



**Inter Security Services Limited v Onguto (Miscellaneous Civil Application
E050 of 2022) [2023] KEELRC 775 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 775 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E050 OF 2022**

**CN BAARI, J
MARCH 28, 2023**

BETWEEN

INTER SECURITY SERVICES LIMITED APPLICANT

AND

ALFRED WINGA ONGUTO RESPONDENT

RULING

1. By a Notice of Motion dated September 19, 2022, the Applicant seeks orders that:
 - i. Leave be granted to the Applicant to file a Memorandum of Appeal out of time.
 - ii. The costs of this application be provided for.
2. The application is supported by grounds on the face of the Motion, and an affidavit sworn by Isaac Okwirry. The crux of the motion is that on January 28, 2022, a judgment was delivered in favour of the Respondent in Chief Magistrate ELRC Cause No E3 of 2021, where a sum of Kshs 1,426,671.53/- was awarded to the Respondent herein, in compensation for unfair termination.
3. The Applicant avers that its appeal has high chances of success and that the Respondent will suffer no prejudice, if its allowed to file an appeal out of time.
4. The Applicant avers that the delay in filing the appeal is due to difficulties tracing the lower court file, the judgment and typed proceedings. The Applicant states that his Advocate wrote to the Executive Officer on February 9, 2022, requesting for copies of typed proceedings, but which were only availed on March 17, 2022.
5. The Respondent opposed the motion vide a replying affidavit sworn on October 17, 2022. The Respondent's case is that the Applicant's appeal does not raise triable issues as it does not challenge the Respondent's entitlement to the compensation awarded, but only the quantum, and which sum was made within the law.



6. The Respondent further avers that one does not need typed proceedings and/or the judgment for purposes of filing a memorandum of appeal, and as such, the application does not satisfy the grounds for leave to appeal out of time.
7. The Respondent states that the motion herein was brought late in the day being about 7 months after the judgment, hence the delay is inordinate, and the now intended appeal is an afterthought.
8. It is the Respondent's position that he stands to suffer great prejudice should the Applicant's motion be allowed.
9. Parties sought to canvass the motion through written submissions. Submissions were filed for both Parties, and which have been dully considered.

Determination

10. Section 79G of the *Civil Procedure Act*, states thus on time for filing appeals: -

“Every appeal from a 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.”

11. The proviso to this Section of the law, creates the possibility of court enlarging time for filing of appeals, depended only, on the Applicant proving that he had a good and sufficient cause for not filing the appeal within requisite time.
12. To allow or decline an application for grant of leave to file or admit an appeal out of time, is a discretionary power of the Court. The Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR spelt out grounds to guide courts in exercising discretion to enlarge time as:
 - i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which would be suffered by the Respondent if the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest, if any is involved.
13. The Judgment sought to be appealed against was rendered on January 28, 2022, while the instant motion and the Memorandum of Appeal sought to be admitted, was filed on September 19, 2022. This is about seven (7) months later, considering that 30 days for filing the appeal lapsed on February 28, 2022.
14. The Respondent has termed this delay, and reasonably so, inordinate. The reasons expressed for the delay is failure by the court to avail to the Applicant/Advocate, the impugned judgment together with typed proceedings. The Respondent has again correctly submitted that one does not require typed proceedings to lodge an appeal.



15. It is now settled that mistake of counsel should not be visited on a litigant, and that such mistakes have largely been held to amount to ‘sufficient cause’. In *Hamam Singh & Others v Mistri* [1971] EA 122 the Court held thus:

“...in relation to applications 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...”
16. The affidavit in support of the instant motion was sworn by one Isaac Okwirry, who deposed that he is a Director of the Applicant. At no point in his affidavit did he attribute the delay in filing both the appeal and the instant motion to his Counsel. This court will thus not go out of its way to make this assumption.
17. On whether or not the Applicant’s appeal is arguable, the grounds of appeal presented before court largely question the award on account of damages for unfair termination. An arguable appeal is not necessarily one that must succeed, but one which ought to be argued fully before the court, and one which is not frivolous (See *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No124 of 2008.)
18. In *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application NoNai 345 of 2004, it was held that in determining whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
19. I am alive to the duty imposed on courts to ensure that the factors considered are in consonance with the overriding objective in civil proceedings, which are the just, expeditious, proportionate and affordable resolution of disputes. I am also aware that justice is not only justice for the Applicant, but also for the Respondent.
20. This leads me to the conclusion that the Applicant’s motion does not meet the threshold for enlargement of time to file an appeal out time. The delay in filing the motion and the appeal is inordinate, and the reasons for the delay are neither good nor do they constitute sufficient cause.
21. In the end, I find the Applicant’s application lacking in merit. It is dismissed with costs.
22. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28TH DAY OF MARCH, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Murungi h/b for Mr. Okulo for the Applicant

N/A for the Respondent

Christine Omolo – C/A

