



REPUBLIC OF KENYA



**H. Young Company (EA) Ltd v Mwangi (Miscellaneous Case .
E055 of 2022) [2023] KEELRC 497 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 497 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CASE . E055 OF 2022
AN MWAURE, J
FEBRUARY 23, 2023**

BETWEEN

H. YOUNG COMPANY (EA) LTD APPLICANT

AND

JOHN MUGO MWANGI RESPONDENT

(Being an application for extension of time to file a memorandum of appeal against the judgment entered in Milimani CMEL Cause No 280 of 2018 on November 16, 2021.)

RULING

1. The Applicant has brought an application dated March 31, 2022 and he prays for the following:
 - i. spent
 - ii. That this honourable Court be pleased to issue an order for extension of time to file a memorandum of appeal against the judgment entered in Milimani CMEL Cause No 280 of 2018.
 - iii. That the cost of this application be provided for.

Applicants Case

2. The application is supported by the affidavit deponed by Peace Mavindu in her supporting affidavit dated March 31, 2022. She is the legal officer of the Applicant.
3. The deponent avers that the application emanated from a case whereby the respondent was dismissed on suspicion founded on reasonable and sufficient ground and the Court found respondent was unfairly terminated and awarded two months' salary equivalent compensation.



4. The Applicant says they hoped to resolve the matter out of Court and while trying to explore that possibility the time for filing appeal elapsed. He says time elapsed as the Applicant was in the process for changing his advocates and also attempting to resolve the matter out of Court. Judgment was delivered on November 16, 2021 and so appeal lapsed on January 15, 2022.
5. The respondent did not file a replying affidavit but filed written submissions. They relied on the case of *Faustin Njeru Njoka vs Kimunye Tea Factory Limited* (2022) eKLR where Court held that despite a replying affidavit not being filed the Court cannot forgo to allow an application as unopposed but proceeds to determine it on pure merit.
6. The respondent submit that the law of extension of time was settled by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir vs Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR where Court distilled the factors to be considered in exercising the discretion to extend time:-
 1. Extension of time is an equitable remedy available to a deserving party. It must be exercised judiciously and on sound factual legal basis.
 2. The parties must lay basis to satisfy the Court.
 3. Discretion depends on case by case basis.
 4. Also Court must consider if there is a reasonable delay and the delay should be explained to the satisfaction of the Court.
7. The respondent states that the Applicant has not satisfied any of the above requirements. Apart from a draft memorandum of appeal the Applicant has not attached a single letter from the lower Court to demonstrate efforts made to follow the proceedings.
8. As for the issue of giving instructions to the advocate the respondent submits that the Applicant was the one to give instructions and has not given any reason why they did not do so on time.
9. The argument that Court went on vacation is also not legitimate as there are practice rules on how to proceed with applications during vacation.
10. Even if Court was on vacation the respondent still avers the Applicant did not file the application until end of March 2022. There has been no explanation of the four months delay.
11. The respondent avers that the appeal is unnecessary and does not demonstrate the Applicant is keen to see justice being met.
12. The respondent says he has litigated for three years and when judgment was entered in his favour this application was filed. He says respondent is struggling and the decretal sum is barely Kshs 200,000/-.
13. It is his submissions that the Applicant has not met the criteria to give the orders sought and the application is not brought in good faith.

Applicant's Submissions.

14. The Applicant also refers to the case of *Nicholas Kiptoo Salat vs Independent Electoral & Boundaries commissions & 7 others* (2014) eKLR where the Supreme Court held that extension of time is not a right of a party but is a creature of equity.
15. They aver that they did file stay of execution application before filing this application for extension of time. They also aver they tried to settle the matter out of Court but it did not bear fruits.



16. The Applicant says respondent was awarded his March 2018 salary which he had already been paid. He therefore avers an award of Kshs 160,368/- is a big award and the respondent may not be able to refund it should the appeal succeed.
17. They also submit that even though the order for deposit security is a discretionary one as seen in the case of *Jayesh Hasmukh Shah vs Narin Haira & another* (2015) eKLR but nevertheless the Applicant is willing to abide by the order of the Court.
18. As for likely success of appeal the Applicant avers they followed substantive and procedural requirements while dismissing the claimant from employment.
19. They do pray that the Court grant extension of time to avoid miscarriage of justice.

Determination

20. The application is for extension of time to file memorandum of appeal. It is noted that judgment was delivered on November 19, 2021 and time to file appeal elapsed 30 days thereafter being December 15, 2021. The application hereto dated March 31, 2022 and was filed on April 20, 2022.
21. In granting extension of time the Court uses its discretion as it is not a right of a party to be given the extension. In numerous authorities including *Njuguna Magichu & 73 others* (2003) eKLR 507 as cited in the Court of Appeal in *Anthony Burugu & Company Advocates vs Electrowatts Limited* Civil Appeal No E441 of 2021 where Court observed:

“extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.”
22. Also the Supreme Court in the case of *Nicholas Kiptoo Arap Salat vs The Independent Boundaries Commission & 7 Others* Application No 16 of 2014 held:

” extension of time being a creature of equity one can only enjoy it if he acts equitably, he who seek equity must do equity. Hence one has to lay a basis that he was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of the Courts which litigants have to lay basis where they seek Courts to grant it.
23. Similarly the Court of Appeal in the case of *Paul Wanjobi Mathenge vs Duncan Gichane Mathenge* (2013) eKLR invited

“the discretion under Rule 4 is unfettered but it has to be exercised judiciously not on whim, sympathy or caprice..”
24. In the *Nicholas Salat* case *supra* the Supreme Court stated the following as the underlying principles that a Court should consider in exercising of such discretion.

”extension of time being a creature of equity one can only enjoy it if he acts equitably, he who seek equity must do equity. Hence one has to lay a basis that he was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of the Courts which litigants have to lay basis where they seek Courts to grant it.”
25. The Court from the pleadings of the respective parties and their submissions garners that the Applicant was indolent in filing the appeal and almost gets the impression he was not serious.



26. He makes allegations which are not proved. He says he was attempting to resolve the matter in other ways but he does not provide any prove that he attempted to give any offers to the respondent.
27. He does not also show efforts made to get the proceedings from the lower Court.
28. He then files this application about 4 (four) months after the lapse of the statutory period provided in filing appeal from the Subordinate Court to the High Court. The Court is therefore justified in finding the Applicant was indeed slothful in pursuing this appeal.
29. Having made the above observations the Court has considered that the memorandum of appeal shows bona fide issues for determination since the consideration is not to look at the chances of success of the appeal but rather whether there are arguable issues in the appeal.
30. The question of likely prejudice to the respondent the Court is persuaded some prejudice can be compensated by damages. Nevertheless conceding the respondents plight where he confesses in his submissions that he is struggling then the Court finds should he execute the decree and receive the decretal sum he may not be in a position to refund the same should the appeal by any chance succeed.
31. This is a dicey position but the Court is cognisant that in the *constitution of Kenya* articles 48 and 50 each party is entitled to a fair hearing and so no party as much as is possible should be locked out of the corridors of justice.
32. Consequently the Court allows the application dated March 31, 2022 subject to the following conditions.
 1. The respondent is paid Kshs 30,000/- as costs to be paid within 25 days from today's date.
 2. The decretal sum be deposited in a joint interest earning account in the names of the advocates of the appellant and of the respondent.
 3. Appeal to be filed within 30 days from today's date but subject to complying with prayers 1 and 2 above otherwise extension elapses.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF FEBRUARY 2023.

ANNA NGIBUINI MWAURE

JUDGE

