



Jaldesa v Hallo, Administrator Al-Falah Islamic Health Centre (Appeal E003 of 2021) [2023] KEELRC 319 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 319 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
APPEAL E003 OF 2021
ON MAKAU, J
FEBRUARY 2, 2023

BETWEEN

IDRIS JALDESA APPELLANT

AND

ADAN H HALLO, ADMINISTRATOR AL-FALAH ISLAMIC HEALTH CENTRE RESPONDENT

RULING

1. This ruling relates to the respondents notice of preliminary objection dated December 1, 2021 which seeks for striking out of the appeal herein for being filed out of time and without leave of the court. On March 28, 2022 the parties agreed to dispose of the objection by written submission but only the respondent filed on June 27, 2022.
2. In brief the respondent submitted that the appeal is null and void for offending section 79 G of the *Civil Procedure Act* and rule 8 (2) and (3) of the *Employment and Labour Relations Court Act* which requires that an appeal be filed within 30 days from the date of the impugned decision. It was observed that the impugned judgment was delivered on February 23, 2021 but the appeal was filed on April 20, 2021, about two months thereafter.
3. Extension of time was never sought before filing the appeal. Typed proceeding were also ready on February 25, 2021 when the respondent collected a copy of the same. Consequently, it was submitted that the delay in filing the appeal was not justified and the appeal is incompetent, null and void. Reliance was placed on the Court of Appeal in *Frankline Mbae Mburia v MCFCU Ltd & 2 Others* (2017) eKLR and *Dishon Mareko Mwarangire & 4 Others v Faustino Njeri Njoka & another* (UR) where the court of appeal dismissed appeals filed out of time without leave of the court.

Determination

4. Rule 8 of the *ELRC Rules* provides that:-



1. “Where any written law provides for an appeal to the court, an appellant shall file a memorandum of appeal within the time specified for that appeal under the written law.
2. Where no period of appeal is specified in any written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.”
5. Section 79 G of the [Civil Procedure Act](#) on the other hand provides that:-

“Every appeal from the 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.”
6. I have considered the submissions by the respondent and perused the record of appeal as well as the lower court file. It is clear that the impugned judgment was delivered on February 23, 2021. Thirty days within which to file a Memorandum of Appeal ended on March 23, 2021. The appeal was filed on April 20, 2021, about 27 days out of time.
7. The said delay has not been explained by the appellant who did not even file submissions to oppose the preliminary objection. The appeal was filed out of time and without leave of the court. In the case of [County Executive of Kisumu v County Government of Kisumu & 8 Others](#) (2017) eKLR, the Supreme Court held that;

“(23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court.”
8. The court went on to hold that :-

“(35) We are in total agreement with the respondent that an appeal filed in this court out of time without the leave of this court is irregular and the court will not invoke such ‘novel’ principles as argued by applicant so as to validate that petition and deem it as properly filed.”
9. In the [Dishon Mareko Mwarangire & 4 Others v Faustino Njeri Njoka & another](#) (UR) the Court of Appeal held;

“We are satisfied that the appeal was filed outside the permitted time without the leave of the court and that being so, the appeal is incurably defective and must be struck out on that ground.”
10. Likewise in this case, I am satisfied that the appeal was filed outside the limitation period of 30 days without leave of the court and it is incompetent. Consequently, I strike it out with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY, 2023.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

