dated April 20, 2022 is hereby deemed duly filed and served.
 - iii. The Applicant is hereby granted conditional stay of execution to the effect that the entire decretal sum will be deposited in an interest earning account in the names of both counsel for the parties herein within 30 days from the date hereof
 - iv. Costs shall be costs in the Appeal.

Dated and delivered at Eldoret this 20th day of January, 2023

Abuodha Nelson Jorum

Judge ELRC

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