



**P.N. Mashru Limited v Kahiga (Miscellaneous Application
E017 of 2023) [2023] KEELRC 1590 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1590 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E017 OF 2023**

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

BETWEEN

P.N. MASHRU LIMITED APPLICANT

AND

ANTHONY WACHIRA KAHIGA RESPONDENT

RULING

1. The application before me is the Applicant's Notice of Motion dated April 18, 2023, expressed to be brought under Section 79G of the Civil Procedure Act, and Section 12(3) of the Employment and Labour Relations Court Act. The Applicant seeks the following orders at this stage:-
 - a) that there be a stay of execution of the judgment delivered on June 8, 2021 and any consequent decree thereon pending the hearing and determination of the intended appeal before the Employment and Labour Relations Court.
 - b) that the Applicant be granted leave to appeal out of time and to file a Memorandum of Appeal as against the ruling of and order given on February 15, 2023 by Hon Lesootia Saitabau- PM.
 - c) That costs of the application be provided for.
2. The application sets out on its face grounds upon which it is brought, which are replicated, but in detail, in the affidavit of Francis Mulili sworn on April 18, 2021 in support of the application. It is deponed in the said affidavit:-
 - a) that judgment in Mombasa ELR Case No 993 of 2019 (*Anthony Wachira vs PN Mashru Limited*) was delivered on 8/6/2021 whereby the claimant in the matter was awarded ksh 1,518,913 as compensation for unfair termination.
 - b) that the Applicant's previous Advocates on record filed a Notice of Motion dated 12/7/2021 seeking, inter-alia, setting aside of the judgment entered against the Applicant



and unconditional leave to defend the suit, but the trial Court, Hon Lesootia Saitabau PM, dismissed the application *vide* a Ruling delivered on 15/2/2023; stating that the Applicant had been served with summons to enter appearance and that its draft defence did not raise triable issues to merit the orders sought.

- c) that subsequently, the Applicant's movable properties were proclaimed.
 - d) that the Applicant is aggrieved by the Ruling delivered on 15/2/2023 as the Court did not conclusively address the issue of service of summons to enter appearance upon the Applicant, and failed to note that there was no proper service of the summons to enter appearance on the Applicant.
 - e) that the Court failed to consider the Applicant's draft memorandum of Response which raises triable issues, including:-
 - (i) whether the Respondent was employed by the Applicant in April 2018 on a fixed term contract which expired on 15/5/2019.
 - (ii) whether the Respondent was terminated on 31/5/2019 as alleged by him.
 - (iii) whether the Respondent was entitled to the reliefs sought.
 - (f) that the Applicant is aggrieved by the Ruling delivered on 15/2/2023 and intends to appeal therefrom.
 - (g) that the Applicant became aware of the Ruling dated 15/2/2023 after it was served with a proclamation on 13/4/2023, and that the Ruling delivered on 15/2/2023 had never been relayed to the Applicant.
 - (h) that had the Applicant been advised of the Ruling delivered on 15/2/2023, it would have issued instructions for lodging of an appeal within the timelines prescribed by law.
 - (i) that it is in the interest of justice that leave be granted and the appeal be heard on its merits.
 - (j) that the Applicant is ready and willing to deposit the decretal sum together with Auctioneers charges a sum of ksh 2,243,069, in Court and /or in a joint interest earning account within timelines to be set by the Court for the grant of an order of stay of execution.
3. The application is opposed by the Respondent *vide* a replying affidavit sworn by him on May 5, 2023 and filed herein. It is deponed in the said affidavit:-
- (a) that summons to enter appearance were served on the Applicant, and that on being satisfied that service had been effected, the Court directed that hearing proceeds by way of formal proof, and delivered a judgment on 8/6/2021.
 - (b) that notice of judgment was duly served on the Applicant by registered post, and a decree was extracted on 29/6/2021, whereupon the Applicant filed an application seeking to set aside the judgment.
 - (c) that the Respondent opposed the application, and a Ruling thereon was delivered on 15/2/2023.
 - (d) that the Applicant went to sleep, and only woke up on April 13, 2023 after execution of the decree commenced.



- (e) that the Appellant has not appealed against the Ruling, and no reasonable grounds have been proposed for the intention to file an appeal out of time.
4. Parties filed written submissions for and against the application pursuant to the Court's directions in that regard, which I have considered.
5. Rule 8(1) & (2) of the [Employment and Labour Relations Court \(Procedure\) Rules](#) 2016 provides as follows:-

“ 8.

- (1) Where any written law provides for an appeal to the Court, an Appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.
- (2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.”

6. Section 79G on the other hand provides that every appeal from the subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding such period of time which the lower Court may certify as having been requisite for the preparation and delivery to the Applicant of a copy of the decree or order. By dint of Article 162(2) (a) the [Constitution](#) of Kenya 2010, this Court is a Court of equal status with the High Court. Appeals to this Court must, therefore, be filed within thirty days from the date of the decree or order appealed against.

7. The proviso to Section 79G states as follows:-

“Provided that 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 in time.”

8. It was stated in *Feroz Begum Quareshi & Another v Maganbhai Patel & Others* [1964] EA 633 that there is no difference between “good cause and sufficient cause”. It was held in *Dalphine Parry v Murray Alexander Carson*[1963] EA 633 that although “sufficient cause” should receive liberal interpretation so as to advance substantial justice when no negligence, inaction or want of bonafides is imputed to the Appellant, its interpretation must be in accordance with Judicial principles.

9. In *First American Bank Of Kenya Ltd vs Gulab P Shah & 2 Others*[2002] 1EA 65, the Court set out factors to be considered in deciding whether or not to grant an application for extension of time as follows:

- “ a) The explanation if any, for the delay.
- b) The merits of the contemplated action, whether the matter is arguable or deserving a day in Court, or whether it is a frivolous one which would only result in delay of the course of justice.
- c) Whether or not the Respondent can be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.”



10. In the present case, the Applicant stated that on learning of the *ex-parte* judgment against it, it applied for setting aside of the judgment, but the Court dismissed the application on 15/2/2023. That the Applicant was not made aware of the Ruling by his previous Advocates, and only learned about it after its properties were proclaimed in execution of the lower Court's decree. It is to be noted that the Applicant's application was dismissed on 15/2/2023 and proclamation of its movable properties occurred on 13/4/2023. The delay involved was not inordinate/unreasonable. I am satisfied with the explanation given by the Applicant.
11. In *Utalii Transport Company Limited & 3 Others v Nic Bank Limited & Another* [2014] eKLR, the Court stated as follows:-
- “Whereas there is no precise measure to what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case, depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate, and therefore; inexcusable. On applying the Court's mind on the delay, caution is advised to Courts not to take the word “inordinate” in its dictionary meaning, but in the sense of excessive as compared to normality.....”
12. In the present case, a delay of about 59 days is, in my view, not inordinate in the circumstances of the case. A delay of 59 days, which has been explained, cannot lead the Court into making a conclusion that the Applicant was not a vigilant litigant who never followed up on the progress of his case with his Advocates.
13. On the merits of the intended appeal, I have seen the draft memorandum of appeal annexed to the affidavit sworn in support of the Applicant's application, and the same cannot be said to be frivolous. The intended appeal is arguable and worth a day in Court.
14. The Applicant has offered to deposit, either in Court or in an interest earning bank account held by Counsel for both parties, the entire decretal sum and Auctioneers charges as a condition for grant of the orders sought in the application. Such a deposit will no doubt secure the Respondent's interest, should the intended appeal fail.
15. Should stay of execution of the lower Court's decree be ordered pending hearing and determination of the intended appeal”. The Court of Appeal (Madan JA) stated as follows in *Butt v Rent Restriction Tribunal* [1979] eKLR:-
- “if there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay that would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be better remedy, will become available to the Applicant at the conclusion of the proceedings.
- It is in the discretion of the Court to grant or refuse stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general rule ought to exercise its best discretion in away so as to prevent the appeal, if successful, from being nugatory, per Brett LJ in *Wilson v Church* (No 2) 12 Ch D[1870] 454 at P459. In the same case, Colton LJ, said at P.458: -



“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court has to see that the appeal if successful, is not nugatory.”

16. In the present case, there is in existence a money decree. The decretal sum is quite substantial. If stay is not ordered and execution proceeds, the appeal will be rendered nugatory. The Respondent has not demonstrated, or even alleged, that if paid he would be able to refund the decretal sum to the Applicant if the intended appeal succeeds. In *BIIY v National Union Of Nurses* [2022] KEERC 3864 (KLR) 27 July 2022) (Ruling), the Court stated as follows:-

“

“31. The above principle was further stated in *ABN AMro Bank v Lemond Foods Limited* Civil Application No 15 OF 2000 where the Court of Appeal held that:

“the legal burden still remains on the Applicant but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum if it is paid unto him and the appeal was to succeed. The evidential burden would be very easy for the Respondent to discharge. He can simply show what assets he has such as land, cash in bank and so on.”

17. It is my finding that the Applicant’s Notice of Motion dated April 18, 2023 is merited. The same is hereby allowed in the following terms:-
- a) the Applicant is hereby granted leave to appeal against the Lower Court’s Ruling/Orders given/delivered on February 15, 2023 in Mombasa CM ELR Case No 993 of 2019 (Anthony Wachira Kahiga PN Mashru Limited) out of time.
 - b) there will be a stay of execution of the Lower Court’s decree in Mombasa CM ELR Case No 993 of 2019 (*Anthony Wachira Kahiga v PN Mashru Limited*) pending hearing and determination of the intended appeal, on condition that the entire decretal sum amounting to ksh 1,977,869.04 is deposited in this Court within twenty one (21) days from the date of this Ruling. The Applicant shall furnish the Respondent with a copy of the deposit slip and/or receipt once the deposit is made.
 - c) the Applicant shall pay the stated Auctioneer’s charges of ksh 265,200 within twenty one (21) days from the date of this Ruling.
 - d) costs of the application are awarded to the Respondent.

18. Orders accordingly.

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:

Miss Akonga for Applicant

Mr. Mokaya for Respondent

