



Mbugua v Mountain View Estate Residents Association (Miscellaneous Application E051 of 2023) [2023] KEELRC 2481 (KLR) (11 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2481 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E051 OF 2023**

NJ ABUODHA, J

OCTOBER 11, 2023

FOUND UNMERITED AND IS HEREBY DISMISSED WITH COSTS.

BETWEEN

NANCY MBUGUA CLAIMANT

AND

MOUNTAIN VIEW ESTATE RESIDENTS ASSOCIATION RESPONDENT

RULING

1. The Claimant filed application dated 8th March, 2023 seeking leave to file appeal out of prescribed time.
2. The application was supported by the Affidavit of Otieno Oluoch advocate who was in charge of the lower court matter CMEL 2334A of 2019 herein who averred that he was retained by the Claimant in the lower court where Judgment was supposed to be delivered on 28th September, 2022 but it was not ready and that parties were informed they would be notified when it was ready.
3. The Advocate realized the case was closed on 13th December, 2022 while going through the Judiciary e-filing portal and on visiting the registry the same day he realized the Judgment was delivered on 31st October, 2022 in absence of parties and that the claim was dismissed.
4. The Claimant being dissatisfied with that decision wished to be granted leave to prefer an appeal to this court out of time on the grounds that he was not aware of the judgment and was not notified of the date of delivery.
5. In reply the Respondent filed its grounds of opposition dated 15th May, 2023 stating that the application was frivolous, vexatious and a non-starter; was an afterthought and had no factual or legal basis for grant of orders sought.
6. The Respondent also filed a Replying Affidavit sworn on 30th June, 2023 and averred that the Claimant's claim was dismissed on 31st, August, 2022 by Hon. PM Kagoni, E.M with no orders as to



costs and the Claimant if aggrieved ought to have sought leave in time; not four months after; she did not give any facts or reasons for the delay and relied on the principle of equity that it aids the vigilant not the indolent.

7. The Respondent further averred that the Claimant being master of the suit, she consistently sat on her right to prosecute and follow up the matter with court to get a judgment date and that the intended Appeal had no chances of success as the same was geared towards frustrating the Respondent from enjoying the fruits of the judgment.
8. The Application was dispensed of by written submissions with each party submitting in support of their respective pleadings.

Determination

9. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited which provides that the appeal ought to be filed within 30 days.

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. In *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR the court held as follows;

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.

11. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi vs. Kenya Airways Limited* [2003] eKLR. They include the following:

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.

12. In this particular case the application has been filed without the intended appeal as held in the above *case*. The Applicant states that the Judgment was delivered on 31st October, 2022 while the Respondent states the same was delivered on 31st August, 2022. This notwithstanding the Applicant's Advocate stated that they discovered that the judgment was delivered in this matter in 13th December, 2022 but filed this application on 8th March, 2023 over two months after discovering and over four months after delivery of the Judgment.

13. The court is guided by the Court of Appeal grounds above and notes that the delay on the part of the Applicant has been inordinate, the reasons for delay being that they were not aware of the delivery of the judgment and that the same was delivered without notice is not sufficient. Being the Claimant in the lower court they ought to have followed up with their case. No evidence has been produced to show they followed up on the matter.



14. The Applicant having not attached or filed the intended appeal to illustrate on the arguability of his appeal, I am of the view that the Applicant's application seeking leave to file the Appeal out of time ought to fail for having been filed as an afterthought. There is inordinate delay and no valid reasons for the delay has been given.
15. In conclusion the Claimant's Application dated 8th March, 2023 is found unmerited and is hereby dismissed with costs.
16. It is so ordered

DATED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2023

DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2023

ABUODHA JORUM NELSON

JUDGE

