



**Board of Management, Friends School, Senende v Abwala (Miscellaneous Cause E026 of 2022) [2023] KEELRC 960 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 960 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
MISCELLANEOUS CAUSE E026 OF 2022**

**NJ ABUODHA, J**

**APRIL 28, 2023**

**BETWEEN**

**THE BOARD OF MANAGEMENT, FRIENDS SCHOOL,  
SELENDE ..... APPLICANT**

**AND**

**PATRICK LUVAYO ABWALA ..... RESPONDENT**

**RULING**

1. By a motion dated October 12, 2022 the application among others sought an order for stay of execution of the judgment and decree issued on September 9, 2022 in Eldoret CM ELRC No 205 of 2019 pending appeal from the said judgment.
2. The said application was promised on the grounds that the impugned decision was delivered on September 9, 2022 in the absence of the Applicant without due notice either to it or its advocate. The Applicant further stated that there was delay in communicating the decision to him by Counsel due to the closure of schools and it was not until October 7, 2022 when the Applicant was able to give instructions to their advocates on record to appeal the decision. The Applicant also urged that the delay of only one day in filing the intended appeal was not inordinate and it would serve the interests of justice if the Applicant was granted a chance to exercise the right of appeal.
3. The application was further supported by the affidavit of one Albert Masiolo Khalwale who stated among others that: "That I am the Principal of Friends School Senende and the Secretary of the applicant board and in that capacity am conversant with the facts of this case and have the due authority of the applicant to swear this affidavit on their on behalf and as well as my own behalf. That I am aware that the respondent a former employee of the school sued the school vide Eldoret CM MELRC Cause No 205 of 2019. That I did testify in the case as a witness in support of the applicant herein and on the occasion the judgement was scheduled to be read it was not delivered and we were informed that it was to be delivered on notice by the Court. That later my advocates on record inform me which



information I verily believe to be true that the judgement in the above case was delivered on September 9, 2022 in the absence of the applicant and or his advocates on record and without due notice to the applicant and or his advocates on record from the court. That my advocates further inform me which information I verily believe to be true that it is the respondent's advocates on record who notified them of the decision of the lower court through an email dated September 15, 2022 which came to their attention on September 20, 2022. My advocates on record inform me which information I verily believe to be true that there was further delay in communicating the said decision to the applicant because of closure of schools over all the entire Republic and that it is within my knowledge that it was not until October 7, 2022 that the applicant was able to give instructions to our advocates on record to appeal the decision. That my advocates advise me which information I verily believe to be true that the period for appealing expired on October 11, 2022 which is a delay of only one day in filing the intended appeal and it is not inordinate and it will serve the interests of justice if the applicant is granted a chance to exercise his right of appeal out of time. That I am aware that the applicant is appealing the entire decision and is apprehensive that should the respondent execute the judgment/ decree passed against it the applicant will suffer prejudice as the respondent will not be able to refund the decretal sums. That it is within my knowledge that the respondent is not a man of means and will not return the awarded monies should the intended appeal be allowed. That my advocates on record advise me that the intended appeal will be rendered nugatory if the instant application is denied."

4. The Respondent filed a replying affidavit in which the deponent inter alia that: "THAT no reason has been offered by the Applicant as to why they did not instruct their counsel on record to file an appeal in time despite being aware of the judgment which was delivered on September 9, 2022. The day to day running management and administration of the school is not stopped merely because schools have closed for students' holiday. That at a look at the Applicant's application dated October 12, 2022, no reason(s) again has/have been offered by the Applicant's counsel as to why it took them over one month to notify the Applicant of the judgment delivered on September 9, 2022 and should have filed any intended appeal within the 30 days' time frame if they so wished. The delay on the part of the Applicant's counsel to notify and file any intended appeal on time is inexcusable. That to demonstrate a lack of seriousness on the part of the Applicant and/or their advocate on record, no letter addressed to the Employment & Labour Relations Court at Eldoret requesting for typed and certified proceedings and judgment duly received by the subordinate court to facilitate been annexed to the supporting affidavit. The Applicant has also not demonstrated that they have paid any deposit to the subordinate court to facilitate the typing of proceedings and judgment for any intended appeal whatsoever. That I am advised by my advocates on record which information I verily believe to be true is that the delay in filing the intended appeal is inordinate keeping in mind the provisions of Section 79G of the Civil Procedure Act which provides for filing of an appeal within 30 days of delivery of the judgment. That I am advised by my advocates on record which information I verily believe to be true is that as indicated in paragraphs 4 and 5 hereinabove, no good and sufficient cause has been shown by the Applicant nor their counsel on record to persuade this Honourable court to exercise its discretion under the proviso to Section 79G of the Civil Procedure Act. That the application herein has been brought in bad taste with the sole aim of stopping me from accessing and enjoying the fruits of my judgment which was rightfully earned after due process of civil litigation."
5. To grant or refuse an application for extension of time to file an appeal out of time is entirely at the discretion of the Judge seized of the matter. The guiding principles are among others that the application must be brought without inordinate delay and further that the Applicant ought to demonstrate it has an arguable appeal to present before the Court. An arguable appeal however is not the same as an appeal with high probability of success. All the Applicant needs to demonstrate is that there is an arguable point of law or fact.



6. On the first limb, the Applicant has stated that the delay was for one day. This cannot by any measure of interpretation be said to be an inordinate delay. On the merit of the appeal, the Applicant contended that the Trial Magistrate erred in holding that the Respondent had been unlawfully dismissed in face of clear evidence of summary dismissal upon lawful cause.
7. Further that the Trial Magistrate erred in awarding the Respondent money for leave due yet not supported by concrete evidence especially in absence of any evidence that the Respondent expressly applied for such leave and the same was denied. These are not frivolous grounds of appeal and deserve merit hearing. The Applicant therefore in the interest of justice ought to be granted a day in Court to canvass these among other grounds contained in the draft memorandum of appeal.
8. On the issue of stay of execution pending appeal, this again is at the discretion of the Judge seized of the matter but guided by the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules.
9. The Applicant before me is a school offering education which is a public service. The Court takes judicial notice that the major source of funding is drawn from fees and other grants from the government.
10. From the foregoing it would be burdensome to order that the Applicant furnishes security for due performance of any decree  
Or order the Court might ultimately make.
11. In conclusion, the Court grants the Applicant leave to appeal out of time and that the draft memorandum of appeal attached to the application hereto be deemed duly filed upon payment of the requisite Court fees and further that there be a stay of execution of the judgment delivered on September 9, 2022 in Eldoret CM ELRC No 205 of 2019 and consequential orders pending the hearing and determination of the appeal herein.
12. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF APRIL 2023**

**ABUODHA JORUM NELSON**

**JUDGE**

In the presence of:-

.....for the Claimant

.....for the Respondent

