



**Fontana Limited v Okumu (Miscellaneous Application E026 of 2023)
[2023] KEELRC 2240 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2240 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E026 OF 2023
HS WASILWA, J
SEPTEMBER 28, 2023**

BETWEEN

FONTANA LIMITED INTENDED APPELLANT

AND

WYCLIFFE OKUMU RESPONDENT

RULING

1. Before this court for determination is the applicant/intended appellant's notice of motion dated May 23, 2023, filed pursuant to order 12 rule 7, order 22 rule 22, order 42 rule 4 &6, order 51 rule 1 & 3 of the *Civil Procedure Rules* 2010, section 3, 3A, 79G, and 95 of the *Civil Procedure Act* and all other enabling provisions of the law, seeking for the following orders; -
 1. Spent.
 2. That this Honourable Court be pleased to grant leave to file the intended Appeal out of time on the judgement and all other consequential Orders of the Honourable Court in CM Civil Suit No. 57 of 2020 by Honourable Orege K. I. issued on January 20, 2023.
 3. That pending hearing and determination of this Application, the Honourable Court be pleased to issue Ex parte Interim Orders staying execution of Judgement against the respondent/Applicant issued on January 20, 2023 in CM Civil suit no. 57 of 2020 issued by Honourable Orege K.L.
 4. The Honourable Court be pleased to grant stay of execution of the Judgement and all other consequential orders of the Honourable Court issued on January 20, 2023, pending filling, hearing and determination of the Intended Appeal.
 5. That the application be heard inter partes on such dates and time as this Honourable Court may direct.



6. Costs of this Application be provided for.
2. The Applicant stated that the trial court entered judgement against the Applicant herein on the January 20, 2023, awarding some prayers in the claim with costs and interest. The Court on delivering its judgement granted 30 days stay of execution.
3. The Applicant herein engaged the Respondent, decree holder, on how the said judgement will be satisfied pending an appeal and made proposal which were not amenable to the Respondent and the negotiations collapsed.
4. At the time the negotiations were collapsing the stay which was granted by the trial court had lapsed on February 20, 2023. Furthermore, that the Respondent's Advocates was bereaved delaying the matter further. Soon thereafter, the Respondent fell out with its Advocates rendering their negotiations efforts futile.
5. Due to the foregoing, the Applicant ran out of time to Appeal but it is still desirous of Appealing the decision of the trial Court, necessitating the leave sought in this Application.
6. The Applicant is apprehensive that the Respondent will execute the judgement to their detriment. That unless the leave to appeal is granted together with stay of execution, the Intended Appeal will be rendered mute.
7. It is stated that the delay in filling the Appeal on time was caused by the negotiations undertaken by the parties, which the Applicant believed could have yielded positive outcome.
8. The Applicant stated that the Appeal is arguable because the trial Court applied the wrong principle in making the award for compensation.
9. The Application herein is further supported by the undated Affidavit sworn by Seth Angatia, the Applicant's Human Resource and Administration Manager. The affidavit reiterated the grounds of the Application and in it annexed a copy of the letter dated 15th May, 2023 on the alleged negotiation and the Draft memorandum of Appeal marked as annexure 1 and 2 respectively.
10. The Application is opposed by the Respondent who filed a replying affidavit sworn on the 30th May, 2023. In the said affidavit the Respondent stated that the application hereon is vexatious, scandalous and an abuse of Court process, only aimed at delaying him from enjoying fruits of its judgement.
11. He stated that the affidavit in support of the motion is fatally defective because it has not indicated the name of the person swearing and the date in which the affidavit was sworn as such its inadmissible and in violation of the *Oaths and Statutory Declaration Act*.
12. He maintained that the Applicant was represented by an advocate in the trial Court and tendered all the required evidence and therefore the decision by the Court was done in consideration of the facts and the law and thus was sound.
13. He stated that he has never engaged in any deliberations with the Applicant on settlement of the issue and the allegations that the Respondent was aware that an appeal was to be filed is not true.
14. He avers that judgement in this case was delivered on 20th January, 2023, where the Court granted the Applicant 30 days stay of execution, which period was sufficient to file an Appeal if any. That the Applicant failed to file its appeal within the 30 days on allegations that negotiations were ongoing which reason is not supported by any evidence. He maintained that the reason given for delay in filling the Appeal is not justified.



15. He stated that they only received one letter dated 15th May, 2023 drawn by Agricultural Employer Association, seeking for negotiation but that he was not amenable to any negotiation because the award was granted by a competent court of law.
16. He stated that the delay in filling this Application is inordinate and prayed for the same to be disallowed and execution proceedings to go on. He added that he has not been paid his terminal dues since 2018 and continue to suffer.
17. He urged this Court to dismiss the Application with costs.
18. Direction were taken for the application to be disposed of by written submissions with the Applicant filling on the 4th July, 2023 and the Respondent filed on 6th July, 2023.

Applicant's Submissions.

19. The Applicant submitted on two issues; whether the Appeal herein should be admitted out of time and whether the prayers sought should issues.
20. On the first issue, it was submitted that rule 8 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides for time within which an Appeal can be lodged. Also that section 79G of the *Civil Procedure Act* provides for Appeal from the Magistrates Courts to be lodged at the High Court within 30 days with a window on when Appeal can be admitted out of the said 30 days. For the said Appeal to be admitted out of time sufficient cause must be shown by the Applicant and this reason is decided on a case to case basis. Some of these reason were listed by the Supreme Court in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR where the court stated as follows;-

“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as: “the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”



21. The Applicant also relied on the Court of Appeal decision in [*Charles Karanja Kiiru V Charles Gitbinji Muigwa*](#) [2017] eKLR where the Court held that

“Whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek, JJ.A in *Edith Gichugu Koine vs. Stephen Njagi Thoithi* [2014] eKLR, thus; “Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

There is also a duty now imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court... Be that as it may, this Court in *Kamlesh Mansukhalal Damji Pattni vs. Director of Public Prosecutions & 3 others* [2015] eKLR articulated that-“It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution... For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”

22. From the above decisions, the Applicant submitted that there are four conditions that must be met before an extension of time Application is allowed. These conditions are; The period for the delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted and whether the matter raises issue for public importance.
23. On the length of delay, the Applicant submitted that the judgement in the trial Court was delivered on 20th January, 2023, while the Application before Court was filed on 24th May, 2023, which in their opinion is not inordinate delay, because the parties were engaged in modalities on settling the claim and the fact that the Respondent’s advocates was bereaved and was not in good terms with the client delayed the matter further. Additionally, that the Applicant’s advocates wrote the letter of 15.5.2023, indicating the undisputed claim, which they are willing to settle. Further that the Applicant being a legal entity took time to sit as a board and make a decision to have the matter appealed, which period took away from the time which the Appeal was to be made.
24. To support the argument that the delay was not inordinate, they relied on the case [*of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet*](#)[2018]eKLR where the Court held that;-

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”



25. Accordingly, it was submitted that the Respondent was not in a position to control the factors that led to delay in filling this Application and subsequent Appeal. On that basis, he urged this Court to consider the reasons given and allow the Application as prayed.
26. On whether any prejudice will be visited on the Respondent, it was submitted on the negative and stated that the Applicant is willing to pay the Respondent all his dues and interest in the event the Appeal is not successful, therefore no loss will be visited on the Respondent. Additionally, that the respondent is willing to pay the undisputed sum as per their letter of 15th May, 2023 to alleviate any suffering the respondent and allow it escalate the other issue to Appeal.
27. The Applicant submitted that having stated the reason for the delay and justified its application, section 79G of the *Civil Procedure Act*, empowers this Court to issue such orders as sought in the Application herein and reiterated by the court of Appeal in *Charles Karanja* case(Supra)that held that:-

“Having expressed ourselves as herein above the other issue that falls for consideration is whether the appeal filed out of time on 24th October, 2014 could be deemed as being properly on record. There is a plethora of authorities from the High Court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule, J. In the *Gerald M’limbine vs. Joseph Kangangi* [2009] e KLR stated that-

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out the stipulated period. To do so would actually be an abuse of the court’s process under Section 79B”.

Similarly, Aburili, J. in *Martha Wambui vs. Irene Wanjiru Mwangi & another* [2015] eKLR held,

“In my view, the use of the term “admitted” connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time ...”

28. The Applicant submitted that the trial Court made errors in its assessment of facts and the law to arrive at the determination subject of this Application and the Intended Appeal. He urged this Court to allow the Application and relook on the issues raised.

Respondent’s Submissions.

29. The Respondent submitted on whether the Application is merited and whether the orders sought should issue.
30. The Respondent began by cited the case of *Thuita Murangi v Kenya Airways* [2003] eklr where the Court held relied on the case of *Leo Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi*, (Civil Application No. Nai.255 of 1997) (unreported), the Court expressed itself thus:-

“It is now 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 an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the



appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.

31. It was submitted that the timeline for filing Appeal from the subordinate Court to this Court is 30 days as provided for under section 79G of the Civil Procedure Act and rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016. He argued that enlargement of time can also be allowed based on conditions alluded to in various case laws including the case of Edith Gichungu Kione v Stephen Njagi Thoitbi [2014] eKLR where Odek JJA, held that:-

“There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

32. On period of delay, the Respondent submitted that 6 months have passed from the time judgement in the trial court was delivered till when the Application herein was filed, which time is inordinate, considering that the Applicant was aware of the Court’s decision.

33. On the reason for delay, the Respondent denied engaging in any negotiations and submitted that they only received the letter of 15th May, 2023 under protest because, they were not ready to negotiate with the Applicant on a judgement that was rendered by a court of law. Also that the Allegations that the Respondent herein fell out with the Advocates and the fact that the Advocate was bereaved cannot be a reason to delay filing Appeal especially that the bereaved advocate was acting for the Respondent not the Applicant herein. In any event that the advocate was bereaved on 10th March, 2023, long after the lapse of the time within which the Applicant ought to have filed its Appeal. To support their argument, the Respondent relied on the case of Utalii Transport Company Limited & 3 others v NIC Bank Limited and another [2014] eKLR where the Court held that; -

“Whereas there is no precise measure of 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 court’s mind on the delay, caution is advised for courts not to take the word “inordinate” in its dictionary meaning, but in the sense of excessive as compared to normality.”

34. On the ground that the Applicant’s Board of directors took time to arrive at a decision to file an Appeal, the Respondent submitted that it is not justified in light of the fact that they took 6 months before the Application herein was filed.

35. On the prospects of the Appeal succeeding, it was submitted that the Appeal does not raise any arguable issues. Further that he sought for his dues from the time he was dismissed, then escalated to the labour office who directed the Applicant to pay but they refused. That he engaged his advocate who sent a demand letter to no avail, leading to the filling of the case at the trial court, all agitating for payment of his terminal dues which remain unpaid to date, therefore the allegations for negotiations after



judgment is not genuine and is merely aimed at frustrating the Respondent from enjoying fruits of its judgement.

36. On the prayer for stay of execution, it was submitted that the prayers sought is overtaken by events because the decretal sum together with costs has already been paid in full by the Applicant vide its cheque number 010317 of Kshs 744,004.80. Therefore, that there is no money owing to the Respondent as such the stay of execution prayer cannot issue.
37. In conclusion, the Respondent submitted that the Applicant does not deserve the prayers sought and prayed for the Application to be dismissed with costs.
38. I have examined the averments and submissions of the parties herein.
39. The applicants seek stay of execution and leave to file an appeal out of time.
40. In consideration of the grounds upon which the application is based upon, I note that the judgment being sought to be appealed against was rendered on 20th January 2023.
41. This application was filed on 23rd May 2023, some four months later. The rules of the court however envisage that any appeal to be filed should be filed within 30 days.
42. That notwithstanding the applicants have indicated that the delay in filing the appeal was occasioned by the parties attempt to settle the matter which attempt ultimately failed.
43. In support of this position, the applicant attached a letter dated 15/5/23 referring to previous attempts to resolve the matter in lieu of an appeal. This is evidence that the parties had previously attempted to resolve the matter which may have led to the delay in filing an appeal.
44. The delay notwithstanding, it is apparent that the applicants desire to file an appeal citing an award given contrary to law.
45. This indeed is a triable matter which should be considered by this court.
46. Issues of leave to file an appeal and stay can be granted discretionary.
47. I exercise my discretion accordingly in view of the reasons given for failing to file an appeal within time and grant orders of stay pending appeal on condition that the applicants pays to the respondents kshs.105,126/= as offered by them vide their letter dated 15/5/23 within 14 days.
48. The appeal should also be filed within 14 days.
49. In default execution may proceed.
50. Costs in the course.

RULING DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Wachira for Applicant – present

Opar for Respondent – present

Court Assistant – Fred

