



Ochieng v Edge and Motion Group Limited (Miscellaneous Application E116 of 2022) [2023] KEELRC 1041 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 1041 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E116 OF 2022**

**L NDOLO, J
APRIL 27, 2023**

BETWEEN

KINSLEY JAMES OCHIENG APPLICANT

AND

EDGE AND MOTION GROUP LIMITED RESPONDENT

RULING

1. By a Miscellaneous Application dated 3rd August 2022, the Applicant seeks leave to file a Memorandum of Appeal out of time.
2. The Application is supported by the Applicant's own affidavit and is based on the following grounds:
 - a. On 7th June 2022, CMELRC No 940: Kingsley James Ochieng v Edge and Motion Group Limited came up for judgment;
 - b. Judgment was read on the aforesaid date, which was to the effect that the Applicant's claim was dismissed with costs;
 - c. On the same date, the Applicant's Advocate informed the Applicant of the delivery of judgment and the Applicant proceeded to instruct Counsel to get a copy of the judgment;
 - d. A copy of the judgment was availed to the Applicant and upon its perusal, the Applicant noted that the learned Magistrate had erroneously dismissed the Applicant's claim on the ground that the Applicant had failed to prove his case to the required standard of proof;
 - e. The Applicant then instructed Counsel to prefer an appeal. However, the thirty (30) days within which a Memorandum of Appeal ought to have been filed have lapsed;
 - f. The failure to appeal within time was not deliberate but was due to circumstances beyond the Applicant's control being that:



- i. A copy of the judgment was availed to Counsel, after payment of the requisite fees, past the 30-day period required by law;
 - ii. The Applicant received a copy of the judgment and by the time he gave instructions to appeal, the 30-day timeline had already lapsed;
 - iii. Had the judgment been received immediately by the Applicant, then it would have been appealed against timeously.
 - g. The grant of leave will avail the Applicant an opportunity to exhaust the statutorily provided mechanism of dispute resolution;
 - h. It is in the interest of justice that the order sought is granted to enable the Applicant to exercise his right of appeal;
 - i. The Applicant has an arguable appeal that raises salient and pertinent issues of law and fact;
 - j. The Respondent will not suffer any prejudice if leave is granted to the Applicant to appeal out of time;
 - k. The Application has been made timeously, in good faith and with due promptitude upon perusal of the judgment;
 - l. Unless the Application is allowed, the Applicant will be denied an opportunity to pursue an appeal and will be exposed to loss and prejudice.
3. The Respondent opposes the Application by a replying affidavit sworn by its Managing Partner, Eliahoo Fred on 1st February 2023.
 4. Eliahoo points out that the Application, though dated 3rd August 2022, was not served on the Respondent's Advocates until November 2022.
 5. The Respondent maintains that the Applicant has not provided any substantial and/or sufficient cause for the delay in filing his appeal.
 6. The Respondent asks for security for costs in the event the Court is inclined to grant the Applicant's plea for extension of time.
 7. According to Eliahoo, the intended appeal has a very low chance of success.
 8. In urging his Application, the Applicant relies on Section 79G of the *Civil Procedure Act* which provides as follows;

79G. 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.
 9. In his affidavit in support of the Application, the Applicant deposes that he received a copy of the judgment on 18th July 2022, upon which he instructed his Counsel to lodge an appeal.
 10. It would appear therefore that by the time the Applicant received a copy of the judgment he intends to challenge on appeal, the 30-day window for filing an appeal had already closed.



11. On the strength of Section 79G of the *Civil Procedure Act* and taking into account the fairly short period of delay, I will exercise discretion in favour of the Applicant.
12. The Application dated 3rd August 2022 is therefore allowed. The Applicant is directed to file and serve a Record of Appeal within the next thirty (30) days from the date of this ruling.
13. The costs of the Application will be costs in the appeal.
14. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF APRIL 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Ochieng for the Applicant

Mr. Mureithi for the Respondent

