



**Teachers Service Commission v Suji (Miscellaneous Civil Application  
1 of 2023) [2023] KEELRC 943 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 943 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION 1 OF 2023**

**CN BAARI, J  
APRIL 27, 2023**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPLICANT**

**AND**

**ERICK ODHIAMBO SUJI ..... RESPONDENT**

**RULING**

1. Before court is the applicant's notice of motion application dated February 10, 2023, brought pursuant to articles 25, 159, and 165 (6) & (7) of the Constitution, sections 1B, 3A, 75, 78 and 79G of the Civil Procedure Act and order 42 rule 6(1) and 8 of the Civil Procedure Rules and section 90 of the Employment Act. The applicant seeks orders that: -
  - i. Spent.
  - ii. There be a stay of proceedings and/or any action in respect to Siaya ELRC cause No 1 of 2023, pending hearing and determination of the intended appeal against the ruling of the subordinate court delivered in Siaya CMCC Misc civil case No E015 of 2022 on December 15, 2022.
  - iii. The honourable court be pleased to grant leave to the applicant to file an appeal out of time against the orders of Hon M.O Wambani delivered on December 15, 2022 in Siaya CMCC Misc civil case No E015 of 2022.
  - iv. The honourable court do vacate and/or set aside the proceedings and ruling of the Hon M.O Wambani (CM) of December 15, 2022 as the same are a nullity and a contravention of the law.
  - v. The costs of this application be provided for.
2. The application is supported by grounds on the face and the affidavit of Edwiiq Musundi, sworn on February 10, 2023. The crux of the application is that the respondent filed Siaya CMCC Misc civil



case No E015 of 2022, which was heard and determined ex parte and that the applicant only got to know of the adverse orders on January 17, 2023, when it was served with the said orders, and by which time, the period for lodging an appeal had lapsed.

3. The applicant avers it is aggrieved by the entire orders of the lower court and intends to lodge an appeal before this court. The Applicant further avers that it has brought this application without undue delay and in good faith
4. The applicant states that the learned magistrate acted without jurisdiction as the matter in dispute was statutorily time barred and that the suit was determined on wrong principles of law.
5. The respondent opposed the application *vide* a reply filed on March 3, 2023.
6. Parties urged the application orally on March 13, 2023, where they reiterated their pleadings.

### **Determination**

7. I have considered the application, the grounds in support, those in opposition and the respective parties' oral submissions. The issue for determination is whether the applicant is entitled to the orders sought.
8. Section 6 of the [Civil Procedure Act](#) guides the court in granting of orders of stay of proceedings pending appeal. Stay of proceedings is granted where an issue is directly and substantially in issue in proceedings between the same parties.
9. In [Global Tours & Travels Limited](#); Nairobi HC Winding Up Cause No 43 of 2000, the court held as follows;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ..... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

10. The applicant's intended appeal is in respect of the jurisdiction of the trial court premised on section 90 of the [Employment Act](#) on time limitation.
11. The Court of Appeal in [Thuita Mwangi v Kenya Airways Ltd](#) [2003] eKLR spelt out grounds to guide courts in exercising discretion to enlarge time as:
  - i) the period of delay;
  - ii) the reason for the delay;
  - iii) the arguability of the appeal;
  - iv) the degree of prejudice which would be suffered by the respondent if the extension is granted;
  - v) the importance of compliance with time limits to the particular litigation or issue; and



- vi) the effect if any on the administration of justice or public interest, if any is involved.
12. The orders subject of the intended appeal were issued on December 15, 2022, while the instant application was filed on February 12, 2023, the orders having been served upon the applicant on January 17, 2023. In view of the grounds for the delay coupled with the reasons for the delay, I conclude that the delay is not inordinate.
13. Further, it is settled that for a court to exercise discretion to allow a party to lodge an appeal out of time, the intended appeal must be one that is arguable. In *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, the court held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.
14. The respondent did not show that he served the applicant with the suit subject of the orders sought to be appealed against until January 17, 2023. It is therefore not the applicant's fault that it did not lodge its appeal within the legal time lines.
15. In the premise, I find and hold that the applicant's motion has merit and is allowed as follows: -
- i. That an order be and is hereby issued staying proceedings and/or any action in respect to Siaya ELRC cause No. 1 of 2023, pending hearing and determination of the intended appeal against the ruling of the subordinate court delivered in Siaya CMCC Misc civil case No E015 of 2022 on December 15, 2022.
  - ii. That the applicant be and is hereby granted leave to file an appeal out of time against the orders of Hon M.O Wambani delivered on December 15, 2022, in Siaya CMCC Misc civil case No E015 of 2022, and to do so not later than 14 days of this order.
  - iii. The costs of the application shall abide the appeal.
16. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27<sup>TH</sup> DAY OF APRIL, 2023.**

**C. N. BAARI**

**JUDGE**

**Appearance:**

Ms. Musundi Present for the Applicant

N/A for the Respondent

**Ms. Christine Omolo-C/A**

