



**Wamukobole v Dawida Maternity Nursing Home (Miscellaneous Application
E069 of 2022) [2023] KEELRC 294 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 294 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E069 OF 2022**

**AK NZEI, J
FEBRUARY 2, 2023**

BETWEEN

DAVID LUBANGA WAMUKOBOLE APPLICANT

AND

DAWIDA MATERNITY NURSING HOME RESPONDENT

RULING

1. The application before me is the Applicant's Notice of Motion dated 14th October 2022. The following orders are sought:-
 - a. that the proposed (appellant/Applicant) be granted leave to appeal out of time against the whole judgment of Senior Resident Magistrate Voi, delivered on 6th September 2022 in Voi ELR Case No. E015 of 2021 without Notice to the Applicant.
 - b. that the memorandum of appeal annexed hereto be deemed as duly filed and served.
 - c. that costs of the application be in the cause.
2. The application is supported by an affidavit sworn by Mwazighe Micar Advocate whereby it is deponed:-
 - a. that the trial Court delivered its Ruling on 6th September 2022, dismissing the Applicant's claim; and that the Applicant was aggrieved by the decision.
 - b. that immediately after delivery of the trial Court's judgment, Counsel for the Applicant procured a certified copy of the judgment and requested for and paid for typed proceedings.
 - c. that Counsel for the Applicant inadvertently noted that he should file an appeal on or before 16th October 2022 instead of 6th October 2022.



- d. that on 10th October 2022, being a holiday, Counsel for the Applicant pulled out the Applicant's file for purposes of proof reading and approving the already drafted memorandum of appeal for purposes of filing, only to realize that he had noted a wrong date to bring up file.
 - e. that the Applicant's Counsel did a mistake which should not be visited on the Applicant, and that the mistake is excusable.
 - f. that the only remedy is for this Court to allow the Applicant to file an appeal out of time so that the Court can resolve the matter with finality.
3. The application is opposed by the Respondent vide an affidavit sworn by one Briston Mbogholi Mwadime the Respondent's Chief Executive Officer. It is deponed in the said replying:-
affidavit:-
- a. that it is misleading to say that the trial Court dismissed the Applicant's claim as the same was allowed in part, that the Respondent was ready and willing to settle the decretal sum, but Counsel for the Applicant/Intended Appellant declined to accept the settlement cheque.
 - b. that the Application is hopelessly out of time as judgment was delivered on 6th September 2022 and Counsel for the Applicant had a month to lodge an appeal, i.e on or before 6th October 2022 in accordance with Section 79G of the Civil procedure Act.
 - c. that Counsel for the Applicant has not shown that the alleged mistake on his part was genuine, honest or based on credible evidence i.e. copies of his diary for the relevant proof that he misdiarized the date to bring up the file on 16th October 2022 instead of 6th October 2022.
 - d. that the reason proffered by the Applicant's Counsel on his failure to file an appeal is devoid of merit, and that it is plainly obvious that in exercise of reasonable due diligence, Counsel would have realized that he needed to file an appeal within 30 days from the date of the judgment.
 - e. that the Applicant cannot seek an extension of time as he has been indolent and guilty of inexcusable delay, thereby disintitling himself of exercise of this Court's unfettered discretion in his favour under the Rules.
 - f. that the appeal does not raise any and or any serious issue of law or fact, and that there is no arguable appeal that the Applicant has raised in that respect.
 - g. that the orders sought should, in the interest of justice, be refused.
4. On 1st November 2022, Counsel for the Applicant swore and filed a further affidavit whereby he deponed that his firm declined to receive the settlement cheque since the Applicant had already appealed and served the application herein on Counsel for the Respondent. Counsel further deponed:-
- a. that when the mistake of not filing the appeal on 6th October 2022 was noted on 10th October 2022, Counsel moved with speed and filed the present application on 14th October 2022, and that there was a delay of only 8 days.
 - b. that the mistake can be excusable and the Applicant allowed to have his day in Court.
5. Rule 8(1) and (2) of the Employment and Labour Relations Court (Procedure) Rules 2016 Provides:-
- “ 8.



- (1) Where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.
 - (2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.”
6. By dint of Article 162(2) (a) of *the Constitution* of Kenya 2010, this Court is a Court of equal status with the High Court. Section 79G of the *Civil Procedure Act* is the written law providing for time of filing civil appeals in the High Court and therefore in this Court. The section 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 decree or order.
 7. The proviso to Section 79G of the *Civil Procedure Act* provides:-

“Provided 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.”
 8. In the case of *First American Bank of Kenya Ltd -vs- Gulab P. Shah & others* [2002] 1EA 65, the Court set out factors to be considered in deciding whether or not to grant such application, and these are:-
 - a. the explanation if any, for the delay.
 - b. the merits of the contemplated action, whether the matter is arguable and deserving a day in Court, or whether it is a frivolous one which would only result in delay of the course of justice.
 - c. whether or not the Respondent can be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.”
 9. In *Dilpack Kenya Limited -vs- William Muthama Kitonyi* [2018] eKLR, the Court stated that:-

“in an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the Court why the discretion should nevertheless be exercised in his favour, and the rule is that where there is no explanation, there is no indulgence. See *Ratman -vs- Cumarasamy*[1964] 3. ALL ER 933...”
 10. The Court of Appeal in Civil Application No. 166 of 1997 *Itute Ngui -vs Mwakavi Mwendwa* (Omolo, JA) stated that whereas Advocate’s bona fide error is a special reason for extension of time within which to appeal, the nature and quality of the mistake must be considered. In the present case, Counsel for the Applicant stated the nature of the mistake on his part as inadvertent failure to correctly indicate the date on which the intended appeal ought to have been filed, resulting in eight days’ delay as at the date of filing the application herein.
 11. I have perused the draft memorandum of appeal and I have noted that the intended grounds of appeal raised therein are arguable and cannot be said to be frivolous. The period of delay is not inordinate,



in my view, and the Respondent has not demonstrated any prejudice that it will suffer if orders sought by the Applicant are granted.

12. It was held in *Belinda Mural & 9 others -vs- Amos Wainaina* [1978] eKLR that:-

“mistakes of a legal advisor may however amount to a sufficient cause under the East African Rule.”

13. In *Haman Singh & Others -vs- Mistri* [1971] E.A 122, it was held that:-

“... in relation to application to this Court for leave to appeal out of time, it has been held that mistakes of a legal advisor may amount to sufficient cause, but not inordinate delay on his part.”

14. In view of all the foregoing, and having considered written submissions filed by Counsel for both parties herein, the Applicant’s Notice of Motion dated 14th October 2022 is allowed in the following terms:-

- a. the Applicant is hereby granted leave to appeal against the whole judgment of the Senior Resident Magistrate’s Court Voi in the said Court’s ELR Case No. E015 of 2021 delivered on 6th September 2022 out of time.
- b. a memorandum of appeal and a record of appeal shall be filed contemporaneously within thirty days of this Ruling, and shall be served within the said period.
- c. costs of this application shall be in the appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND FEBRUARY 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. Mwzighe for Applicant

Mr. Okello Respondent

