



**Dharmadhikhari v Professional Media Africa Limited (Cause  
622 of 2017) [2023] KEELRC 1836 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1836 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 622 OF 2017  
BOM MANANI, J  
JULY 31, 2023**

**BETWEEN**

**NIRAJ DHARMADHIKHARI ..... CLAIMANT**

**AND**

**PROFESSIONAL MEDIA AFRICA LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. The parties to the current action were in an employment relationship until the close of March 2017 when the relation came to a close. By this court's judgment delivered on January 30, 2023, the court found that the Respondent's/Applicant's decision to close the relation was irregular and therefore unlawful. Consequently the court ordered the Respondent/Applicant to compensate the Claimant under various heads of damages as more particularly set out in the decision.
2. According to the court record, the judgment was delivered on January 30, 2023 in the absence of counsel for the Respondent/Applicant. This is notwithstanding that the date of delivery of judgment had been pronounced on December 14, 2022 in the presence of counsel for both parties.
3. On April 22, 2023, the matter was placed before me under certificate of urgency. The application sought to be heard under certificate of urgency was prepared in February 2023. It is dated February 20, 2023. This means that although the application was prepared in February 2023, it was only placed before me two months down the line. This development appears to cast aspersions on the bona fides of the respondent/applicant in the current endeavour. This notwithstanding, the application was eventually heard by parties presenting written submissions and making oral highlights.
4. The respondent/applicant seeks for the following two primary orders: -
  - a. That this court grants it leave to appeal the court's decision of January 30, 2023.



- b. That the court stays execution of its judgment pending the hearing and determination of the intended appeal.
5. The respondent/applicant submits that its lawyers did not notify it about the court's decision. And hence the failure to lodge its appeal in time. The date of announcing the decision having been fixed in the presence of counsel for both parties, the respondent/applicant, in law, presumed to have been aware of it.
6. The Respondent/Applicant does not explain why it did not follow up on the details of the decision after the date of delivery of the decision which was within the respondent/applicant's knowledge. It is surprising that a party that is aware of the appointed date for delivery of a decision that affects him will elect to just sit back and await his lawyer's communication about the decision.
7. That said, I acknowledge the respondent's/applicant's right to have the appellate court have a second look at the matter. section 7 of the [Appellate Jurisdiction Act](#) provides as follows: -
- “The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”
8. From the above provision, it is clear to me that the power to extend time to file a Notice of Appeal is discretionary. However, and as has always been indicated, exercise of discretionary power must not be whimsical. The court has to be guided by some known principles.
9. In [Karny Zabarya & another v Shalom Levi](#) C Appl No 80 of 2018, the Court of Appeal set out some of the parameters that ought to be considered when deciding whether to grant an application for leave to appeal. The court observed as follows:-
- Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully ventilate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be borne in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal.”
10. Although this was a Court of Appeal decision, it offers me a useful guide on what I must consider whilst addressing the application before me. I will therefore borrow from it.
11. The respondent/applicant has alluded to the fact that its lawyers did not communicate the results of the case to it. Even though the Respondent/Applicant had a duty to follow up on the matter, I am hesitant to punish the party for the failure of the lawyers representing it to discharge their professional mandate on time. I also remain cognizant of the need to permit a party to fully ventilate his case including on appeal even as I recognize the right of the decree holder to enjoy the fruits of his efforts. It is a balancing act.



12. In the premises, I am minded to allow the respondent/applicant the opportunity to lodge the appeal out of time. The respondent/applicant is granted an extension of time to lodge the Notice of Appeal within fourteen (14) days of this decision. The said notice to be served within the timelines that are set in law.
13. Regarding the prayer for stay of execution pending appeal, I am required to consider the parameters that are set under Order 42 Rule 6 of the *Civil Procedure Rules*. The rules require that an applicant for an order for stay of execution pending appeal satisfies the following conditions: -
  - a. The court must be convinced that substantial loss may be occasioned if the orders sought are not granted.
  - b. The application for stay of execution must have been filed without unreasonable delay.
  - c. The court must be satisfied that there is security for the performance of the decree.
14. I have considered the foregoing requirements. The trial record indicates that after the claimant left employment, he ventured into his own business. Whilst I do not question his means, it is not clear to the court whether the said business is generating sufficient profits to enable the Claimant refund the amounts in the decree should the appeal succeed after the money has been paid out to him. The absence of this evidence should bring to bear on the court's mind the danger that execution of the decree could result in substantial loss to the respondent/applicant in the event that the intended appeal succeeds.
15. Second, I note that the respondent/applicant has offered to deposit the entire amount in the decree into a joint interest earning account in the names of counsel for the parties as security for performance of the court's decree. I think that this offer meets the requirement for provision of security for performance of the decree that is the subject of appeal.
16. Finally, although there was delay in presenting the application, I will perhaps not blame it entirely on the Respondent/Applicant considering the explanation that was given that the Respondent's/Applicant's lawyers failed to advise the Respondent/Applicant in time about the results of the case to enable the Respondent/Applicant make an informed decision on the way forward. In the premises, I am hesitant to invoke the apparent delay in filing the motion to refuse the prayer for stay of execution.

### **Determination**

17. The upshot is that I allow the application dated February 20, 2023 in the following terms: -
  - a. Leave is granted to the respondent/applicant to appeal out of time and to lodge the Notice of Appeal within 14 days of today.
  - b. The Notice of Appeal shall be served in accordance with the timelines set by law.
  - c. Meanwhile, an order for stay of execution of the court's decree arising from its judgment delivered on January 30, 2023 is hereby granted subject to the respondent/applicant depositing the entire amount in the decree in a joint interest earning account in the names of counsel for the parties at an agreed financial institution within 21 days of today.
  - d. In default of any of the above conditions, the leave to appeal hereby granted shall be deemed as having lapsed and the claimant shall be at liberty to execute the court's decree.

**DATED, SIGNED AND DELIVERED ON THE 31<sup>ST</sup> DAY OF JULY, 2023**

**B. O. M. MANANI**



## **JUDGE**

In the presence of:

..... for the Claimant/Respondent

.....for the Respondent/Applicant

## **ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

