



REPUBLIC OF KENYA



KENYA LAW
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**Kavuu v Badar Hardware Limited (Appeal E025 of 2023)
[2023] KEELRC 1193 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1193 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E025 OF 2023**

**M MBARÚ, J
MAY 18, 2023**

BETWEEN

LEONARD KIOKO KAVUU APPELLANT

AND

BADAR HARDWARE LIMITED RESPONDENT

RULING

1. The appellant/applicant filed his application dated 16th March, 2023 under the provisions of Article 159 of the *Constitution*, Section 8 of the *Employment and Labour Relations Court (Procedure) Rules* 2010 [2016] and Order 37 rule 6(1) of the *Civil Procedure Rules* and seeking for orders of leave to extend time limited for filing an appeal out of time against the judgment of the Principal Magistrate D.O. Mbeja delivered on 30th November, 2022 in Mombasa ELRC Cause No. E285 of 2021.
2. The application is supported by the Supporting Affidavit of the appellant and on the grounds that the trial court entered judgment on 30th November, 2022 and being aggrieved, he wishes to file his appeal which is arguable as the lower court made findings that he was liable in causing an accident and leading to termination of his employment which was not the case and had the totality of evidence been well analysed this would have been apparent that he suffered unfair termination of employment.
3. The right of appeal is lawful and the application seeking for time extension to file the appeal out of time is not inordinate. Upon delivery of judgment, the applicant went into shock and travelled to his home county in Machakos, he instructed his advocates to apply for certified copies of the proceedings and judgment and due to closing of offices in December, 2022; when judgment was delivered the applicant relocated back to his home County Machakos and then he got ill. The delay in filing an appeal is excusable and in the interests of justice, time should be enlarged to file appeal out of time.
4. In his affidavit, the applicant avers that he has a draft Memorandum of Appeal attached to his affidavit setting out the grounds upon which his appeal shall be premised on and once allowed more time, he



shall file and serve the respondent immediately. The lapse in time should not be applied to prejudice his appeal.

5. In reply, the respondent filed the Replying Affidavit of Omar Ahmed Yussuf the managing director and who avers that the application is filed 4 months after judgment was delivered on 30th November, 2022 and there are no justified reasons given for the delay in filing any appeal within the legal timelines. An appeal need not be filed by the appellant because he is at liberty to instruct his advocates to do so and on the averments that the applicant instructed his advocates to file an appeal in December, 2022 but failed to attend, he cannot blame the respondent. The averments that he relocated to Machakos County and then got ill is not supported by any evidence.

6. Mr Yussuf also avers that an applicant seeking time extension to file an appeal out of time is invoking the discretion of the court and must give sufficient cause as to why such an order should be given. Granted time to appeal upon judgment on 30th November, 2022 the applicant did nothing and the lapse of 4 months is inordinate and the application if allowed will prejudice the respondent and should be dismissed with costs.

Both parties attended and made oral submission.

7. Article 159 of the Constitution should not be applied as the panacea to address all wrongs, maladies and inaction by a party. Justice should be administered to all parties without undue regard to technicalities but where timeframes to appeal against a judgment of the trial court is set in statute, rules of the court or other practice directions, non-adherence to the same cannot be justified under the provisions of Article 159 of the Constitution.

8. Indeed, under Rule 8 of the ELRC (Procedure) Rules, 2016 a party is allowed 30 days right of appeal pursuant to Section 17 of the ELRC Act, 2011.

9. A party who fails to file an appeal within the allowed time is allowed to plead for more time but must bear in mind that such application is only granted where there exists good cause and within the provisions of Rule 8 of the ELRC Rules, 2016 read together with Section 79G of the Civil Procedure Act, which stipulates that;

Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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 good and sufficient cause for not filing the appeal.

10. A good and sufficient cause for not filing appeal within time must be demonstrated.

11. The applicant has explained the delay to file the appeal was occasioned by the facts that after judgment was delivered by the lower court on 30th November, 2022 he relocated to his home County in Machakos and that he got unwell. His advocate submitted that the applicant called around December, 2022 seeking to lodge an appeal but the law firm was closing for the season and only resumed operations after January, 2023 and by the time the matter was addressed, the time to file an appeal had lapsed.

12. Where indeed the applicant instructed his advocates in time and in December, 2022 but due to counsel operational matters failed to act in good time, and when a decision was taken to act time had lapsed, the respondent should not be prejudiced because such inaction is not good and sufficient cause for not filing the appeal within time. The applicant as the right-holder and in need to file an appeal, he ought to have secured such right immediately and where his advocate failed to address, he had the option of



moving the court in person or through any other available advocate. Justice cuts both ways. It is not sufficient that upon delivery of judgement judgment on 30th November, 2022 offices closed for the season and did not reopen until late January, 2023. Were such matters to be taken and allowed to take root and hold, there would be no need for Rule 8 of the *ELRC Rules*, 2016 or Section 79G of the *Civil Procedure Act*. Such rules exist for good reasons and have served society, legal practice and litigants for good measure and adherence to timelines is a lawful and procedural requirement. Without good cause and reason being demonstrated, the instant application must fail.

13. Accordingly, application dated 16th March, 2023 is hereby dismissed. Costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... **and**

