



**Thoya v Delfy Secutity Limited (Miscellaneous Application
E036 of 2023) [2023] KEELRC 2691 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2691 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E036 OF 2023
M MBARŪ, J
OCTOBER 30, 2023**

BETWEEN

ALBERT IHA THOYA APPLICANT

AND

DELFY SECUTITY LIMITED RESPONDENT

RULING

1. The applicant filed application dated 4 September 2023 under the provisions of Section 3A, 63(e) and 79G of the *Civil Procedure Act* and seeking for orders that;

Pending the hearing and determination of this application, there be stay of execution of the judgment in Mombasa MCELRC Cause no E085 of 2020 delivered on 28/7/2023.

His court be pleased to grant leave to the applicant to lodge/or file an appeal out of time.

Costs of this applicant be in the cause.
2. The application is supported by the affidavit of the applicant and on the grounds that judgment of the lower court was delivered on 28 July 2020 in the absence of the parties and when the matter came up on 2 February 2023 to confirm filing of submissions, the court was not sitting and placed for mention on 14 March 2023.
3. On 3 May 2023 parties attended court and were informed that judgment would be delivered on 27 July 2023 which was not the case and parties only became aware that judgment had been delivered on 29 August 2023 and despite making enquiries, the file was not accessible and when parties got the judgment, time to file appeal had lapsed. The applicant is desirous of filing appeal to challenge the judgment and seek leave to extend time within which to file the appeal.
4. In response, the respondent filed the Replying Affidavit of Shuebi Ali Sheikh Amin a director of the respondent company and that this application is in abuse of court process and should be dismissed.



5. The applicant is seeking for orders of stay of execution but the suit was dismissed without costs. The leave sought to appeal out of time is not explained and had a duty to track his case and he cannot be found to state that he was not aware of the judgment. the appeal is not without merit as the fact of the applicant abandoning his work was found to be gross misconduct.
6. Under Rule 8 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 an appellant is allowed 30 days to lodge an appeal after the decision sought to be heard.
7. On the judgment delivered on 27 July 2023, the applicant had 30 days to lodge an appeal.
8. The applicant in his Amended Supporting Affidavit at paragraphs (6) and (7) aver that on 1 August 2023 his advocate received letter from the respondent's advocate asking to know where judgment was delivered on 28 July 2023 but this could not be confirmed and it was not until 29 August 2023 that the court informed the parties that judgment had been delivered.
9. By this date, time to lodge an appeal had lapsed. This application was filed soon thereafter as required under Section 79G of the *Civil Procedure Act* that;

Every appeal from a 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 from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an 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.

10. The time lapse is not inordinate. Having the judgment delivered in the absence of the parties, upon learning of the same, the applicant moved expeditiously with his application as herein done save, the judgment having dismissed his claim without costs, to issue and order of stay of execution of the judgement delivered on 28 July 2023 will not serve any purpose.
11. The orders sought being discretionary and at the instance of the applicant, the orders seeking that costs be in the cause taken into account, the respondent shall be paid ksh 5,000 all inclusive.
12. Accordingly, application dated 4 September 2023 is allowed to the extent that leave to file appeal out of time is hereby extended by 14 days only and failure to utilise, the leave shall automatically lapse. The applicant shall pay the respondent ksh 5,000 all inclusive.

DELIVERED IN OPEN COURT AT MOMBASA THIS 30TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... **and**

