



**Thuo v County Government of Nyandarua (Cause 178 of 2018)
[2023] KEELRC 7 (KLR) (17 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 7 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 178 OF 2018
HS WASILWA, J
JANUARY 17, 2023**

BETWEEN

RACHAEL NJAMBI THUO CLAIMANT

AND

COUNTY GOVERNMENT OF NYANDARUA RESPONDENT

RULING

1. This ruling is in respect of the respondent/Applicant's notice of motion dated September 29, 2022, filed under certificate of urgency pursuant section 7 of the *Appellate Jurisdiction Act*, rule 41 of the *Court of appeal Rules, 2020* and section 3 & 20(1) of the *Employment and Labour Relations Court Act*, together with all other enabling provisions of law seeking the following orders;-
 - a. Spent.
 - b. That the honourable court be pleased to extend time of giving notice of intention to appeal against the judgement delivered by the court on January 20, 2022.
 - c. That the court be pleased to issue directions or orders on the time frame within which the said notice of intention to appeal may be filed and served upon the relevant parties.
 - d. That the costs of this application to abide by the outcome of the intended appeal.
2. The application is based on the following grounds; -
 - a. That judgment in this case was entered in favour of the claimant/ respondent herein as against the respondent/applicant herein on the January 20, 2022 for payment of kshs 1,000,000 as damages for breach of contract.



- b. That the advocate who was previously on record, Merris Simiyu, Opondo, Kiranga & Company Advocates failed to inform the respondent about the outcome of this case and therefore the respondent did not take appropriate action within the time frames provided under the law.
 - c. It is averred that the respondent asked its advocates to give an update on the case but they failed and on August 19, 2022, the claimant presented a list of tabulation of the award given, to the respondent's legal office and that is the point they came to know the outcome of the case herein.
 - d. On August 20, 2022, the respondent wrote a letter to its previous advocate inquiring why they failed to inform them of the outcome of the case herein which letter was never answered.
 - e. Several emails were exchanged between the respondent and its erstwhile advocate and another letter was written on September 1, 2022 which did not receive a favorable response. This led to the firing of the said advocate and appointment of the Kanyi Ngure and Company advocates with instruction to appeal against the entire Judgement in this case.
 - f. A consent to come on record by the current advocates was executed by the former advocates on September 19, 2022 and the advocates filed a change of advocates on September 21, 2022 and requested for copies of the judgement together with the proceedings to be able to lodge the appeal.
 - g. At the time of appealing, the time within which the appeal could be filed had lapsed leading to the filling of this application.
 - h. He states that the application was filed timeously and that there will be no prejudice that will be visited on the claimant if the application is allowed. He added that the appeal, the respondent intends to file, is arguable because the house allowance review was done by SRC and not the respondent, therefore SRC ought to have been blamed, which they were not.
 - i. He stated further that it is in the interest of justice that the application is allowed as the respondent is likely to suffer irreparable loss in the event execution is commenced against it.
3. The application is also supported by the affidavit deposed upon by Joseph Mugo Gachambi, the respondent's senior legal officer, on September 29, 2022 which he reiterates the grounds in the application.
 4. The application is opposed by the claimant/ respondent herein who filed a replying affidavit sworn on the October 27, 2022. According to the respondent the application herein is a sham, frivolous, malicious with intent to deny her the fruits of her Judgement.
 5. The claimant states that her advocates upon receiving the judgement of the court forwarded a copy to the respondent's advocates who acknowledged receipt and promised to pay the decretal sum as directed by their client.
 6. It is contended that from the email correspondence between their advocate and the applicant's previous advocate, he had indicated clearly that they had informed the respondent about the decision of this court in this matter.
 7. The claimant took issue with the respondent's inaction for about 9 months from the time of judgement till the filling of this application.



8. Contrary to the allegation by the applicant, the respondent avers that she notified the respondent, through its account office, of the judgement of the court who assured her that they were working on making payments soon.
9. The respondent contends that the appeal especially ground three has no chances of success but in case the court is inclined to allow the application herein security for due performance be deposited to safeguard the respondent's interest. She then proposed for the entire decretal sum to be deposited in a joint interest earning account.
10. In the supplementary affidavit sworn by the Joseph Mugo Gachambi on the November 25, 2022, the affiant reiterated that their former advocates failed to inform them about the judgement in this case. He added that they are willing to abide by any condition on security for costs that this court may deem fit to grant.
11. The application was disposed of by way of written submission with the applicant filing on November 24, 2022, However no submission for the respondent were on record at the time of writing this ruling.

Applicant's Submissions.

12. The applicant submitted from the onset that this court is empowered under section 7 of the [Appellate Jurisdiction Act](#) to extend time within which a litigant may give notice of intention to appeal. Further that rule 41 of the [Court of appeal Rules, 2010](#) empowers the court to extend time for the doing of any act, authorized or required under the rules. To support this they relied on the decision by this court in the case of [Jayne Nyagoba Emisembe v Nairobi County Branch \(KUPPET\)](#) [2019] eKLR where the court held that;

“On the issue of extension of time for filing an appeal, section 7 of the [Appellate Jurisdiction Act](#) states as follows:-“The High Court may extend the time for giving notice of intention to appeal for a Judgement of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such an appeal may have already expired”.Rule 4 of the [Court of appeal Rules](#) on extension of time states that:-“The court may, on such terms as it thinks just, by order extend the time limited by these rules, or by any decision of the court or of a superior court for the doing of any act authorised or required by these rules, whether before or after the doing of the act and a reference to these rules to any such time shall be continued as a reference to that time as extended”. The law therefore allows this court or the Court of appeal to extend time within which to file an appeal.”

13. The applicant then submitted on the four condition to be justified before extension of time to appeal is allowed which include; length of delay, reason for delay, chances of appeal succeeding and degree of prejudice to the respondent if the application is granted.
14. On the reason for delay, it was submitted that the same was occasioned by their erstwhile advocate who failed to informed the applicant of the delivery of the judgement to enable it take action within the requisite period. Further that they only became aware of the judgement in this matter on August 19, 2022 and they immediately filed this application seeking for extension of time to file a notice of appeal. In this they cited the case of [George Mwai Mburu v Mary Wamaittha Kaitany and another](#)[2016] eKLR where the court held that;-

“It is then clear that time within which the applicant was required to file the intended appeal commenced running on July 24, 2013. The current application has been brought over 2



years after the lapse of the requisite time for filing the appeal. In my view whether this delay was unreasonable ought to be determined with the explanation given for the delay... The applicant attributed blame to his then counsel for filing an erroneous application and maintained that the current application was filed timeously after the withdrawal. I find that the delay is wholly attributable to the applicant's former counsel and I am not prepared to condemn the applicant for such transgression. In view of the explanation given I find that the delay was not inordinate. Having taken into account the issues raised by the applicant I find that the intended appeal is arguable. I also find that no prejudice would be occasioned to the respondents' if the leave sought is granted."

15. To further reinforce on that point, the applicant relied on a plethora of cases including the case of *Delphis Bank Limited V Recoo Bilder Limited and another* [2005] eklr and the case of *Kenya Industrial Estates Ltd v Samuel Sang and another* [2008] eklr.

16. On the chances of appeal succeeding, it was submitted that the applicant was wrongfully impleaded since it is the salaries and remuneration commission that revised the House allowance that was the basis of the claim. Therefore, that the respondent herein ought to have sued the salaries and remuneration commission on the issue. Furthermore, that the trial Court erred in awarding general damages for breach of contract which is not one of the reliefs provided for under the *Employment Act*. To support this he relied on the case of *Leonard Odindi v Kenya Ports Authority* [2011] eklr where the court held that ;

"...Besides, as a general rule, no general damages are payable in cases between a master and servant whose relationship is generally contractual."

17. On the degree of prejudice, the applicant submitted that the respondent will not suffer prejudice that cannot be compensated by costs. In any case that the respondent has not yet commenced execution proceedings, neither have they taxed costs. In this they relied on the case of *Norah Chelangat v Chelangat Nases Njakai and 2 others* [2021] eklr where the court held that;

"There is definitely inordinate delay in bringing this application. However, I believe that the applicant has explained the reason for the delay in her affidavit and I find her explanation plausible. If the various advocates appointed by the applicant had acted on her instructions or in the alternative if they had communicated to her their inability to take up or act on her instructions to finality, then I believe the applicant could have taken the requisite steps to remedy the situation as indeed she is attempting now through the instant application. Taking from the above, it is my view that it would not only be unfair but also unjust to pin the responsibility on the applicant for non-compliance with the rules of this court and use this as the basis for withholding the exercise of discretion in her favour. The court has on several occasions declined to visit the wrongs committed by advocates on innocent clients where it is sufficiently demonstrated that the client was not to blame... it is my opinion that the degree of prejudice that the respondent stands to suffer if this application is allowed is outweighed by the prejudice that the applicant will suffer if this application is not allowed."

18. In conclusion, the applicant urged this court to allow their application as prayed.

19. I have examined the averments and submissions of the parties herein.

20. As per the affidavit of the applicants herein, the applicants have explained the events that led them not to file their appeal in time being inaction and inordinate conduct of their counsel.



21. I note that this court has jurisdiction to grant orders sought as per section 7 of the *Appellate Jurisdiction Act* cited in parts of this ruling.
22. This court indeed can exercise its discretion if there are valid reasons raised.
23. The reasons as raised in the application are in my view valid and I will allow the application on condition that the applicants deposit the entire decretal sum in an interest earning account held in joint names of counsel on record within 14 days.
24. The appeal should henceforth be filed within 14 days from the date of this ruling.
25. Costs to abide the determination of the appeal if at all.

RULING DELIVERED VIRTUALLY THIS 17TH DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Kanyi Ngure for respondent/applicant – present

Kamau for claimant/respondent – present

Court Assistant – Fred

