



**Dreamline Express Limited v Mutinda (Appeal E008 of 2021)
[2023] KEELRC 47 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 47 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E008 OF 2021
AK NZEI, J
JANUARY 19, 2023**

BETWEEN

DREAMLINE EXPRESS LIMITED APPELLANT

AND

DANIEL MBUVI MUTINDA RESPONDENT

((Being an Appeal from the judgment and Decree of Hon. Lesootia A. Saitabau – PM at Mombasa delivered on 12th February 2021 in Mombasa CMCC No. 744 of 2019))

RULING

1. The appeal herein was filed on 26th February 2021 vide a Memorandum of Appeal dated 23rd February 2021. The Memorandum of appeal is not shown to have been accompanied by copies of the proceedings, documentary evidence relied on and a copy of the judgment from the proceedings appealed against in compliance with Rule 8(4) of the *Employment and Labour Relations Court (Procedure) Rules* 2016.
2. When the appeal came up for mention before me on 8th October 2021, a date shown to have been fixed at the Court’s Registry by the Respondent’s Advocates, the Appellant’s Advocate sought, and was granted thirty days to file and serve a record of appeal. The Court fixed the appeal for mention on 2nd December 2021 for taking of directions on hearing of the same.
3. The Appellant did not file a record of appeal within the thirty days’ time sought and granted on 8th October 2021, and was on 2nd December 2021 given upto 1st March 2022 to file and serve the record of appeal.
4. The Appellant had not filed the record of appeal on 8th March 2022 when the appeal came up for mention in Court. the Appellant’s Counsel sought, and was granted two more months to file the record of appeal, and the appeal was fixed for mention on 20th June 2022.



5. The Appellant did not file the record of appeal, and on 20th June 2022 the Appellant/Applicant's Counsel sought to be given sixty more days to file the record of appeal. The Respondent's Counsel did not oppose the application, but prayed for dismissal of the appeal if the Appellant failed to comply with the orders that the Court would give. The Court noted that the Appellant/Applicant had not filed a record of appeal despite the matter having been mentioned in Court since 8th October 2021 and gave the following orders:-
 - a. The Appellant is granted 60 more days to file and serve a Record of Appeal, failing which the appeal shall stand dismissed.
 - b. Mention on 20/9/2022.”
6. The Appellant did not file or serve a record of appeal within the sixty days' period ordered, and the appeal stood dismissed upon the lapse of sixty days as from 20th June 2022.
7. There was no subsisting appeal as on 20th September 2022 when the matter came up for mention, and I made the following order:-

“The appeal stands dismissed by dint of this Court's orders dated 20/6/2022 as no record of appeal has been filed.”
8. On 28th September 2022, the Respondent filed a Notice of Motion evenly dated seeking the following orders:
 - a. that the sum of kshs. 325,335 deposited in Court on 31st August 2021 pursuant to the order of Hon. Lesootia Saitabau issued on 9th August 2021 in Mombasa CM ELR Case No. 744 of 2019 be released forthwith to the Respondent/Applicant's Advocates, C.O. Tolo & co. Advocates.
 - b. That costs of the application be provided for.
9. The application is supported by an affidavit of Clifford O. Tolo Advocate sworn on 23rd September 2022. It is deponed in the said affidavit:-
 - a. that the appeal herein is against the judgment of the Principal Magistrate, Hon. Lesootia Saitabau in Mombasa MC ELR Case No. 744 of 2019 delivered on 12th February 2021.
 - b. that on 9th August 2021, the Appellant was granted stay of execution pending hearing and determination of the appeal herein by Hon. Lessotia Saitabau in Mombasa MC ELR Case No. 744 of 2019 on condition that the decretal sum was deposited in Court (a copy of the Ruling dated 9th August 2021 was annexed to the supporting affidavit).
 - c. that the decretal sum, being ksh. 325,335 was deposited in Court on 31st August 2021 as directed by the trial Court (a copy of the official Court receipt dated 31st August 2021 was annexed to the supporting affidavit).
 - d. that the appeal was dismissed on 20th September 2022, and as such there is no reason why the decretal sum should not be released to the Respondent/Applicant.
10. The application is opposed by the Appellant/Respondent vide a replying affidavit of Abdulrahman Abdulaziz sworn on 12th October 2022 and filed in Court on even date. It is deponed in the said replying affidavit:-



- a. that upon filing the appeal herein on 26th February 2021, the Appellant/Respondent requested for a copy of the judgment and certified proceedings for preparation of the record of appeal, but the same were never supplied to date due to unavailability of the lower Court file, leading to striking out of the Appellant's appeal.
 - b. that the Appellant's Advocate updated the Appellant and opted to file an affidavit in this Court explaining the Appellant's predicaments and desire to prosecute the appeal, but the Court omitted to consider the said affidavit and dismissed the appeal.
 - c. that the Appellant has since instructed its Advocate on record to institute an appeal in the Court of Appeal at Mombasa for redress, and that the appeal has high chances of success; and that if the funds are released to the claimant the intended appeal will be rendered nugatory and superfluous.
 - d. that the Respondent is a party of straw and may not be able to reconstitute the decretal sum, if paid to him.
 - e. that the order for depositing the decretal sum was made in the lower Court file No. 744 of 2019, and the Applicant ought to have approached the trial Court (which) has jurisdiction to handle the instant motion.
11. It is worth noting that by dint of this Court's orders dated 20th June 2022, the appeal herein stood dismissed upon the lapse of sixty days from the date of the said order. I have noted from the Court's record that on 22nd August 2022, after the lapse of the sixty days ordered on 20th June 2022 and after the order dated 20th June 2022 had taken effect and the appeal herein stood dismissed, the Appellant's Advocates filed an affidavit sworn by Wafula Wanjala Advocate on 22nd August 2022, purporting to explain the delay in filing the Appellant's record of appeal. The Court has not been told why filing of the said affidavit happened after dismissal of Appellant's appeal. It is not honest for the Appellant to purport to accuse the Court of having subsequently omitted to consider the affidavit filed in Court on 22nd August 2022 and of having dismissed the appeal. The Appellant's appeal stood dismissed by 20th August 2022, and the affidavit of Wafula Wanjala Advocate filed on 22nd August 2022 was filed on a dismissed appeal. All that the Court did on 20th September 2022 was to make an order to the effect that the appeal stood dismissed by dint of the order dated 20th June 2021.
 12. It is the duty of every party or litigant filing an appeal in this Court to file all the documents required to be filed under the Court's rules of procedure to enable the Court to determine the appeal expeditiously. It is not the Court's duty to avail such documents on behalf of parties.
 13. On the orders sought in the Notice of Motion dated 28th September 2022, both parties are in agreement that the decretal sum sought to be released to the Respondent/Applicant's Advocates was so deposited pending hearing and determination of the now dismissed appeal herein. There will, therefore, be no reason why the said decretal sum should remain held up in Court, unless there is a contrary order from a higher Court. Either the lower Court or this Court can order for the release of the deposited decretal sum. I allow the application as prayed.
 14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JANUARY 2023.

AGNES KITIKU NZEI

JUDGE



ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Wafula for Appellant/Respondent

Ms. Mutune Respondent/Applicant.

