



**Ong'ere v Babito General Contractors (Miscellaneous Case E009 of 2023)  
[2023] KEELRC 2363 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2363 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
MISCELLANEOUS CASE E009 OF 2023**

**AK NZEI, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**HERMAN MTUNDO ONG'ERE ..... APPLICANT**

**AND**

**BABITO GENERAL CONTRACTORS ..... RESPONDENT**

**RULING**

1. Before me is the Applicant's Notice of Motion dated February 14, 2023 and expressed to be brought under Section 12 of the [Employment and Labour Relations Court Act](#), Section 95 of the [Civil Procedure Act](#) and Order 50 Rule 6 of the [civil procedure Rules](#). The Applicant seeks the following orders:-
  - a. that the Court be pleased to grant leave to the Applicant to file (an) appeal out of time against the judgment delivered by Honourable G. Kiage, Senior Resident Magistrate on January 6, 2023 in Mombasa MC ELR Case No. E290 of 2021.
  - b. that costs of the application do abide the outcome of the intended appeal.
2. The application sets out on its face grounds upon which it is founded, and is premised on the Applicant's supporting affidavit sworn on February 14, 2023. It is deponed in the said affidavit:-
  - a. that on November 17, 2022, the trial Court directed that it would on December 9, 2022 deliver judgment in Mombasa MC ELR Case No. 290 of 2021 Harman Mutundo Onge'ere - vs- Babito General Contractors & Supplies Ltd); but the case, though not on the said Court's cause list for the said date, was adjourned to December 13, 2022.
  - b. that the judgment was subsequently delivered on January 6, 2023, without notice and in the absence of all the parties and their advocates.



- c. that the Applicant's Advocate did not become aware of the delivery of the judgment until January 23, 2023 when she learnt of it from the judiciary portal; but could not peruse the Court file as the same was still in the Court's chambers.
  - d. that it was not until February 14, 2023 that the Applicant's Advocate learnt that the delivered judgment was not in the Applicant's favour.
  - e. that the Applicant was dissatisfied with the said judgment and intends to appeal therefrom, but the time for filing an appeal has already lapsed hence the application.
  - f. that delay in filing the appeal was not caused by a mistake on the part of the Applicant, and that the intended appeal has high chances of succeeding.
  - g. that the delay is not inordinate, and the Applicant, who is ready to abide by any conditions and terms on security that the Court may deem fit, stands to suffer irreparable loss if the application is not allowed.
3. A copy of a draft memorandum of appeal, raising some four grounds of appeal, was annexed to the supporting affidavit. The Applicant did not however, annex a copy of the judgment (decree) intended to be appealed against to his said supporting affidavit. The Court has, therefore, not seen the impugned judgment.
  4. The application is opposed by the Respondent vide (a statement of) grounds of opposition dated February 22, 2023. The Respondent stated in the said grounds of opposition that the application seeks orders that are untenable, is vexatious, bad in law, fatally defective, grossly incompetent, and is an abuse of this Court's process.
  5. As already stated in this Ruling, the impugned judgment/decree has not been exhibited/placed before this Court, and the Court cannot grant leave to appeal against a judgment that it has not seen. The application is thus hollow, and there is nothing for me to consider. I do agree with the Respondent that the application is incompetent, and the same is thereby struck off with no order as to costs.
  6. The Applicant may, however, file a proper application if he so wishes, within thirty days of this Ruling.
  7. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> SEPTEMBER 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 Respondent fees.

**AGNES KITIKU NZEI**

**JUDGE**

