



**Kimathi v Mutea & another (Miscellaneous Cause E184 of 2022)
[2023] KEELRC 1212 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1212 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CAUSE E184 OF 2022**

**AN MWAURE, J
MAY 12, 2023**

BETWEEN

DAVID KIMATHI CLAIMANT

AND

ERNEST GIKUNDI MUTEA & ANOTHER RESPONDENT

RULING

1. The applicant filed an applicant vide notice of motion dated November 3, 2022.
2. The prayers are as follows:-
 1. spent
 2. that this honourable court be pleased to order a stay of execution of the judgment and order delivered on the July 15, 2022 in the Chief Magistrates trial court, in Employment and Labour Relations case number E2268 of 2019, *Ernest Gikundi Mutea & Another vs David Kimathi* pending the hearing an determination of this application inter partes.
 3. That Messrs Nairobi connection services auctioneers, any other firm of auctioneers, or whomsoever, be restrained by way of an order of stay of execution of the judgment in MCELRC No 2268 of 2019 delivered on July 15, 2022 from attaching, repossessing, advertising for sale the motor vehicles registration numbers KAZ 436V and KCH 618K pending the hearing of this application inter partes.
 4. That this honorable court be pleased to enlarge time within which the applicant should file his appeal and to be allowed to file his memorandum of appeal out of time and as the court shall direct in terms of the draft attached to this applications supporting affidavit.
 5. That following the filing of the memorandum of appeal and/or the substantive appeal this honorable court be pleased to order a stay of execution of the judgment delivered on the



July 15, 2022 in the chief magistrate's trial court, Employment And Labour Relations Case Number E2268 of 2029, *Ernest Gikundi Mutea & Another vs David Kimathi* pending the hearing and determination of the appeal filed in this court as the court shall direct.

6. That costs of this application be provided.
3. The applicant is supported by the grounds thereto and the supporting affidavit of David Kimathi.
4. The deponent averred that on July 15, 2022 the Magistrate's Court in Milimani Employment and Labour Relations Court Case Number 2268 of 2016 entered judgment against her.
5. That he instructed his advocates to file an appeal and the copy of memorandum of appeal is attached hereto
6. He says on October 28, 2022 some unknown persons approached him and informed him they were auctioneers on instructions of the respondent. They attached two of his motor vehicles KZA 436V and KCH 618K (warrants of attachment are annexed hereto).
7. The applicant further depones the motor vehicles did not belong to him and the owner stands to lose if they are attached.
8. Further he says that his advocate filed his suit in the wrong court by error i.e at Milimani Commercial Court but now wishes to file in the proper court and so prays for enlargement of time to file the same out of time.
9. He therefore prays for the orders sought or else this appeal will be rendered nugatory.

Respondents replying affidavit

10. The respondent's filed a replying affidavit dated November 23, 2022 deponed by Willis Wetaba on behalf of the claimants. The claimant's/respondent aver that the applicant has no chances of succeeding since they never produced records of their employees and so cannot dispute the awards of the special damages.
11. They also say that they relied on section 48 of the *Labour Relations Act* on minimum wages and the respondents did not dispute the same.
12. They also says that the respondent has not demonstrated the loss they are likely to suffer and execution being a legal process does not amount to less.
13. He also have not addressed the issue of security.
14. The urge the court to give conditions should it be inclined to grant the application.
15. They also pray that applicant pays auctioneers costs.
16. In conclusion the respondent prays the application be dismissed with costs.
17. The court has considered the respective submission by the applicant dated the February 6, 2022 and the respondents submissions dated the February 17, 2023.



Analysis and determination

18. The court will consider the law pertaining to extension of time and various authorities including *Paul Wanjohi Mathenge vs Duncan Gichane Mathenge* (2013) eKLR where court held:

“The discretion in rule 4 is unfettered, but it has to be exercised judicially not on whim, sympathy or caprice”.
19. In the case of *Mwangi vs Kenya Airways Ltd* (2003) eKLR the court held that “it is 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 extension of time are first the length of the delay, the reason for delay and thirdly (possibly) the chances of appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if application is granted.
20. The court looking at the tenet of granting enlargement of time has considered that the applicant filed an appeal on October 31, 2022 albeit in the wrong court. Judgment had been delivered on July 11, 2022. On discovering the mistake of filing the application in the wrong court the application and memorandum of appeal were withdrawn on November 3, 2022 and same day this application was filed in the employment and labour relations court.
21. The applicant made a serious mistake but attempted to rectify it as soon as was practical.
22. Then again the court noted that the draft memorandum of appeal annexed hereto seems to have some plausible triable issues and especially considering the assets attached by Nairobi Connection services auctioneers seem to belong to other persons other than the respondents. The court would be loath to lock out a party out of the corridors of justice so long as they have a case with triable issues.
23. The court finds it is just and reasonable to allow the applicant to file his appeal out of time and secondly to grant a stay of execution of the judgment and order delivered on July 15, 2022 in the chief magistrate’s court -employment and labour relations case number E2268 of 2019 pending the hearing and determination of the appeal to be filed herein.
24. The Messrs. Nairobi connection services auctioneers are restrained by way of an order of execution of the judgment in MCELRC 2268 of 2019 from attaching, repossessing and advertising sale of motor vehicle number KAZ 436V and KCH 618K pending the hearing of the appeal.
25. The above orders are given on condition the applicant deposits 50% of the decretal sum in an interest earning account in the names of the respective advocates within 40 days from this date. In default these orders will be vacated and execution will proceed forthwith.
26. The memorandum of appeal to be filed within 45 days herewith as well and costs of this application to be in the intended appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF MAY 2023.

ANNA NGIBUINI MWAURE

JUDGE

ORDER



In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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

ANNA NGIBUINI MWAURE

JUDGE

