



**Giuliano Zanette t/a Mediterraneo Restaurant v Amache (Appeal
E006 of 2021) [2023] KEELRC 329 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 329 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E006 OF 2021
AN MWAURE, J
FEBRUARY 10, 2023**

**BETWEEN
GIULIANO ZANETTE T/A MEDITERRANEO RESTAURANT APPLICANT
AND
NASHON OWINO AMACHE RESPONDENT**

RULING

1. The applicant prays vide a notice of motion application dated March 10, 2022 seeking the following orders.
 1. That this honourable court be pleased to enlarge time within which the memorandum of appeal should have been filed.
 2. That upon granting of prayer one (1) herein above, the memorandum of appeal filed herein on January 22, 2021 be deemed to have duly been filed and served.
 3. That the court be pleased to grant further or such orders as it shall deem fit in the interest of justice.
 4. That costs of this application be provided for.
2. The application is grounded on the supporting affidavit of Justin Muteti who says he is the human resource manager of the appellant/applicant company Giuliano Zanette t/a Mediterraneo restaurant.
3. Mr Justin Muteti depones that on December 11, 2020 Hon D O Mbeja Senior Resident Magistrate delivered judgement against the appellant/applicant together with costs to the respondent. This was on December 11, 2020.
4. He depones that on February 22, 2021 their advocates applied for typed copies of proceedings and judgment for purpose of appeal and filed a memorandum of appeal dated January 19, 2021 and he



- says he was informed by his advocates that the same was filed out of time. The deadline for filing memorandum of appeal was anuary 10, 2021 but was filed on January 22, 2021 12 days later.
5. He says the filing out of time was due to error in computation of time and so he says the same will not occasion any harm to the respondent and furthermore the delay was only for 12 days.
 6. He further says that the error in computing time was an error on his part and should not be visited on his client.
 7. Furthermore he says they have paid claimant 50% of the decretal sum as per order given on April 23, 2021 and has deposited kshs 177,859/- in a joint account held by the respective advocates.
 8. He says the said order was given in order to grant stay of execution and enable him prosecute appeal against the lower court judgment.
 9. He says these orders before this court now are for enlargement of time for appeal.

The respondent's case

10. The respondent in his replying affidavit says the application vide notice of motion dated March 10, 2022 is an abuse of court process for one because the applicant has not demonstrated they have an arguable appeal.
11. He says the applicant has not met conditions to grant the application.

Application submissions

12. The applicant in their submissions state that memorandum of appeal was filed 12 days after the due date and secondly they complied with terms imposed by the subordinate court in granting stay of execution. They submit that no prejudice will be suffered by the respondent if this application is granted.
13. The applicant is reliant on case of Charles Karanja Kiiru vs [Charles Gitinji Muigwa](#) 2017 eKLR where Court of Appeal observed:

“It is trite that extension of time is not a right of a party. It is an equitable remedy tht is available to a deserving party at the discretion of the court.”
14. The applicant submitted that while praying for enlargement of time the length of delay is put into consideration and they submit the delay in this case was 12 days including weekends and Christmas holidays.
15. They aver that the appeal ought to have been filed within 30 days under section 790 of [Civil Procedure Act](#). He says that appeal can be allowed out of time if there is a sufficient cause for not filing the appeal on time.
16. The appellant has disclosed that delay in filing appeal was occasioned by error in computation of time which was an error by the advocate and so ought not to be visited on the client.
17. The applicant says that since they complied with the subordinate court orders given to justify stay of execution there is no prejudice that the respondent will suffer. They further submit that the attitude of the application in obeying court order should be taken into account.
18. They also submit that they have arguable appeal since they stated their evidence was not considered on the respondent deserting work and having been given annual leave routinely.



19. So in their submissions they urge the court to grant the prayer for enlargement of time to file their appeal out of time.

Respondent's submissions

20. The respondent submits that as an appellate court the court should be hesitant to differ with findings of the fact of the trial court unless findings are not supported by evidence on record. They rely on the case of *China Zhongxing Construction Company Ltd vs Arun Akuro Sophia* (2020) eKLR which court quoting with approval the decision of *Peter vs Sundan Post ltd* (1958) E A 424 observed:

“An appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

21. In this case the respondent says he worked for respondent from May 21, 2013 to November 2017 and was not paid for 15 days worked in November 2017 and did not go on leave the years 2016-2017. Respondent further says he was underpaid and was not paid for uniform and so the trial court entered judgment in his favour.
22. It is their submission that since the respondent proved he was unlawfully terminated the trial court judgment should be upheld. They say that the appellant did not prove the validity of the grounds for terminating the respondent.

Decision

23. In considering granting enlargement of time in filing appeal out of time the court considers period of delay, degree of prejudice likely to be suffered by the respondent if application is granted and also the court considers if the case raises issues of public importance. The court should also consider if the appeal is arguable.
24. In the length of delay the court is aware that an appeal ought to be filed 30 days after delivery of judgment and that is from the subordinate court to the high court. Judgment was delivered on December 11, 2020 in this current case. Memorandum of appeal was filed on 19th January 2021. There was a delay of 12 days.
25. The court is of the view that considering this was during the festive season 12 days delay cannot be regarded to have been inordinate or in any event.
26. The other issue is of the prejudice likely to be suffered by the respondent if the application is granted. The applicants were ordered to pay 50% of the decretal sum to the respondent and they did. Furthermore appellant avers that they deposited the other balance in an interest earning account held jointly by the respective advocates. In the circumstances, the respondent will not suffer prejudice even if the application is granted and appeal is determined in their favour or otherwise.
27. The applicant has shown good will in complying with the subordinate court order.
28. It is already worthy to note that the subordinate court granted stay of execution and gave conditions precedent to granting the said order. It is reasonable in view of the foregoing and seeing the applicant complied with those orders to give the applicant an opportunity to prosecute this appeal.



29. In Civil Appeal cause no 71 of 2016 *Charles Karanja Kiiru vs Charles Githinji Mugwe* the court concurred with the sentiments of the court in the case of *Kamlesh Mansukhalal Damji Pattin vs Director of Public Prosecution & 3 Others* 2015 eKLR where it was held:

” it suffices to comment that a court of law should be hesitant at closing the door to the corridor of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contends the same was not due for hearing and which he had no notice.”

30. Further the court is persuaded by the sentiments in the case of *Factory Guard Limited vs Abel Vundi Kitungi* where court observed that the right of appeal should not be impeded as it is a constitutional right and the cornerstone of the rule of law. Where there is delay and it is explained and the court accepts that explanation in order to render substantive justice and to facilitate access to justice for all ensuring that deserving litigants are not shut out of judgment such leave should be granted.

31. Finally the applicant has annexed their record of appeal and memorandum of appeal. The provision about the appeal is that there should be an arguable appeal and not mandatory that success of appeal be demonstrated. The court is satisfied that there is a memorandum of appeal annexed to this application and denotes triable issues. The court is satisfied the applicant has sound reasons to grant its application dated March 10, 2022. The court therefore allows the said application to enlarge time within which the memorandum of appeal should have been duly filed.

32. The court also is pleased to allow the memorandum of appeal filed on January 22, 2022 to be deemed to have been duly filed and the same to be served for abundant precaution.

33. Costs in the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10TH DAY OF FEBRUARY 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

