



REPUBLIC OF KENYA



**Radar Limited v Kipkurui (Appeal E180 of 2022)
[2023] KEELRC 912 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 912 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E180 OF 2022
MN NDUMA, J
APRIL 13, 2023**

BETWEEN

RADAR LIMITED APPELLANT

AND

STEPHEN METET KIPKURUI RESPONDENT

RULING

1. In the Notice of Motion application dated October 17, 2022, the applicant seeks an order in the following terms: -
 1. Spent
 2. That the firm of M/s Chomba and Mbugua Advocates be granted leave to come on record for the applicant/appellant.
 3. That the court do grant stay of execution of the judgment and decree delivered by the Hon. Principal Magistrate A.N. Makau (Ms) on June 23, 2022 pending hearing and determination of intended appeal.
 4. That the court do grant the applicant leave to file appeal out of time and deem the Memorandum of Appeal dated October 15, 2022 as being properly on record and duly filed within time.
 5. Costs of the application to abide the outcome of the appeal.
6. The application is premised on grounds set out on the face of the notice of motion and the supporting affidavit of the applicant sworn to by Berly Odhiambo, the Human Resource officer of the applicant.
2. The applicant states that she is dissatisfied with the judgment of the Court. That the decretal sum is in the sum of 2,201,235.73 and the applicant will suffer substantial loss if stay of execution is not granted.



- That the delay in filing the appeal was not intentional but was caused by the previous advocates on record who failed to follow the applicant's instructions to file the appeal and became uncooperative.
3. That the respondent has commenced execution of judgment and decree by taking out warrant of attachment dated October 7, 2022 and issuing a proclamation notice dated October 13, 2022. That the applicant is ready and willing to provide security as directed by the court.
 4. The application is opposed vide a replying affidavit of Willis Wataba Nanjendo, advocates for the respondent who deposed that the judgment was delivered on June 23, 2022. That the respondent gave the applicant an allowance of 30 days within which to take any necessary steps including filing an appeal.
 5. That the applicant seeks to leave to file appeal out of time and the application ought to be miscellaneous application and not a substantive appeal and the impression that memorandum of appeal has been filed is erroneous.
 6. That the delay to file an appeal was intentional since the applicant was at all material times aware of the judgment. That it is not true that previous advocates frustrated the filing of appeals since the new advocates (Chomba & Mbugua Advocates) filed a notice of change of advocates dated June 29, 2022, six days after the judgment of the court was delivered.
 7. That the applicants are not candid and reasons given for the delay are false and not deserving of consideration by the court.
 8. That having come on record, the new advocates failed to seek for a copy of the judgment and typed proceedings and failed to lodge a memorandum of appeal within 30 days having come on record only after six (6) days. That the outgoing advocate has not been served with this application so as to answer the allegations made against him.
 9. That the intended appeal has no prospects of success.
 10. That leave ought not be granted and the applicant be allowed to enjoy fruits of his judgment. That stay of execution ought not be granted since no security has been offered for the due execution of judgment and the decree.
 11. That the delay in filing the appeal is inordinate and this application is also visited by inordinate delay.
 12. The parties filed written submission which the court has carefully considered together with the depositions by the parties.
 13. The court has considered the issue of extension of time as set out by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR as follows:-

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi v Charles Gichina Mwangi* – Civil Application No Nair 26 of 2004, this Court held:-

“It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be



appropriate to re-emphasise this principle by referring to the decision in *Mwangi v Kenya Airways Limited* [2003] KLR 486 in which this Court stated:” Over the years, the Court has, or course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* - Civil Application No. Nai 225 of 1997 (unreported), the Court expressed itself thus:-

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

14. In the present case, judgment was delivered on June 23, 2022. This application for extension of time was filed on October 18, 2022 almost four (4) months from the date the judgment was delivered and only after warrants of attachment were issued and proclamation made.
15. The genuineness of the reasons given by the applicant for the delay is key in unlocking the exercise of discretion by the court to grant extension of time to file appeal. In the present matter, the applicant has clearly given a false narrative, by blaming the previous advocates on record for having caused the delay. The present advocates applied for change of advocates only six (6) days after judgment was delivered. The present advocate and the respondent have not offered any reason why they both failed to file the appeal on time. It would appear that the delay which is inordinate, was deliberate since the respondent and the current advocates were aware of the judgment in good time.
16. The applicant did not take any steps to file memorandum of appeal; nor to get certified copies of judgment and the court proceedings.
17. The applicant has failed to satisfy the criteria set by the Supreme Court and Court of Appeal, for grant of extension of time. This court therefore finds that this application lacks merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 13TH DAY OF APRIL, 2023.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Mbugua for Applicant

Mr. Wataba for Respondent

Ekale – Court Assistant

