



Kenalrise Limited v Muiru & 3 others (Miscellaneous Cause E028, E029, E030 & E031 of 2022 (Consolidated)) [2023] KEELRC 1051 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 1051 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
MISCELLANEOUS CAUSE E028, E029, E030 & E031 OF 2022 (CONSOLIDATED)
NJ ABUODHA, J
APRIL 28, 2023

BETWEEN

KENALRISE LIMITED APPLICANT

AND

JOHN MUIRU RESPONDENT

AS CONSOLIDATED WITH
MISCELLANEOUS CAUSE E029 OF 2022

BETWEEN

KENALRISE LIMITED APPLICANT

AND

PETER LIHASI OREGI RESPONDENT

AS CONSOLIDATED WITH
MISCELLANEOUS CAUSE E030 OF 2022

BETWEEN

KENALRISE LIMITED APPLICANT

AND

NAHASHION MUTINDI ABUKUSE RESPONDENT

AS CONSOLIDATED WITH
MISCELLANEOUS CAUSE E031 OF 2022



BETWEEN
KENALRISE LIMITED APPLICANT
AND
JOHN MUIRURI MUKUNDI RESPONDENT

RULING

1. By a motion dated October 21, 2022 the Respondent sought orders inter alia:
 - i. That pending the hearing and determination of this Application, this Honourable Court be pleased to stay the execution of the Judgment of Honourable Christine Menya (SRM) delivered on September 9, 2022 and decree issued therefrom in CMELRC No 125 of 2020.
 - ii. That pending the hearing and determination of the Applicant's intended Appeal, this Honourable Court be pleased to stay the execution of the Judgment of Honourable Christine Menya (SRM) delivered on 9th September, 2022 and decree issued therefrom in CMELRC No. 125 of 2020.
 - iii. That this Honorable Court be pleased to extend the time within which to file and serve the Memorandum of Appeal challenging the judgment and decree of Honourable Christine Menya delivered on September 9, 2022 in CMELRC No. 125 of 2020 by such period as the court deems just.
2. The application was supported by the affidavit of Nelly Agufana Hoyi who deponed on the main That:
 - i. That I am an Accountant of the Appellant Company and I am duly authorized by the Directors to swear this affidavit on the Appellant's behalf.
 - ii. That the Respondent herein filed a suit against the Appellant/Applicant seeking a declaration that he was unlawfully and illegally terminated from employment compensation, certificate of costs among other prayers.
 - iii. That the Appellant in Response to the said claim filed in Court a Response dated December 28, 2020 and filed on January 7, 2020 wherein it denied employing the Claimant.
 - iv. That I am aware that on September 9, 2022 Honourable Christine Menya (SRM) delivered judgment in favour of the Respondent against the Applicants as follows:
 - a. One month's pay in lieu of notice Kshs 18,399.70/-
 - b. Compensation for unfair termination (12 months) Kshs 220,796/-.
 - v. That we were recently informed of the said Judgment vide a letter dated September 21, 2022 from our previous Advocates Messrs Ngeno, Ondieki & Company Advocates.



- vi. That upon perusing the Judgment delivered by the Honourable Court, the Appellant was dissatisfied with the findings therein and is desirous to Appeal against the said Judgment.
 - vii. That the Appellant has since instructed the firm of Kale Maina & Bundotich Advocates to come on record on its behalf in place of its previous Advocates Ngeno, Ondieki & Company Advocates.
 - viii. That I am further aware that our current Advocates requested for the physical files from the previous Advocates in order for them to proceed further but received the same on October 18, 2022.
 - ix. That I am further advised by our current Advocates which advice I verily believe to be true that in order for them to come on record post Judgment, the previous Advocates have to sign a Consent Order. The same was signed and forwarded to them on October 18, 2022 hence the delay.
 - x. That the time frame for filing an appeal lapsed on October 9, 2022 and there is need for the Honourable court to enlarge time to allow the Appellant/Applicant to file an appeal out of time and also for the court to order for stay of execution pending hearing and determination of this application as well as hearing of the appeal.
 - xi. That the failure to file the Memorandum of Appeal within the prescribed time was not intentional but an inadvertent error which is excusable given the specific facts of the case which have been sufficiently and reasonably explained.
 - xii. That I am advised by our Advocates on record and whose advice I verily believe to be true that the Applicant's intended Appeal raises several arguable points and is meritorious with high chances of success.
 - xiii. That the Appellant/Applicants' appeal which has of succeeding will be rendered nugatory unless the Honourable court grants the Applicant orders for stay of execution pending hearing and determination of this application as well as the intended appeal.
 - xiv. THAT the Applicant stand to suffer irreparable harm and prejudice if the stay of execution is not granted since the Respondent is an individual and his ability to refund the decretal amount is unknown.
 - xv. That I am also aware that following the determination of the Trial Court, it is imminent that the Respondent has or at any time will initiate measures to recover the decretal sum against the Applicant.
3. Both Counsels filed their submissions for and or against the application, which the Court has reviewed and considered.
 4. The guiding principle on whether or not to grant an application for leave to appeal out of time is that the intended appellant must satisfy the Court that he or she has sufficient cause for not filing the appeal in time.



5. Further, as was stated in the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court takes into account the length of the delay, the reason for the delay, the chances of the appeal succeeding and finally the degree of prejudice to the Respondent if the application is granted.
6. According to the Applicant, it ought to have filed the memorandum of appeal by October 9, 2022 but unfortunately, there was an inadvertent delay of 18 days. The Applicant was not notified of the judgment until September 21, 2022 when they received a letter from their previous advocates on record.
7. Upon perusal of the judgment, the Applicant felt aggrieved and became desirous of appealing. Counsel for the Applicant thus submitted that failure to file their memorandum of appeal within time was not intentional but an inadvertent error.
8. Concerning the success of the intended appeal, the Applicant submitted that the same raised several arguable points with the chances of success. To demonstrate this, Counsel for the Applicant submitted that it is disputed the Respondent was its employee or at all. This according to Counsel was an issue that ought to be argued fully before the Honourable Court.
9. On the issue whether the Court should grant a stay of execution or not. Counsel submitted that the Applicant disputed that the Respondent was its employee hence not entitled to one month pay in lieu of notice and compensation of unfair termination. Therefore if an order for stay of execution was not granted, the Applicant was likely to suffer substantial loss. This was because execution would create a state of affairs that would irreparably affect or negate the essential core of the appeal which would be rendered nugatory.
10. Counsel further submitted that the Respondent had no known means of income hence it would not be easy for them to refund the judgment sum should the intended appeal succeed. Counsel further stated that the Respondent was ready and willing to comply with any order of the Court which may be issued as regards concerning security for costs.
11. Counsel for the Respondent on the other hand submitted that the Applicant had not approached the Court in good faith. According to the Respondent, the Applicant was all along aware of the subordinate Court's judgment. According to Counsel, the Applicant's former advocates communicated the judgment on September 21, 2022 barely 12 days after delivery.
12. Further, there was constant communication between the parties including service of the proposed party and party bill of costs. No cause had therefore been shown why the appeal was not processed within the stipulated time. Counsel therefore submitted that the application lacked merit and was not brought in good faith.
13. As was held in the case of *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR, the decision whether to or not to extend the time for filing an appeal is an exercise of unfettered discretion of a Judge.
14. However in the exercise of such discretion, the Court must act upon reasons not based on whims or caprice. In general the matters which the Court takes into account in deciding whether to grant an extension of time are the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted.
15. The Applicant herein stated that it became aware of the judgment herein on September 21, 2022 when it received a letter from their previous advocates. By the time the process of taking over the matter by the current advocates on record, the time within which an appeal ought to have been filed, had lapsed by some 18 days. The Applicant has further contended that the Respondent was never its employee



hence an award of one month's pay in lieu of notice and twelve month's salary in as compensation for unfair termination did not arise.

16. The foregoing facts are satisfactory enough to persuade the Court to grant the Applicant leave to file an appeal out of time. The delay is not inordinate and has been reasonably explained. Further, the allegation that the Respondent was never the Applicant's employee hence not entitled to the award, is serious and requires to be canvassed further.
17. On the issue of stay of execution, this is guided his Order 42 Rules (2) of the [Civil Procedure Rules](#) which provides:
 - (2) No order for stay of execution shall be made under subrule (1) unless—
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
18. As observed concerning the issue of extension of time to file the intended appeal, the Court takes the view that application for stay of execution has not been brought unreasonably late.
19. Regarding security for due performance of the decree which the Court may ultimately make, the Court hereby orders that in view of the numeracy of the Claimants herein and the aggregate amount of the award, in order not to tie up the Applicant's cash resources which it might badly need for its operations, the Court will order that the Applicant executes within 60 days of this ruling, a suitable bank guarantee to the extent of the decretal sum.
20. In conclusion the Court hereby grants the Applicant leave to file an appeal out of time and such an appeal shall be filed within 30 days of this ruling. Secondly stay of execution is hereby granted on terms set out above.
21. This ruling applies and disposes of Cause Misc. Application Numbers 29, 30 and 31 of 2022.
22. It is ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF APRIL 2023

ABUODHA JORUM NELSON

JUDGE

In the presence of:-

.....for the Claimant

.....for the Respondent

