



Simba Corporation t/a Acacia Premier Hotel v Kirui (Miscellaneous Application E002 of 2023) [2023] KEELRC 691 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 691 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS APPLICATION E002 OF 2023
CN BAARI, J
MARCH 23, 2023**

**BETWEEN
SIMBA CORPORATION T/A ACACIA PREMIER HOTEL APPLICANT
AND
HARUN KIMUTAI KIRUI RESPONDENT**

RULING

1. By a Notice of Motion dated January 12, 2023, the Applicant seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. spent
 - iv That the Court be pleased to grant stay of execution of the orders against the Judgment of Hon. Telewa delivered on October 7, 2022, in Kisumu Chief Magistrates Court, ELRC Cause No 163 of 2021, Harun Kimutai Kirui v Simba Corporation T/A Acacia Premier Hotel, together with the resultant decree pending hearing and determination of the intended appeal.
 - v That the Honourable Court be pleased to grant the Applicant leave to appeal against the Judgement delivered in Kisumu Chief Magistrates Court, ELRC Cause No 163 of 2021, Harun Kimutai Kirui v Simba Corporation T/A Acacia Premier Hotel out of time.
 - vi. That the Memorandum of Appeal annexed hereto and marked 'GM 3' be deemed as dully filed and served.
 - vii. The costs of this application be provided for.



2. The application is supported by grounds on the face of the Motion, and the affidavit sworn by Jepkoech Katwa. The crux of the motion is that upon delivery of the judgment herein, the Respondent took out warrants of attachment and proceeded to proclaim the Applicant's property on January 10, 2023.
3. The Applicant avers that it was not aware of the entry of the judgment herein, and neither were its Advocates. The Applicant avers that during the delivery of the judgment subject herein, the Advocate holding brief for the Applicant's Advocates did not relay the information on the judgment to the Applicant's lawyers.
4. The Applicant further avers that the 30-day window to lodge an appeal has since lapsed and that it has valid grounds of appeal and has annexed a draft memorandum of appeal to this proceedings.
5. The Respondent opposed the application vide a replying affidavit sworn by George O. Anyumba on January 30, 2023. The Respondent avers that the application herein is unmerited and only intended to deny the Claimant/Decree holder the fruits of his judgment.
6. The Respondent further avers that the Applicant is guilty of laches as no sufficient evidence has been advanced for failure to file the appeal in time. It is the Respondent's further argument that the Applicant has all along been aware of the existence of the judgment, having instructed an Advocate to hold their brief and that he served the Applicant with the Claimant's bill of costs and notice of the taxation through their Advocates on record.
7. The Respondent avers that Counsel for the Applicant attended Court during taxation and sought to file submissions, which request was allowed and further that the Advocates for both parties were present during the taxation of the bill of costs.
8. The Respondent avers that the chronology of events shows that the Applicant was aware of the judgment which he now seeks leave to appeal against.
9. Parties sought to canvass the application through written submissions. The Applicant filed submissions in the matter and which have been duly considered. The Respondent did not.

Determination

10. I have carefully considered the application, the grounds and the affidavits sworn by both parties, together with the submissions by the Applicant. The issue for determination is whether the application is merited as to entitle the Applicant to the orders sought.
11. Section 79G of the *Civil Procedure Act* states thus on enlargement of time:

“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 a good and sufficient cause for not filing the appeal in time.”
12. I will first proceed to establish whether the prayer for extension of time to file an appeal is merited, as without an appeal, the orders of stay will be unfounded.



13. In *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & Others*, Supreme Court Application No 16 of 2014, [2014] eKLR, the Supreme Court enunciated the following principles to guide courts in an application for the enlargement of time as follows: -
- “ 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
 2. a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court;
 3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to-case basis;
 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. whether the application has been brought without undue delay; and
 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”
14. The delay in filing the instant application is about two months and the basis of the delay is that the Applicant did not have knowledge of the judgment that it now seeks to appeal against, having been delivered in the absence of their counsel.
15. The Respondent contends that it is not true that the Applicant did not have knowledge of the judgment, their Advocate having send a Counsel to hold his brief, and being personally present in court when the bill of costs was taxed.
16. The Court of Appeal in *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015]eKLR, stated thus: -
- “It suffices to comment that a court of law should be hesitant at closing the door to the corridors 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 contents the same was not due for hearing and when he had no notice.....”
17. I am alive to the provisions of Articles 48 and 50(1) of *the Constitution* that guarantees every person access to justice and the right to have any dispute that can be resolved by the application of law decided in affair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body
18. It is my considered view that the delay in filing the appeal subject herein, is attributed to the mistake of counsel, as his brief was held when the judgment was delivered, and actually proceeded to participate in the taxation process and cannot therefore have failed to know how the matter was progressing. This said, it is settled that mistake of counsel should not be visited on an innocent litigant.



19. In the case of *Belinda Mural & 9 Others v Amos Wainaina* [1978]eKLR, the Court of Appeal – Law JA, the Court held that:

“Mistakes of a legal adviser may however amount to ‘sufficient cause under the East African Rule.”

20. I will therefore proceed to allow the prayer for enlargement of time in the interest of upholding the Applicant’s rights under Article 48 and 50 of *the Constitution*.

21. On the prayer for stay of execution, the legal principles that guide the court in determining an application for stay of execution of Judgment are as set out under Order 42 Rule 6 of the *Civil Procedure Rules*.

22. The sole purpose of a stay order, is to ensure that an appeal if successful, is not rendered nugatory. It thus follows, that to allow a party leave to lodge an appeal out of time, and disallow a pray for stay of execution, would obviously render the intended appeal nugatory.

23. Consequently, the application is allowed as follows: -

- i. That the Applicant be and is hereby granted leave to appeal against the Judgment delivered in Kisumu Chief Magistrates Court, ELRC Cause No 163 of 2021, Harun Kimutai Kirui v Simba Corporation T/A Acacia Premier Hotel out of time.
- ii. That the Memorandum of Appeal annexed hereto be and is hereby deemed as dully filed.
- iii. That a stay of execution be and is hereby granted against the Judgment and decree of Hon. Telewa delivered on October 7, 2022, in Kisumu Chief Magistrates Court, ELRC Cause No 163 of 2021, Harun Kimutai Kirui v Simba Corporation T/A Acacia Premier Hotel, pending hearing and determination of the appeal.
- iv. Costs shall abide the appeal.

24. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF MARCH, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Omondi present for the Applicant

N/A for the Respondent

Christine Omolo – C/A

