



**Munyithya v Bandas & Grill Limited (Miscellaneous Application
E124 of 2021) [2023] KEELRC 2652 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2652 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E124 OF 2021
MN NDUMA, J
OCTOBER 26, 2023**

BETWEEN

MWIKYA MUNYITHYA CLAIMANT

AND

BANDAS & GRILL LIMITED RESPONDENT

RULING

1. By a notice of motion Application dated 6/7/2021, the applicant seeks for an order in the following terms:-
 1. Spent
 2. That this Honourable Court be pleased to grant the Applicant leave to lodge an Appeal out of time against the decision delivered on 25th February, 2021 by Hon. Kagoni in Nairobi CMEL No. 389 of 2018.
 3. That upon grant of leave to appeal out of time, the Memorandum and Record of Appeal lodged herein be deemed as duly filed.
 4. That this Honourable Court be pleased to stay the execution of the judgment pending the hearing and determination of the Appeal.
 5. That the costs of this application be provided for.
2. The application is premised on grounds (a) to (k) set out on the face of the notice of motion and buttressed in the supporting affidavit of Rajiv Shah the gist of which is That the lower Court delivered a judgment in favour of the Claimant /Respondent on 25/2/2021.
3. That the applicant only realized That judgment had been entered against it upon being served with the letter dated 5/7/2021 seeking the respondent to settle the decretal sum of Kshs.450,815.



4. That the respondent intends to file an appeal but was not in receipt of the judgment and proceedings which are the requisite documents for purpose of Record of Appeal, hence have not lodged a Memorandum of Appeal.
5. That the respondent is in the process of lodging execution proceedings, against the applicant and hence the application for stay pending appeal.
6. That the application has been filed timeously and in good faith. That the applicant stands to suffer loss and damage if the application is not granted.
7. That the intended appeal raises triable issues.
8. The application is opposed vide a replying affidavit of Lemmy Regau Nyawade Advocates in conduct of the matter on behalf of the respondent who states That the application is an abuse of Court process.
9. That judgment notice dated 20/1/2021 was served on the applicant and so were aware judgment was due on 25/2/2021. That no proper basis for grant of stay of execution has been brought out in the application. That in the event stay is granted, the applicant should deposit the decretal sum in an interest earning account and/or release half of the decretal amount to the respondent.
10. The parties filed written submissions which the Court has carefully considered together with the depositions by the parties.
11. The Court notes That the application dated 6/7/2021 was filed 4 months after judgment was delivered. The applicant has not expressly denied having received the judgment notice duly served on them a month before judgment was delivered.
12. Section 79G of the [Civil Procedure Rules](#) which the applicant relies on provides:-

“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.”
13. This provision has been the subject of many decisions. In [Charles N. Ngugi v ASL Credit Limited](#) [2022] eKLR the Court stated as follows:-

...from the provision above, it is noteworthy That the phrase used is “an appeal may be admitted out of time”. This therefore means That an appeal may indeed be admitted out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & Others v Wanjiru & another* [1970] EA 482 the Court stated as follows:-

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact That this has not been done might be a reason for refusing the application or only allowing one on terms as to costs.”
14. In the present case, the applicant has not preferred good and sufficient reasons for the delay in noting the appeal within 30 days of judgment.



15. The applicant has not deposed as to the steps taken this far to obtain certified proceedings and judgment to enable the applicant file memorandum of appeal. Indeed no request for proceedings and judgment has been attached to the application.
16. Clearly, the applicant has not demonstrated good faith by taking all appropriate steps to lodge an appeal before craving for the indulgence of the Court to grant stay pending the intended appeal.
17. Accordingly, the Court is not satisfied That the applicant has satisfied the requisites for grant of stay pending appeal. The application is visited with negligence and inordinate delay in taking appropriate steps to realise the intended appeal.
18. The application is dismissed with costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 26TH DAY OF OCTOBER, 2023.

MATHEWS N. NDUMA

JUDGE

