



**Eagle Realty Limited v Mulongo (Miscellaneous Application
E141 of 2022) [2023] KEELRC 769 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 769 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E141 OF 2022**

**K OCHARO, J
MARCH 23, 2023**

BETWEEN

EAGLE REALTY LIMITED APPLICANT

AND

MATHEWS SARATUKI MULONGO RESPONDENT

RULING

1. The Application before this court by the applicant dated the September 11, 2022 expressed to be brought pursuant to section 79G, Order 42 rule 11 and Order 51 rule 1 of the [Civil Procedure Rules, 2010](#) and sections 1A, 1B, 3, 3A and 63 (e) of the [Civil Procedure Act 2010](#), seeks orders:
 - a. That this Application herein be certified as urgent.
 - b. That the honourable court grants the applicant an Order for the enlargement of time to file Memorandum of Appeal out of time.
 - c. That the Costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the annexed affidavit of Taib A Taib Bajaber.
3. The applicant states that it was the respondent in Milimani MCELRC Cause No. E741 OF 2021, wherein the judgement intends to assail by way of appeal should the leave sought herein be granted, obtains, whilst the respondent in this application was the claimant.
4. The appellant states that the trial magistrate slated the above stated matter for mention for purposes of fixing the same for Judgment, for the June 21, 2022. However, on this date a judgment date was not picked as the parties were notified vide a court notice that the court was on transfer and the parties were to take a date from the Court Clerk.



5. The applicant asserts that consequently the parties picked a date for delivery of judgement for the July 20, 2022. However, on this said date, they were notified that the same would not be delivered as the Learned Trial Magistrate was unwell, and therefore not sitting. All the matters for that day were rescheduled for the July 26, 2022.
6. The applicant contends that on the July 26, 2022, there was no notice nor a Cause list posted on the Kenya Law website for the Honourable Magistrate. Too there was no link provided for online access of the Learned Magistrate's Court.
7. It is contended that the applicant herein was on the August 29, 2022 notified by the respondent that the judgment was on the July 26, 2022, delivered in his favour. As at this date of notification, the statutory period of 30 days for filing of an appeal had lapsed.
8. It is further stated that the applicant is aggrieved by the judgement and is desirous to challenge it by way of an appeal. The intended appeal is one with overwhelming chances of success. The application herein has been brought without undue delay. The applicant will not suffer any prejudice if the orders sought are granted.

The Respondent's Response.

9. The respondent in opposition to the applicant's Application filed a replying affidavit sworn on the October 25, 2022.
10. The respondent contends that the crux of the applicant's Application is that the applicant did not attend court on the July 26, 2022 when Judgment in Milimani MCELRC Cause No. E741 of 2021 was delivered because supposedly there was no notice nor a cause list posted on the Kenya Law Report website for the Honourable Magistrate, nor a link provided for joining his court online. That consequently the judgement was delivered in its counsel's absence. It only realised that the judgment was delivered on the date it was supposed to from him but after the period for right of appeal had lapsed.
11. The respondent asserts that the narration, and reason given by the applicant for the failure to file his appeal within the requisite time is absolutely not true. The matter was cause listed for the July 26, 2022, and a link given. It is clear therefore that the applicant was aware that the Judgment was to be delivered on that day.
12. The respondent contends that even after judgment was delivered, the applicant did not bother to follow up on what transpired in Court on the July 26, 2022 and the failure to lodge an appeal within the requisite 30 days from the date of delivery of the judgment was not because it was not aware that the judgment had been delivered but because of its indolence.

The Applicant's submissions.

13. The applicant filed its submissions on the September 10, 2022. It submits that the Court can only exercise its discretion for enlargement of time in an Applicant only where sufficient cause for failure to file the appeal within time has been demonstrated. The applicant relies on the provision of section 79G of the *Civil Procedure Act* 2010 which states:

“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.”

14. The applicant relied on the case of *Charles Karanja Kiiru v Charles Gitinji Muigwa* (2017)eKLR, where it was held;

“It is trite that the extension of time is not a right of the party. It is an equitable remedy that is only available to a deserving party, at the discretion of the court.”

15. The applicant further submits that it has an arguable Appeal. As to what amounts to an arguable appeal in the context of an application for enlargement of time for purposes of lodging an appeal, reliance was placed on the case of *R FS v JDS* [2013] eKLR where the court held:

“An appeal is said to be arguable when it contains grounds, points or issues that can genuinely be asserted, on which there can be divergent legal or factual positions of some merit worthy of judicial investigation and determination. To succeed, it is enough that even a single, solitary ground of such description exists, and the same need not be one that must necessarily succeed on appeal.”

16. It is further submitted that the respondent cannot claim to suffer any prejudice if an extension of time to file a Memorandum of Appeal is granted as the court had directed for the opening of an interesting –earning Escrow account in the names of the applicant and the respondent’s law firms in which the decretal sum of Ksh.108, 955 be deposited and in lieu of this the Application should be allowed and the orders sought granted.

The Respondent’s Submissions.

17. The respondent filed his submissions on the January 10, 2023 ventilating only one issue for determination thus;

a. Whether the applicant has disclosed a reasonable explanation for its delay in filing the Appeal.

18. The respondent submits in an application like is the instant one, the question to be answered is whether the applicant has shown a reasonable explanation for the delay in filing its Appeal thus warranting the exercise of discretion of the court.

19. The respondent further submits that enlargement of time is an equitable remedy, and to support this point, reliance has been put on the holding in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others*(2014)eKLR, where the court held:

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to 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 a basis where they seek courts to grant it.”

20. The respondent submits that the applicant has not been candid to this court and more specifically on the issue of the cause list and link for the trial Magistrate, on the material date. The orders sought being equitable, the court cannot exercise its discretion for a party who has approached equity with dirty hands.



Analysis and determination.

21. The substratum of the applicant's application is that the judgement sought to be challenged through the intended appeal was delivered in the absence of his counsel as on that day, neither the trial Magistrate's cause list was published nor link for access of her court provided. That it was after the statutory period for the right of appeal had lapsed that it was realised that the judgment was delivered on the date when it was supposed to.
22. I have noted that the respondent has provided this court with a cause list for the trial court for the July 26, 2002, for judgements and rulings. The matter between the respondent and the applicant is listed as item 9, under judgments. Also, a notice that shared the court's link. This court has no doubt that the cause list and the link were publicly provided. I find the narration of the applicant on the aspect of the cause list and link absolutely untrue and unconvincing.
23. The authority donated to this court for enlargement of time for lodging of an appeal, is discretionary. It is an equitable remedy grantable to the most deserving. Any person approaching the court for a favourable exercise of the authority, must approach it with clarity, precision and candidness. Having found as I have that the applicant has not been truthful to court on the most pivotal aspect of the application, I come to the inescapable decision that the applicant is undeserving the equitable orders sought.
24. In the upshot, I find the applicant's application herein wanting on merit, and hereby dismiss the same with costs.

READ, SIGNED AND DELIVERED THIS 23RD DAY OF MARCH 2023.

OCHARO KEBIRA

JUDGE

In presence of

Ms. Cherop holding brief for Ms. Mideva for the Respondent.

Ms. Aisha for the Applicant.

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.

OCHARO KEBIRA



JUDGE

