



Chandarana Supermarket Limited v Edward (Miscellaneous Application E111 of 2023) [2023] KEELRC 3074 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3074 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E111 OF 2023**

**NJ ABUODHA, J
NOVEMBER 28, 2023**

BETWEEN
CHANDARANA SUPERMARKET LIMITED APPLICANT
AND
AMISI EDWARD RESPONDENT

RULING

1. The Applicant filed application dated 2nd June, 2023 brought under section 79G of the *Civil Procedure Act* and section 12(3) of the *Employment and Labour Relations Court*. The applicant is seeking for orders to enlarge time within which the applicant is to file a Memorandum of Appeal and order of stay of execution of Decree from the Judgment and Decree issued by Hon. Hosea Ng'ang'a on 6th April, 2023 in Milimani CMEL No. E234 of 2021 pending hearing and determination of the application and the intended appeal at the Employment and Labour Relations Court herein.
2. The application was supported by the affidavit of Antony Gakungu advocate on record for the Applicant herein who averred that on 23rd March, 2023 he attended court before Hon. Hosea Ng'ang'a for delivery of judgment whereby the Judgment was not ready. Judgement was scheduled for April 6, 2023.
3. The Applicant averred that he inadvertently failed to diarize the matter and consequently failed to attend court and missed the judgment upon delivery. The Applicant learnt that judgment had been delivered when the respondent's advocate sent a letter threatening execution on the applicant.
4. The applicant averred that a client should not suffer mistakes of their advocate. That in the interest of justice the execution should be stayed to avoid the intended appeal being rendered nugatory should it succeed.
5. In reply the Respondent filed his reply sworn on 19th June, 2023 and opposed the Applicant's Application.



6. The Respondent averred that he filed his case CMEL No. E234 of 2021 at Milimani Commercial Courts against the Applicant seeking compensation for unlawful termination of employment.
7. The Respondent averred that the judgment was delivered on 6th April, 2023. The court found that he was terminated unfairly and awarded him compensation totalling Kshs 325,992.75/=.
8. The Respondent averred that a certified copy of the Decree was issued on 25th May,2023 and his advocates wrote a letter to the Applicant's Advocates requesting for the decretal sum to be paid which letter was received on 29th May, 2023.
9. The Respondent further averred that the judgment date of 6th April, 2023 was taken by consent in court in the presence of the Applicant's Advocate and therefore they ought to have been present when the judgment was delivered.
10. The respondent averred that under section 79G of the *Civil Procedure Act* the applicant ought to have filed the Appeal within 30 days after delivery of judgment. That despite being aware of the judgment date the applicant failed to comply.
11. The Respondent averred that the subject matter is not substantial and should execution proceed the Applicant does not stand to suffer any irreparable loss or prejudice. He further averred that he is a man of means having the ability to refund the decretal amount if need be hence the appeal will not be rendered nugatory should stay of execution proceedings be disallowed.
12. The Respondent further averred that the draft memorandum of appeal annexed to the Applicant's Supporting Affidavit does not raise any arguable issues and it has no chance of success.
13. The Respondent averred that he will suffer prejudice if the application is allowed because he will be denied the fruits of his lawfully obtained judgment hence set back the execution process. That this will also prejudice him under article 159 2 (b) of *the Constitution* which provides that justice shall not be delayed hence an infringement on his constitutional rights.
14. The Respondent finally averred that this application was a delay tactic made in bad faith that it was misconceived, incompetent, lacks merit and was an abuse of court process. It ought to be dismissed with costs.
15. The Application was disposed of by written submissions with each party submitting in support of their respective pleadings.

Determination

16. Section 79G of the *Civil Procedure Act* is the operative provision in answering the question whether the prayer to enlarge time to file the appeal is merited. It provides:

“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”.
17. 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....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 V Kenya Airways Ltd* [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 if Respondent 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.
18. In this particular case the application has been filed with a draft memorandum of Appeal. The judgement in this matter was delivered on 6th April,2023. The date for judgment was taken by consent in presence of all parties' advocates. The Applicant's advocates state that they did not attend court on the date of the delivery of judgment because they forgot to diarize the matter.
19. The Applicant became aware of the delivery of the judgment on 29th May, 2023 when they received a letter requesting them to pay decretal sum from Respondent's advocates.
20. It is true the mistakes of counsel should not be met on clients. I note that the period of delay was barely less than a month since 30 days lapsed on 6th May,2023. This instant Application was filed on 2nd June, 2023. I find this period not to be inordinate delay and counsel has explained the reason for the delay. Counsel became aware of the judgment on 29th May,2023 and filed this application immediately on 2nd June,2023.
21. On the issue of an arguable Appeal I have looked at the draft memorandum of Appeal attached by the Applicant and I note it has grounds which may need to be addressed by the court on appeal more so on the compensation granted.
22. The courts have discouraged the habit of turning away a litigant unheard when they approach a court within a reasonable time.
23. On the issue of prejudice to be suffered as much as I am awake to the fact that the Respondent has to enjoy the fruits of his judgment I am also aware that the Applicant has approached the court and it needs to be heard.
24. In the upshot I allow the Applicant to file the Appeal out of time.
25. On the other issue of stay orders the grounds upon which this Court exercises the discretion to grant a stay of execution are well governed by the Civil Procedure rules under order 42 rule 6 which stipulates as follows;
- (2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
26. In Joseph Odide Walome v David Mbadi Akello [2022] eKLR the court in support of the above provision held as follows;

An applicant needs to satisfy the court on the following conditions before they can be granted the stay orders:



- a. Substantial loss may result to the applicant unless the order is made,
 - b. The application has been made without unreasonable delay, and
 - c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
1. In the case of *Halal & Another v Thornton & Turpin Ltd* [1990] eKLR citing the case of *Rasiklal Somabhai Patel v Parklands Properties Ltd* it was stated:

“that before a Court could decide the application (for stay of execution) it must have regard to the requirements of Order XLI rule 4(2) of the Civil Procedure Rules under which the applicant had to satisfy the court of two matters...Firstly, that substantial loss may result to the applicant unless the application is granted, which prima facie means that if the appeal succeeds, the respondent would not be in a position to make full restitution. Secondly, the applicant had to give such security as the court may order. Those are the requirements under Order XLI rule 4(2) of the Civil Procedure Rules.

28. On the issue of substantial loss, this has been ably explained by Gikonyo J in the case of *James Wangalwa & Anor v Agnes Naliaka Cheseto* [2012] eKLR. Where the learned Judge observed:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process...The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.

29. As observed in the cases cited above, having allowed the prayer for filing of appeal out of time it would be prejudicial to the Applicant if it succeeds on the Appeal and no stay was granted pending appeal. It would therefore be in the interest of justice to stay the execution until the issues the Applicant has raised in its appeal are ventilated. This will avoid rendering the appeal nugatory.
30. The stay will however be on condition that the applicant deposits the decretal sum in Court within 30 days of this ruling.
31. Costs of the application shall abide the outcome of the Appeal.
32. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2023

DELIVERED VIRTUALLY THIS 28TH DAY OF NOVEMBER, 2023

ABUODHA NELSON JORUM

JUDGE

