



**Makini Schools Limited v Omutakha & 5 others (Cause E072 of 2023)
[2023] KEELRC 2619 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2619 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E072 OF 2023
NJ ABUODHA, J
OCTOBER 27, 2023**

BETWEEN

MAKINI SCHOOLS LIMITED APPELLANT

AND

JOSEPH SHALINGA OMUTAKHA 1ST RESPONDENT

HILARY ULUMA WANDIRI 2ND RESPONDENT

DENIS BARASA OKUMU 3RD RESPONDENT

DOUGLAS KISIA MUNIARE 4TH RESPONDENT

CHRISTINE OKACHA KHATALI 5TH RESPONDENT

VINCENT JUMA MAKOKHA 6TH RESPONDENT

RULING

1. The Appellant/Applicant filed application dated 18th May, 2023 on 19th May, 2023 seeking for orders to enlarge time within which the Applicant is to file and serve a memorandum of Appeal and a record of Appeal; an order of stay of execution of Decree from the Judgment and Decree of Honourable E.Wanjala (P.M) delivered on 26th August,2022 and subsequent orders issued by Hon. R.L Musiega on 27th March, 2023 in Milimani CMELR 1939 of 2019-Consolidated with CMELR 1934, 1935, 1936, 1937 and 1938 of 2019 pending hearing and determination of the application and the appeal to the Court of Appeal herein and the Appellant be ordered to pay the Respondents the sum of Kshs 88,243 and to deposit I court Kshs 400,000 being a portion of the balance of the decretal amount as security pending the hearing and determination of the appeal.
2. The application was supported by the Affidavit of Horace Mthombeni the Regional Managing Director of the Applicant herein who averred that on 26th August,2022 Honourable E. Wanjala(PM) delivered a judgment in favour of the Respondent and the court ordered for a report by the labour



office regarding the redundancy dues payable to the Respondents herein which report was adopted in the final orders by Hon.R.L Musiega on 27th March 2023.

3. The Applicant averred that it was aggrieved and dissatisfied with the said orders of 26th August,2022 and 27th March,2023 and its counsel on 27th March,2023 sought for stay orders pending filing of an appeal which was granted for 30 days pending appeal and that at the time of delivery of judgment and final orders herein the Applicant had been undergoing a restructuring exercise that necessitated a change in its board and management which is the same time the deponent took charge and leadership of the Appellant school where the outgoing leaders failed to handover and communicate the judgment to himself or new Human Resource Manager.
4. The Applicant averred that he learnt of the judgment on 8th May,2023 when Appellant's counsel forwarded an email to himself and the new HRM from the Respondent's counsel threatening to commence execution proceedings and the failure to and the failure to hand resulted into lapse of 30 days prescribed for appeal which to him was not inordinate.
5. The Applicant further averred that it is ready to effect payment to the Respondents in the sum of Kshs 883,243 being the redundancy dues which is rightfully due to the Respondents but aggrieved by the decision that the redundancy carried out by the Applicant was unfair and unlawful and the consequent decision to award the Respondents the sum of Kshs 1,781,196.
6. The Applicant further averred that the intended appeal is highly meritorious and with good chances of success and annexed a draft Memorandum of Appeal and the appeal will be rendered nugatory if this application is not allowed and the Applicant is willing and ready to comply with any conditions the court may impose in issuing the orders sought of stay including any orders for deposit of security.
7. The Applicant averred that the Respondent does not stand to suffer any prejudice if the orders sought are granted and if any it can be compensated by award of costs and interests.
8. In reply the Respondents filed their reply sworn on 7th June, 2023 and opposed the Applicant's Application and averred that the Applicant appeals a decision of court delivered on 26th August, 2022 barely 9 months after which judgment was read in presence of the counsel for the Applicant which judgment dealt with the entire issues save for computations of redundancy dues by labour officer which amounts were contained in the Applicant's documents in their Supplementary list and bundle of documents of 24th June,2021.
9. The Respondents averred that the Applicant does not dispute the computed amounts but the compensation awarded to the Respondents on 26th August,2022 and the computation did not deter them from filing an appeal if aggrieved which time lapsed on 26th September,2022 with the Applicant not demonstrating reasons for the delay in filing the Appeal which appeal has so far not been filed hence the application herein is fatally defective.
10. On the Issue of restructuring raised by the Applicant that the earlier board did not bring this to their attention the Respondents averred that the deponent who is the regional Managing Director was not the only employee of the Applicant capable of making decisions of appeal and he did not state when he took over and when the earlier board ceased to exist; the counsel who informed him of the judgment on 8th May 2023 have been on record since inception; deponent was aware of adoption of computation and stay orders granted thereafter to its counsel and no explanation from previous board why they did not opt for an appeal while now the new board prefers an appeal which is an abuse of court process.
11. The Respondents averred that on 27th March,2023 the adoption of the terminal dues was made in the presence of counsels for the Applicant where they were granted stay until 26th April,2023 and after



lapse of the said period the Applicant declined to settle the decree or even take any action in the matter and that being awoken up by counsels correspondences it shows the appeal is an afterthought and there was inordinate delay on the part of the Applicant who have even refused to pay the undisputed amounts to the Respondents hence denying the Respondents right to enjoy their judgment.

12. Mr. Andiwo for the applicant submitted that the criteria to be followed by the Court in exercising its discretion in extending time for appeal was stated in the case of *Nicholas Kiptoo arap Salat v Independent Electoral Boundaries Commission & 7 others* [2013] eKLR the Supreme Court stated that.

“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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; whether there will be prejudice suffered by the respondent if the extension is granted; whether the application has been brought without undue delay; and whether uncertain case like election petition, public interest should be a consideration.”
13. Counsel further submitted that a duty is now imposed on the Court under sections 1A and B of the *Civil Procedure Act* to ensure that the factors stated in the above case are consonant with the overriding objective of civil litigation, that is to say, just, expeditious, proportionate and affordable resolution of disputes before the Court. According to Counsel, although the judgment sought to be appealed from was delivered on 26th August, 2022, it is not disputed that the final orders regarding the suit were issued on 27th March, 2023. The applicant filed the application on 18th May, 2023 which was 52 days from the date of the final orders of the Court. In any event, should the Court adopt the 26th August, 2022 as the date of the final judgement, the application would then have been filed within 8 months, which counsel submitted was not an unreasonable delay. In this respect Counsel relied on the case of *Elijah Murithi & another v Peter Christopher Kaboro Mbogo* [2020] eKLR where extension of time was allowed after a delay of six months which the court therein did not consider inordinate.
14. Counsel further submitted that the reason given for the delay in filing the appeal was the restructuring process that was being undertaken at the applicant’s business and change in the management of the applicant’s school. The applicant deponed that although the judgment had been forwarded to the school, the same was never brought to the attention of the new management and that they only learnt of the same when the respondent threatened to execute. In this regard counsel relied on the case of *Music Copyright Society of Kenya & 2 others v Richard Cheruiyot Tanui & 2 others* [2017] eKLR. Counsel further submitted that it was not disputed that the case herein was as a result of a redundancy carried out by the applicants through letters dated 19th August, 2021. It was also not disputed that the applicant underwent a change of ownership in 2019 and since then the applicant has been undergoing various restructuring exercises including changes in the Board and shareholding of the applicant school. The applicant had therefore satisfactorily explained the reasons for the delay in lodging the memorandum of appeal.
15. As regards chances of success of the intended appeal, Counsel submitted that the draft memorandum of appeal particularized arguable issues one which was whether the trial Court misinterpreted the orders issued by Lady Justice Maureen Onyango in ELRC 491 of 2019 *Julius Lulle Kakelo & 42 others v Makini School* and whether the Court disregarded the laid down principles in section 49(4) of the *Employment Act* by awarding maximum compensation to the respondents who had worked for the applicant for a very short period of time. Counsel further submitted that the applicant had shown its



willingness to honour the court's judgment by paying the undisputed amount in the judgment and readiness to deposit the decretal sum in Court.

16. On whether the Court should grant a stay, Counsel relied on Order 42 rule 6 of the [Civil Procedure Rules](#) and stated that whereas it was within the discretion of the Court to grant a stay, the principles to be considered were set out in the case of [Butt v Rent Restriction Tribunal](#) [1982] KLR 417 where the Court stated that:
- “i) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 - ii) The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 - iii) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 - iv) The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 - v) The court in exercising its powers under Order XLI rule 4(2)(b) of the [Civil Procedure Rules](#), can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
17. On the issue of substantial loss, counsel submitted that should the orders of stay not granted, the applicant would suffer substantial loss as each of the claimants testified that they did not have any gainful employment consequently if they proceeded to execute the judgment, they would not be in a position to refund the decretal sum in the event the applicant succeeds on appeal. In this regard counsel relied on the case of [National Industrial Credit Bank Limited v Aquinas Francis Wasike & another](#) [2006] eKLR.
18. Counsel for the respondent Ms. Obiero submitted that it was not open to the Court to exercise its discretion under the proviso to section 79(G) of the [Civil Procedure Act](#) except where there is in existence appeal filed before the Court. In this regard counsel relied on the case of [James Njai Gitbui v Equity Bank Limited](#) [2020] eKLR and submitted that in this particular case the applicant though seeking extension of time, had not yet filed the appeal. The application according to Counsel was therefore an abuse of the Court process and ought to be dismissed. On the issue of delay, counsel submitted that the judgment was delivered on 26th August, 2022 in the presence of the Counsel for the applicant. The judgment dealt with all the issues including the award, interest and costs. The only item which was remitted to the Labour Officer was the actual redundancy dues payable to the respondents upon declaration of redundancy. The redundancy dues were therefore not at large but already computed and delivered to the Court by the applicant when they filed their supplementary bundle of documents on 24th June, 2021 way before the judgment was delivered.



19. On the delay caused due to the restructuring of the applicant, counsel submitted that the period of restructuring occurred in 2019 way before the judgment of the Court was delivered. The argument that the applicant could not file an appeal on time owing to the restructuring was not convincing and candid. Further the deponent avoided indicating the exact date he took over the management of the school. According Ms. Obiero, the applicant’s counsel on record has remained the same during the delivery of the impugned judgment and actively participated in all post judgment computations at the labour office.
20. On the issue of stay of execution, counsel wondered how the court could order the stay of execution of an appeal which had not been filed. According to Counsel for the respondent, the invocation of the jurisdiction of the Court under Order 42 rule 6 must be preceded by filing of an appeal or compliance with the procedure for filing of an appeal. In this regard Counsel relied on the case of *Rosalindi Wanjiku Macharia v James Kiingati Kimani (suing as the legal representative of the Estate of Martin Muiruri)* [2017] eKLR. Counsel further submitted that the jurisdiction of the Court under Order 42 rule 6 is fettered by three conditions namely, establishment of sufficient cause, satisfaction of substantial loss and furnishing of security. Further the application must be made without unreasonable delay. Counsel submitted that the application for stay was not made within reasonable time as the judgment sought to be appealed was delivered on 26th August, 2022 and the applicant chose neither to file an appeal nor make appropriate application for stay pending the determination of the appeal. The respondent stands to suffer prejudice if the orders sought are granted as they will be kept away from the fruits of their judgment.
21. Section 79G of the *Civil Procedure Act* stipulates 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”.
22. Order 50(6) of the *Civil Procedure Rules* further provides that:
- “Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
- Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.
23. A reading of the proviso to section 79(G) together with Order 50 rule 6 yields the inevitable interpretation that enlargement of time is matter purely within the discretion the Court seized of the application. It however important that any judicial discretion must not be exercised capriciously or whimsically on the contrary it must be exercised judiciously and in the interest of justice. In cases where the court is faced with an application for enlargement of time, the court ought to take into consideration the reason for the delay, the delay must not be inordinate and any possible prejudice that may result to the person affected by the enlargement of time.



24. It was not contested that the judgment sought to be appealed from was delivered on 26th August, 2022 and parties referred to the Labour Officer to compute the quantum of the redundancy payable to each of the claimants. This was done and the final orders issued on 27th March, 2023. The applicant filed the present application on 18th May, 2023 which as counsel for applicant rightly stated was some 52 days from the date of the final orders of the Court. Counsel for the respondent however contended that the judgment of the Court was delivered on 26th August, 2022 hence the application herein was mounted some 8 months later which according to the respondent was inordinately late.
25. The decision of the Court that was delivered on 26th August, 2022 was not final. The labour officer was tasked to compute the quantum of redundancy payable to the respondents. Whereas the applicant had prior to the direction of the Court computed the redundancy, these did not become the final determination of the issue. The computation by the labour officer upon direction of the court was to be the final pronouncement on the matter. There was a possibility that the labour office could have come with a different figure from what the applicant had computed. This could have been a ground of appeal. It was therefore prudent for the applicant to await the final orders of the Court before mounting an appeal. From the foregoing the final orders of the that the court made on 25th March, 2023 becomes a more reasonable point to reckon time for purposes of filing an appeal. The applicant has further explained that it was not possible to file the appeal due to the restructuring including change of the Board of directors of the applicant school impacted on the making of the decision to appeal. This explanation sounds plausible enough to persuade the court to exercise its discretion in favour of the applicant which the Court hereby does.
26. On the issue of stay of execution, the applicant has expressed its readiness to furnish security as the Court may order in that regard the Court hereby orders that the decretal sum herein be deposited in Court as a condition for granting the stay herein and such deposit be done within 30 days of this ruling.
27. The Court further orders that the draft memorandum of appeal attached with this application be deemed duly filed and served upon payment of the requisite Court fees.
28. The costs of this application shall abide the outcome of the appeal
29. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023 .

ABUODHA JORUM NELSON

JUDGE

