



Mwaranguo v Naushad Trading Company Limited (Miscellaneous Application E075 of 2022) [2023] KEELRC 1114 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 1114 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E075 OF 2022**

**AK NZEI, J
APRIL 28, 2023**

BETWEEN

SALIM JUMA MWARANGUO APPLICANT

AND

NAUSHAD TRADING COMPANY LIMITED RESPONDENT

RULING

1. The application before me is the applicant's Notice of Motion dated November 17, 2022. The applicant, who filed the application in person, seeks the following orders:-
 - a. that the applicant be granted leave to file an appeal out of time as against the judgment delivered by Honourable M. Mutuku on August 1, 2022 as per the attached draft memorandum of appeal.
 - b. that costs of the application be in the cause.
2. The application is supported by the applicant's supporting affidavit sworn on November 17, 2022, whereby it is deponed:-
 - a. that on October 25, 2022, the applicant visited his former Advocate's office and was told that his claim in CM ELR Case No. 105 of 2020 had been dismissed, and that being dissatisfied with the said judgment intends to appeal.
 - b. that time for filing appeal lapsed on September 2, 2022, hence the prayer for leave to appeal out of time.
 - c. that it is in the interest of justice and fairness that the application be allowed.
3. Documents annexed to the applicant's supporting affidavit included copies of the trial court's judgment delivered on August 1, 2022 and a draft memorandum of appeal.



4. The application is opposed by the respondent vide grounds of opposition dated January 10, 2023; whereby the respondent states:-
 - a. that the application is frivolous, vexatious and an abuse of the court's process.
 - b. that the application lacks merit as it offends the spirit of the law under the provisions of section 79G of the Civil Procedure Act, 2010.
 - c. that the applicant did not file a Notice of Appeal in time and currently there is none on record, thus the delay in filing the appeal is ongoing.
 - d. that there has not been filed a memorandum of appeal for the court to consider the viability of the appeal before granting the orders sought.
 - e. that the applicant was ably represented when the judgment in issue was delivered.
5. Rule 8(1) & (2) of the Employment and Labour Relations court (Procedure) Rules 2016 provides as follows:-
 - “(1) Where any written law provides for an appeal to the court, an appellant shall file a memorandum of appeal with the court within the time specified for that appeal under the written law.
 - (2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.”
6. This court's rules, the Employment and Labour Relations court (Procedure) Rules 2016, are silent on extension of time to file appeals out of time. Proceedings of a civil nature in the subordinate courts are generally governed by provisions of the Civil Procedure Act and the Civil procedure Rules. Section 79G of the Civil Procedure Act provides that an appeal to the High court (in this case to this court) shall be filed within 30 days from the date of the judgment and/or orders appealed against. The proviso to the said Section extends jurisdiction to the High court, and therefore to this court, being a court of equal status with the High court, to extent time for filing of appeals against judgments and/or orders of the subordinate courts upon sufficient cause being shown why an appeal was not filed within time.
7. In the present case, the applicant has not attempted to explain why he did not file an appeal against the subordinate court's judgment within the time prescribed by the statute.
8. It was held as follows in the case of Dilpack [k] Limited v William Muthama Kitonyi [2018] eKLR
“In an application for extension of time, where the court is being asked to exercise discretion, there must be some material before the court to enable its discretion to be exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the court why the discretion should nevertheless be exercised in his favour, and the rule is that where there is no explanation, there is no indulgence. See Ratman v Cumarasamy [1964] 3. All ER 933...”
9. I find no merit in the Notice of Motion dated November 17, 2022, and the same is hereby dismissed.
10. Each party will bear its own costs of the application.
11. Orders accordingly.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH APRIL 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform.

A signed copy will be availed to each party upon payment of court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for applicant

..... for respondent

