



**Muravvej Holdings Limited v Mwadzoya (Appeal E108 of 2023)  
[2023] KEELRC 3464 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3464 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E108 OF 2023  
M MBARŪ, J  
NOVEMBER 23, 2023**

**BETWEEN**

**MURAVVEJ HOLDINGS LIMITED ..... APPELLANT**

**AND**

**RASHID JUMA MWADZOYA ..... RESPONDENT**

**RULING**

1. The appellant, the applicant herein filed application dated 12 October 2023 under Order 42 rule 6, Order 22 rule 1 of the *Civil Procedure Rules* and Section 3A of the [Civil Procedure Act](#) and seeking for orders that;
  - a. This court be pleased to grant leave to the applicant to appeal out of time.
  - b. Costs of this application abide the outcome of the intended appeal.
2. The application is supported by the affidavit of Elijah Gathu, advocate for the appellant and on the grounds that following judgment in Mombasa CMELRC No.318 of 2018 on 3 September 2021 the appellant obtained leave to file appeal out of time through miscellaneous proceedings in Mombasa ELRC No. E060 of 2021. Thereafter the appellant underwent restructuring of the firm and several of its files were misplaced as a result of the major restructuring.
3. The appellant has since retrieved the file and noted that the notices issued were served upon another firm, Soni & Company Advocates. The appellant is desirous of prosecuting the intended appeal and has already lodged the Memorandum of Appeal with a view to expedite the hearing and determination and unless the orders sought are issued, there will be injustice. The respondent will not suffer any prejudice if the orders sought are issued.
4. In the Supporting Affidavit, Gathu advocate aver that he is an advocate representing the appellant herein and support the application seeking for leave to appeal out of time.



5. In reply, the respondent filed his Replying Affidavit and aver that judgement in Mombasa CMELRC 318 of 2018 was delivered on 3 September 2021. On 7 October 2021 the appellant was notified of the judgment and then served with the Decree. M/s Makini Auctioneers were instructed to proclaim the appellant's moveable property but the appellant's sister company Pharmaken Limited Filed Notice of Objection on 5 October 2021 which application was allowed on 5 October 2021.
6. On 5 November 2021 the respondent filed application seeking to attach the appellant's funds held in Guardian Bank Account but the appellant filed ELRC Misc. Application E060 of 2021 before the lower court could determine the objection proceedings and asked for leave to file appeal out of time. In a ruling delivered on 28 April 2022 the court allowed the appellant leave of 30 days and to deposit the decretal sum of Kshs. 357,978.58 in court within 14 days.
7. The appellant made the deposit of the decretal sum but failed to file any appeal within 30 days as directed.
8. The respondent also avers that on 21 February 2023 he filed application seeking for release of funds deposited in court.
9. The appellant filed this appeal more than a year after the court gave 30 days leave on 28 April 2022. This ruling has not been reviewed and no appeal is made. The instant application is res judicata. The appellant and his advocates have been in the full conduct of this matter and even after the law firm restructure, contact was with Muthee Kihiko & Associates LLP. On 13 April 2023 Mutugi Advocate attended court representing the appellant from the law firm. The instant application is not in good faith and should be dismissed with costs.

Both parties attended court and made oral submissions.

10. Leave to appeal out of time is a matter regulated under the provisions of Section 79G of the [Civil Procedure Act](#) that provides as follows;

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.

11. These provisions are not far removed from the requirements of Section 17 of the [Employment and Labour Relations Court Act](#), 2011 read together with Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016. An appeal from the decision of court or from the subordinate court allowed to hear and determine employment claims should be addressed within 30 days. Where for good cause the appeal is not filed, the court to which the appeal lie should be moved expeditiously and leave obtained to file appeal out of time.
12. Therefore, the decision as to whether to extend time must be exercised within the principles of the law. Factors to be considered when determining such an application seeking leave to appeal out of time are largely discretionary. However, there are given parameters within which to place such an application. Court of Appeal in the case of [Omar Shurie v Marian Rushe Yafar](#) Civil Application No. 107 of 2020 held that in addressing an application seeking leave to file an appeal out of time, the court must take into account;

The length of the delay;



- The reasons for the delay;
13. The chances of the appeal succeeding if the application is granted; and
  14. The degree of prejudice to the respondent if the application is granted.
  15. The respondent raised the matter that this application is res judicata in view of ELRC Misc. Application E060 of 2021 where the appellant obtained leave and was granted 30 days but failed to file an appeal.
  16. A miscellaneous application has a single purpose. Such an application is used to address a variety of matters which are not considered civil claims. Such an application is ancillary and supplementary proceedings not defined as a civil case. Once its purpose is met, that is the end of such an application.
  17. Under the *Civil Procedure Act* and the rules thereto, a miscellaneous application is allowed for a number of reasons hence the purpose of Order 48 of the *Civil Procedure Rules* as held in *Mandavia v Ruttan Singh* Civil Appeal No.27 of 1967 [1968] EA.
  18. Having obtained leave under ELRC Misc. Appl. No. E060 of 2021 under the miscellaneous provisions, the matter closed on the orders issued. There was no appeal filed in terms of the leave obtained.
  19. To file the instant appeal, this is different and separate from proceedings obtaining under the Miscellaneous application.
  20. However, filing an appeal and then seeking leave to file an appeal out of time is to circumvent the very procedures obtained under ELRC Misc. E060 of 2021. This is the route to take and not first file an appeal and then seek leave to have it admitted out of time. Such a procedure goes contrary to Section 79G of the *Civil Procedure Act*, Section 17 of the *Employment and Labour Relations Court Act*, 2011 and the rules thereto.
  21. The reasons given for the delay in filing the appeal in time, the length of delay from 3 September 2021 and whether the appeal has high chances of success or not, such are matters that can well be ascertained in an application properly filed under miscellaneous provisions of the law and the rules referenced above.
  22. There is no valid appeal. Orders sought within an invalid appeal must fail.

The appeal herein is struck out. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 23<sup>RD</sup> DAY OF NOVEMBER 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

