



**Auto Continetal Limited v Chome (Employment and Labour Relations
Appeal E053 of 2022) [2023] KEELRC 1577 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1577 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E053 OF 2022**

**AK NZEI, J
JUNE 22, 2023**

BETWEEN

AUTO CONTINETAL LIMITED APPELLANT

AND

FRANKLIN NGALA CHOME RESPONDENT

*(Being an appeal from the judgment of Hon. D. Mbeja, - PM at Mombasa
in CM- ELR Case No. 722 of 2019 delivered on 13th February 2022)*

RULING

1. The Application before me is the Appellant's Notice of Motion dated January 12, 2023. The Appellant/Applicant seeks the following orders:-
 - a. That this Court be pleased to stay execution of the order issued on October 26, 2022 pending the hearing and determination of the application.
 - b. That the Court be pleased to review and/or set aside the orders made on the October 26, 2022.
 - c. That this Court do extend the time for the Appellant to file and serve a Record of Appeal.
 - d. That the Court do direct the Deputy Registrar to assist the Appellant in securing the typed and certified copies of proceedings and judgment in respect of Mombasa ELRC No 722 of 2019 (Frankline Ngala Chome -vs- Auto Continental Ltd).
 - e. That costs be provided for.
2. The application is expressed to be brought under Order 45 Rules 1 and 2, and Order 50 Rule 1 of the [Civil Procedure Rules](#) and Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#), and is supported by an affidavit of Stephen Jumbale Advocate sworn on January 12, 2023. It is deponed in the said affidavit:-



- a. That judgment in the Lower Court suit, Mombasa ELR Case No 722 of 2019 (Frankline Ngala Chome -vs- Auto Continental Ltd), was delivered on February 18, 2022 without notice and in the absence of the Appellant and/or its Advocates.
 - b. That the Appellant sought and obtained leave of the Court to file the present appeal out of time on condition that it deposited the entire decretal sum of Kshs 1,621,497 into a joint interest earning account in the names of the parties' respective advocates.
 - c. That keen to have his appeal heard, the Appellant deposited Kshs 1,621,497 into a joint interest earning account, and that this secured the path to its appeal being heard and determined on merit.
 - d. That after filing the appeal, securing typed and certified copies of proceedings of the primary suit became a challenge as the Registry kept on saying that the file could not be traced. That the Court file had gone missing previously on two occasions, leading to creation of skeleton files, and ought to be available.
 - e. That on October 26, 2022, this Court ordered the Appellant to file a Record of Appeal within 60 days, failing which the appeal would stand dismissed.
 - f. That 60 days are bound to lapse on January 18, 2023, and all the Appellant's efforts seem to hit a dead end, hence the need to review the order dated October 26, 2022 in the interest of justice.
 - g. That prior to the said order, deliberate and diligent efforts had been made to secure typed and certified proceedings of the primary suit from the Court's Registry by visiting the Registry and writing letters. That letters written include those dated April 5, 2022, October 5, 2022, October 13, 2022, September 20, 2022 and October 31, 2022; which unfortunately did not elicit any written response.
 - h. That it is the Court's duty to supply typed and certified copies, hence the Respondent's inability to file and serve a record of appeal; and the necessity for this Court to intervene and assist the Appellant in getting the documents.
3. The application is opposed by the Respondent vide a replying affidavit of Ernest Mokaya Advocate sworn on February 10, 2023. It is stated in the said affidavit:-
- a. That the Subordinate Court delivered its judgment on February 18, 2022.
 - b. That the Appellant was granted leave to appeal out of time on July 20, 2022, but only a memorandum of appeal was filed.
 - c. That the Appellant had only 30 days from July 20, 2022 to file her record of appeal in accordance with Section 79G of the [Civil Procedure Act](#).
 - d. That on October 26, 2022, this Court granted the Appellant a further sixty days to file a record of appeal.
 - e. That the Appellant never copied a single letter to the Respondent's Counsel while requesting for typed and certified proceedings, hence Counsel for the Respondent cannot tell when the first or the last letter was drawn requesting for proceedings.
 - f. that the Respondent is greatly prejudiced as he is unable to enjoy the fruits of the Court's judgment.



- g. That this Court has been gracious enough to the Appellant, and should not grant any further extension of time to file his appeal, as the Appellant has not made anything out of the time generously awarded to him so far.
 - h. That a fair hearing is a guarantee under the Constitution of Kenya 2010, but procedural and statutory guidelines such as timelines for filing appeals apply, and are construed as part of judicial fairness.
 - i. That the application herein is brought late in the day and no material has been presented to the Court to warrant stay of proceedings or review of the orders issued on October 26, 2022; and stay cannot be granted in the proceedings herein as no record of appeal has been filed.
 - j. That no material has been placed on record to convince the Court that any mechanism has been put in place by the Appellant to fast track the appeal filed, and the application is without supporting material and should be dismissed.
 - k. That the application lacks bona fides, and is an attempt to further delay conclusion of the matter.
4. Both parties filed written submissions pursuant to the Court's directions in that regard, which I have considered.
 5. Rule 8(4) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides as follows:-
 - ' 8 (4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.
 - Provided that where copies of proceedings are not filed with the memorandum of appeal, the appellant shall file such copies as soon as possible and within a reasonable time.'
 6. In the present case, all that the Appellant filed on July 22, 2022 was a memorandum of appeal. Even a copy of the Order/Ruling granting the Appellant leave to appeal out of time was not filed together with the memorandum of appeal, and has to date not been placed on this Court's record. This makes it impossible for this Court to tell, at this stage, whether the appeal was filed within time pursuant to leave being granted. The only indication in this regard is the Respondent's Advocate's deposition that leave was granted on July 20, 2022.
 7. I have noted from the documents annexed to the supporting affidavit of Stephen Jumbale Advocate that the first letter that the Appellant wrote to the lower/trial Court, dated April 5, 2022 and presented to the said Court on the same date, was requesting for a copy of the said Court's judgment to enable the said Advocates to advise their client (the Appellant). The said letter did not request for or even mention typed and certified copies of proceedings.
 8. Although subsequent letters exhibited by the Appellant/Applicant herein are on the subject of typed and certified copies of the lower Court's proceedings, there is no indication in those letters that the applicable Court charges/fees were ever paid to facilitate typing and certification of the proceedings. No Court receipt in that regard has been exhibited. Further, the exhibited letters have no mention of a missing Court file/record.
 9. The single issue for determination in the application herein is whether the orders sought are merited.



10. The Appellant/Applicant seeks review and/or setting aside of this Court's order dated October 26, 2022, and thereupon extension of the time ordered for the Appellant to file and serve a record of appeal.
11. On October 26, 2022, this Court made the following orders:-
 - (1) The Appellant is granted 60 days to file and to serve a record of appeal, failing which the appeal shall stand dismissed.
 - (2) Mention on January 16, 2023'.
12. The foregoing orders were made after earlier orders of September 22, 2022 giving the Appellant 30 days to file and serve a record of appeal. It is worthy noting that the Appellant never mentioned to this Court that the lower Court's record was missing.
13. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:

' 33. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

 - (a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) On account of some mistake or error apparent on the face of the record;
 - (c) If the judgment or ruling requires clarification; or
 - (d) For any other sufficient reason.'
14. The Appellant has not demonstrated that it has discovered any new and important matter that was not in the Appellant's knowledge when the order dated October 26, 2022 was made, and has not demonstrated the existence of an error that is apparent on the face of the record. Further, the Appellant has not demonstrated that the order dated October 26, 2022 requires clarification, and has not demonstrated the existence of a sufficient reason why the said order should be reviewed and set aside. The Appellant has failed to meet the basic threshold set by the law for grant of orders of review.
15. On whether this Court can extend time for filing of the record of appeal out of the time ordered, I return that this Court has twice extended time for filing of documents/record of appeal that ought to have been filed together with the memorandum of appeal under Rule 8(4) of this Court's Rules, which is reproduced in paragraph 5 of this Ruling.
16. It is to be noted that the appeal herein is said to have been filed pursuant to leave by the Court to file an appeal out of time. It would be expected that the Appellant placed both the lower Court's proceedings and judgment before the Court, before leave to appeal out of time could be granted. The Appellant/Applicant appears to be inviting this Court to assist it in securing the typed and certified copies of the lower Court's proceedings. This clearly means that the Appellant is asking for an indefinite period of time to obtain the lower Court's proceedings and to file a record of appeal.



17. The Appellant has not demonstrated the existence of a valid reason why this Court should interfere with the time-bound and self executing order of this Court dated October 26, 2022. The application lacks merit, and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND JUNE 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Jumbale for Appellant

Mr. Mokaya for Respondent

