



**Radar Limited v Gitahi (Miscellaneous Application E046 of 2023)
[2023] KEELRC 3455 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3455 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E046 OF 2023
M MBARŪ, J
NOVEMBER 23, 2023**

BETWEEN

RADAR LIMITED APPLICANT

AND

FAITH WANJIKU GITAHI RESPONDENT

RULING

1. The applicant, filed application dated 3 October 2023 under the provisions of Section 1A, 1B, 3 and 3A and 79G of the Civil Procedure Act and Order 42 rule 6, order 51 rule 1 of the Civil Procedure Rules and seeking for orders that;
 1. Spent.
 2. Spent.
 3. Pending hearing and determination of the intended appeal, this court be pleased to stay proceedings in Mombasa Chief Magistrates Court ELRC Cause No.502 of 2021 *Faith Wanjiku v Radar Limited*
 4. The pending the hearing and determination of the intended appeal, this court be pleased to stay proceedings in Mombasa Chief Magistrates Court ELRC Cause No.502 of 2021 *Faith Wanjiku v Radar Limited* delivered on 30 March 2023.
 5. The Memorandum of record of appeal annexed hereto be deemed as duly filed and served.
 6. Costs of this application be awarded to the applicant.
2. The application is supported by the annexed affidavit of Beryl Adhiambo Odhiambo and on the grounds that all along, the applicant was under the mistaken belief that the memorandum of appeal had been filed upon judgment of the lower court on 30 March 2023 after which stay of execution was



granted. The record of appeal was compiled and unless leave is allowed to file the appeal out of time, the applicant will suffer prejudice, loss and damage and its appeal will not be heard on the merits. The appeal has high chances of success and will be rendered nugatory if there is no stay of proceeding in the lower court, the judgment and decree therefore stayed and leave granted to allow the applicant urge its appeal.

3. In reply, the respondent filed the Replying Affidavit of Boaz Adalla, Advocate for the respondent who aver that this application is in abuse of court process and should be dismissed with costs. Judgment sought to be challenged on appeal was delivered on 30 March 2023, a period of 7 months. The application is filed with inordinate delay without any good justification. The reasons given for the delay is that there was an application seeking stay of execution but the applicant inadvertently forgot to lodge the memorandum of appeal. There is no evidence to support such averments.
4. Following judgment on 30 march 2023, the same was shared via email to both parties. There was no appeal filed within 30 days as required. The respondent then sent letter dated 5 April 2023 seeking payment in terms of the judgment award which went without any response. Instead, application dated 5 may 2023 was filed and backdated seeking stay of execution but still, no memorandum of appeal was filed. During the hearing of the subject application, the applicant indicated that stay was required to argue its appeal yet there was no such appeal on record.
5. The alleged inadvertent mistake to file the memorandum of appeal is not justified, such matter was addressed before the lower court where the applicant indicated that a Memorandum of Appeal had been lodged but the draft attached to its application is fundamentally different from the one filed herein and in any event it was not lodged. The applicant has come to court with unclean hands after failing to address the matter within time and the instant application should be dismissed with costs.
6. Both parties attended and made oral submissions.
7. The applicant's counsel submitted that following judgment of the lower court, the applicant filed application seeking stay of execution under the mistaken belief that a memorandum of Appeal had been filed and when the respondent filed its reply, it was noted that this Memorandum had not been filed. It was a mistaken belief and the mistake of advocate should not be visited against the client. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the court considered eight conditions to be considered before allowing a party to file an appeal out of time and the main one was that the failure to file appeal in time was not intentional. The applicant has attached a Memorandum of Appeal and the Record of Appeal is ready.
8. The failure to file the memorandum of Appeal in time was due to the inadvertent mistake of advocate and not that of the applicant and should not be punished and denied a chance to urge its appeal. To secure the judgment of the lower court, the applicant is willing to deposit the decretal sum in court or as the court will direct.
9. The respondent submitted that the applicant is not candid to the court with regard to events leading to the instant application. The non-filing of the Memorandum of Appeal was raised before the lower court during the reply to the stay application filed on 5 May 2023 but backdated to April 2023. By then, the 3 days for filing an appeal had lapsed. The prompt that there was no appeal did not urge the applicant to address and move the court as herein done. The draft memorandum of appeal attached to the application before the lower court is totally different from the instant draft.
10. The delay in filing in this application is not justified and the reasons given are not honest and should be dismissed with costs.



Determination

11. An applicant seeking leave to file appeal out of time is 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.

12. 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 done 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 by giving reasons for the delay.

13. 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;

The chances of the appeal succeeding if the application is granted; and

The degree of prejudice to the respondent if the application is granted.

14. As correctly submitted by the applicant in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR, the Supreme Court in addressing a similar matter though based on different set of facts held that;

... in considering whether to grant an extension of time for an appeal ... the court should consider all the circumstances of the case including;

- a. the interests of the administration of justice;
- b. whether the application for relief has been made promptly;
- c. whether the failure to comply was intentional;
- d. whether there is a good explanation for the failure;
- e. the extent to which the party in default has complied with other rules, practice directions and court orders;
- f. whether the failure to comply was caused by the party or his legal representative;



- g. the effect which the failure to comply had on each party; and
- h. the effect which the granting of relief would have on each party.

15. As of May 2023 the applicant was aware that no appeal had been filed. Nothing was done until 3 October 2023 and the intervening period is not accounted for. In the Affidavit of Beryl Odhiambo, save to urge the court that there was an inadvertent mistake of advocate, from 30 March 2023 to 3 October 2023, no effort to render an account is gone into.

Was this lapse intentional?

- 16. Where indeed the applicant made a case for stay of execution before the lower court in the application dated 5 May 2023 and attached a draft memorandum of appeal, what was the basis of such draft? To steal a match against the respondent or secure justice?
- 17. Noteworthy, the subject application is supported by the Affidavit of Rinah Ondego, human resource manager and the instant application is supported by Beryl Odhiambo the human resource manager for the Objector.
- 18. Both deponents attach different memoranda setting out the grounds of appeal.
- 19. In this instance, putting into account the extent to which the party in default has complied with other rules, practice directions and court orders, the major lapse arising from counsel attending for the applicant, to achieve justice, the applicant should not be locked out of court. However, acknowledging where the error and lapse lies, to plead that costs of the application be awarded is to fish too wide and a failure to appreciate that the respondent has the right to enjoy the fruits of the judgment.
- 20. In view of the right of appeal secured in law and the court moved, the only relief the applicant shall enjoy is 14 days leave to file appeal and serve the respondent. Failure to do so, the leave granted shall automatically lapse. The decretal sum awarded by the lower court shall be deposited in a joint interest earning account held by both parties within the same period of 14 days.
- 21. For completeness, costs of these proceedings are awarded to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 23RD DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

