



**Muriuki v Skytop Technologies Limited; Skytop Mearfix Limited (Objector)
(Cause 788 of 2019) [2023] KEELRC 3172 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3172 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 788 OF 2019
BOM MANANI, J
NOVEMBER 30, 2023**

BETWEEN

ALEXANDER WANJAU MURIUKI CLAIMANT

AND

SKYTOP TECHNOLOGIES LIMITED RESPONDENT

AND

SKYTOP MCARFIX LIMITED OBJECTOR

RULING

Background

1. By a judgment that was delivered on 12th November 2021, Justice Onesmus Makau ordered the Respondent to pay the Claimant outstanding salary of Ksh. 1,400,000.00. In addition, the court ordered the Respondent to remit to the Kenya Revenue Authority the sum of Ksh. 861,360 being on account of outstanding taxes that had been deducted from the Claimant's salary but not remitted to the tax agency. The court granted the Claimant costs of the case.
2. The record shows that the Claimant applied for warrants of execution in enforcement of the above decree. In reaction, the Objector lodged objection proceedings through the Notice of Objection dated 6th December 2022.
3. The Objector's assertion was that the goods that had been seized in execution of the decree belonged to it. As such, it (the Objector) prayed that the attachment be raised.
4. On 20th April 2023, Justice Ndolo delivered a ruling disallowing the objection proceedings. In the learned Judge's view, the Objector had failed to demonstrate that it was the equitable owner of the attached goods.



5. Aggrieved by this decision, the Objector's Advocates filed a Notice of Appeal dated 3rd May 2023. The record shows that the court's Deputy Registrar endorsed the said notice on 4th May 2023.
6. On 29th May 2023, the Objector's Advocates filed the application dated 5th May 2023. In the application, the Objector has, in effect, raised two substantive pleas:-
 - a. That the court enlarges time within which the Objector should apply for leave to appeal.
 - b. That the court grants the Objector leave to appeal against the decision by Justice Ndolo dated 20th April 2023.
7. The application has been filed pursuant to Order 43 rule 1 (3) of the Civil Procedure Rules and sections 1A, 1B, 3A and 75 of the Civil Procedure Act. In addition, the Objector has invoked article 159 of the Constitution of Kenya 2010.
8. The substance of the application is that upon delivery of the impugned decision, the Objector's Advocates immediately lodged a Notice of Appeal. However, they omitted to seek leave of the court to file the appeal. According to the lawyers, they erroneously failed to take into account the fact that the impugned decision was not appealable as of right.
9. The Claimant has opposed the application. It is the Claimant's position that the application has been overtaken by events since the goods that were attached have since been sold in execution of the decree. Further, the Claimant argues that the Objector has not annexed a draft Memorandum of Appeal to the application to evidence the presence of valid grounds of appeal.

Analysis

10. Order 43 rule (1) (1) of the Civil Procedure Rules provides a list of Orders from which an appeal shall lie as of right. Appeals from a decision that stems from any other Order which is not listed under Order 43(1) (1) aforesaid require leave of the court.
11. The decision that the Objector seeks to challenge was issued pursuant to objection proceedings which were commenced under Order 22 (51) & (52) of the Civil Procedure Rules. These provisions are not in the list that is provided under Order 43(1) (1) aforesaid. Therefore, an appeal from the decision required leave of the court.
12. Under Order 43(1) (3) of the Civil Procedure Rules, such leave must be sought from the Judge or Magistrate who rendered the decision that is sought to be challenged on appeal. The application for leave may be made orally immediately after the decision is rendered or in writing within 14 days thereof.
13. The impugned decision was rendered by Justice Ndolo. Therefore, the application for leave to appeal ought to have been heard by the said Judge. However, the matter has fallen for my consideration.
14. The reason for this development is that the Objector's director raised a complaint against the learned Judge, a matter that forced her to recuse from the proceedings. As a result, on 9th October 2023, the matter was placed before the Principal Judge of the court who directed that I hear and determine the pending applications.
15. As mentioned earlier, the first limb of the application prays for enlargement of time to lodge the application for leave. This request is informed by the fact that Order 43(1) (3) of the Civil Procedure Rules requires that an application for leave to appeal be lodged either immediately after delivery of the decision that is sought to be challenged or within 14 days thereof. Coming outside these timelines, the Objector has sought the extension aforesaid.



16. Order 50(6) of the Civil Procedure Rules empowers the court to enlarge the time that has been fixed for doing any act or taking any proceedings under the [Civil Procedure Act](#) and Rules. Therefore, the request for enlargement of time is founded in law.
17. The Objector's lawyers contend that the failure to lodge the application for leave to appeal within 14 days of the decision was out of their mistake. It is their case that they thought that by lodging the Notice of Appeal, they had done all that was required in order to mount a valid appeal. They contend that they only discovered that leave to appeal was required some days after the 14 days within which they were to have moved the court had lapsed.
18. With respect to the second limb of the application, the Objector prays for leave to appeal in terms of Order 43(1) (3) aforesaid. The Objector argues that it has an arguable appeal which merits to be heard. It is the Objector's case that the question whether the Objector and Respondent are distinct persons in law is a compelling question which the Court of Appeal needs to address. It is the Objector's position that it was improper for the court to have overlooked this fact in its ruling on the objection.
19. The Objector argues that the goods that were attached belonged to it because they were removed from its premises. According to the Objector, the Respondent had long surrendered the lease to the said premises in its (the Objector's) favour.
20. The Claimant has submitted that the proceedings do not serve any useful purpose since the goods in question were sold in execution of the decree. Further, he contends that since the Objector did not provide a copy of the Memorandum of Appeal, the court should find that it (the Objector) has not demonstrated that it has an arguable appeal.
21. In large part, the reliefs that are sought in the instant application fall within the court's discretion to either grant or refuse to grant. However, this discretion must be exercised judiciously (*Simon Wambua Mukula. & 10 others v Attorney General & 3 others* [2021] eKLR).
22. I have considered the reasons why the application for leave was lodged outside time. It is indicated that this was out of inadvertence by the Objector's lawyers. Significantly, the affidavit affirming that the failure to present the application within time was due to a mistake by the applicant's lawyers has been sworn by the lawyer who occasioned the error.
23. The question that the court must grapple with is whether it is appropriate to punish the Objector for its lawyer's mistakes. The general position is that a litigant should not be punished for his lawyer's mistake unless it is demonstrated that he (the litigant) was complicit in the events that resulted in the mistake (*Markson Karani Muchunku v Joseph Ngari Gituku* [2021] eKLR). In the instant case, there is no indication that the Objector was complicit in the events that resulted in its lawyers' failure to apply for leave to appeal from the decision of 20th April 2023.
24. Second, although the Objector has not filed the draft Memorandum of Appeal, it is clear that the matter that it raises present an arguable appeal. As mentioned earlier, it is the Objector's position that the learned Judge erred in failing to consider that there was a distinction between it (the Objector) and the Respondent. In my view, this is a matter that the Objector is entitled to urge before the appellate court. It does not appear to me to be frivolous.
25. The fact that the attached goods have since been sold does not mean that the opportunity to appeal is lost. Indeed, it is only after the appellate court pronounces itself on the matter that the Objector will determine whether it has a cause of action in damages.



26. Finally, I have considered that this application was filed promptly. The motion was lodged on 29th May 2023 following the impugned decision on 20th April 2023. In my view, there was no inordinate delay in moving the court.

Determination

27. For the above reasons, I arrive at the conclusion that the application dated 5th May 2023 is merited.

28. As a result, the application is allowed as presented.

29. The time to apply for leave to appeal against the court’s ruling of 20th April 2023 is enlarged to the date of this ruling.

30. The Objector is granted leave to file the intended appeal and the Notice of Appeal that was lodged on 3rd May 2023 is deemed to have been lodged on the date of this ruling with the court’s leave under Order 43 (1) (3) of the Civil Procedure Rules.

31. Costs of the application shall abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

.....for Objector

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

