



**Alpine Coolers Limited v Miheso (Miscellaneous Application  
E097 of 2023) [2023] KEELRC 2912 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2912 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E097 OF 2023**

**K OCHARO, J  
NOVEMBER 9, 2023**

**BETWEEN**

**ALPINE COOLERS LIMITED ..... APPELLANT**

**AND**

**ALFRED AVUKWI MIHESO ..... RESPONDENT**

**RULING**

**Background**

1. The Applicant herein moved this Court vide a Notice of Motion dated 4<sup>th</sup> May 2023 seeking the orders that;
  - a. Spent.
  - b. This Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time arising out of the judgment of the Chief Magistrate's Court at Nairobi in NRB CMCC NO. 845 OF 2012 delivered on 6<sup>th</sup> March 2017.
  - c. Spent.
  - d. The costs of this application be in the cause.
  - e. This Honourable Court be pleased to grant any other orders it deems just and expedient.
2. The Notice of Motion dated 4<sup>th</sup> May 2023 is premised on the grounds to the face of it hereof and the Supporting Affidavit of one Scort Sala sworn on 4<sup>th</sup> May 2023.
3. The Respondent opposed the application through a Replying Affidavit sworn on 22<sup>nd</sup> May 2023.



4. In line with this Court's directions issued on 15<sup>th</sup> May 2023 that the Application be canvassed by way of written submissions, the Applicant filed submissions dated 24<sup>th</sup> July 2023, and the Respondent filed submissions dated 31<sup>st</sup> July 2023.
5. The Applicant's application is expressed to be under Order 50 Rule 5 And Order 51 Rules 1,3 and 4 of the *Civil Procedure Rules* 2010; article 159 (3) of the *Constitution of Kenya* 2020; Sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of law.
6. The Grounds upon which the Notice of Motion dated 4<sup>th</sup> May 2023 is anchored are that:
  - i. Judgment was delivered by Justice Aleem Visram on 9<sup>th</sup> March 2023 in High Court Civil Appeal No. 152 of 2017 whereby the Applicant's appeal was struck out. The Court was of the view that it did not have jurisdiction to entertain the appeal.
  - ii. In the circumstances, the appeal was not heard on merit, but was merely struck out, hence this Court has jurisdiction to hear and determine the same.
  - iii. That the applicant became aware of the judgment when it was served with the Respondent's letter dated 11<sup>th</sup> April 2023 containing the Respondent's tabulation of costs of the appeal and the Decree dated 7<sup>th</sup> October 2022. The Applicant received the letter on 19<sup>th</sup> April 2023.
  - iv. That the Advocates for the respective parties opened a joint account with Standard Chartered Bank where the decretal sum was deposited, pursuant to a court order issued on 22<sup>nd</sup> November 2017.
  - v. That no prejudice will therefore be occasioned to the Respondent if the orders sought are granted.

### **Analysis and Determination**

7. I have carefully considered the Notice of Motion application dated 4<sup>th</sup> May 2023, the Grounds thereof and Affidavit in Support thereof; the Replying Affidavit sworn on 22<sup>nd</sup> May 2023; the Submissions filed by both parties, and the authorities relied on. I return that the only issue for determination is;
  - a. Whether this Court should grant leave to the Applicant to file its appeal out of time.

### **Whether This Court Should Grant Leave To The Applicant To File Its Appeal Out Of Time.**

8. The Applicant intends to assail a Judgment and Decree of the subordinate court (Hon. G.A. Mmasi, R.M.) delivered on 6<sup>th</sup> March 2017 in Nairobi CMCC No. 845 of 2012, by way of an appeal.
9. Under Section 79G of the *Civil Procedure Act* a party who desires to challenge an order or judgement by way of an appeal is clothed with the right to the appeal within 30 days of the decision. The Section 79G provides: -

“79G. Time for filing appeals from subordinate courts

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.”

10. To comply with the above set out provisions, therefore, the Appellant should have filed their Memorandum of Appeal before the Appellate Court within 30 days of the subordinate court’s decision. Did the Appellant do so? A perusal of the Judgment delivered on 9<sup>th</sup> March 2023 by Justice Aleem Visram, which is annexed to the Applicant’s Supporting Affidavit sworn on 4<sup>th</sup> May 2023, and marked SS1, indicates that the Applicant did indeed file its Memorandum of Appeal before the High Court on 4<sup>th</sup> April 2017, following the delivery of Judgment by the subordinate Court on 6<sup>th</sup> March 2017. The Memorandum of Appeal was therefore filed 29 days after the Judgment was delivered, therefore within the statutory period.
11. The jurisdiction of this Court to enlarge time is derived from Section 79G set out above; and Order 50 Rule 6 of the [Civil Procedure Rules](#) 2010 which provides that:-

“ 6. Power to enlarge time [Order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise.”

12. Undoubtedly, granting an application for an enlargement of time is a discretionary action. It depends on the peculiar circumstances of each case. However, it must be exercised judiciously. Therefore, the provision doesn’t specifically set the conditions considerable by the court whenever confronted with an application for an extension of time. However, the judicial precedent has over time established the conditions. However, in those conditions are not cast in stone, they are not exhaustive.
13. The Supreme Court of Kenya in the case of [Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & others](#) [2014] eKLR, considered at length and restated the principles which should guide a Court considering an application for extension of time. It stated: -

“ From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in the exercise of such discretion:

- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;



- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. Whether the application has been brought without undue delay; and
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

14. In *Kenya Ports Authority v Silas Obengele* Civil Application No Nai 297 of 2004 [2006] 2 KLR 112 the Court held that:

“Whereas it is now settled that whenever there is a delay, even for one day, there must be some explanation for it otherwise an extension may not be granted where there was material before the single judge from which he could and did conclude that the delay or the periods of delay ..... the full bench will not interfere”

15. I shall consider the factors set out by the Supreme Court in the *Nicholas Salat case* (*supra*) to the circumstances of this case. No doubt, the judgement that the Applicant intends to challenge was delivered some six years and nine months ago. Undeniably, this is a long period. However, I am not hesitant to conclude that the delay in filing the appeal before this Court has been reasonably and satisfactorily explained. The Applicant filed an appeal in the wrong forum. Time was spent there waiting for the determination of the appeal on merit, only for the same to be struck out for want of jurisdiction.
16. I take notice but with concern, that though it is clear that the Advocate for the applicant filed the appeal before the wrong court, they have not advanced any explanation for this apparent mistake, and have not addressed this issue in their application or submissions before this Court. This Court was established back in the year, 2012 under the Employment and Labour Relations Court following the command in Article 162 (2)(a) of the 2010 *Constitution*. The appeal that was erroneously filed in the High Court, was filed almost six years after the establishment. Surely, the Advocate ought to have known the proper forum for filing the appeal. However, having said this, I heed the call ‘do not visit counsel’s mistake on a litigant’ and I oblige.
17. The next question that I must consider is whether the Respondent will suffer prejudice if the Appellant/Applicant is granted leave to file their appeal out of time. The Applicant has averred and demonstrated that following an order for stay pending appeal, the sum of the decree, the subject matter of the intended appeal was deposited in a joint interest-earning account in the names of Counsel for the parties. This leads me to conclude that the Respondent would not suffer grave prejudice if the order for an extension of time was granted. Further, the prejudice that may be suffered by the Respondent can be compensated by way of costs.
18. It is contended by the Respondent that the instant application was filed with undue delay. I am persuaded that there wasn’t. This is because the Judgment of the High Court (Hon. Visram, J) was



delivered on 9<sup>th</sup> March 2023, and this application was filed on 4<sup>th</sup> May 2023, about two months later. However, this Court hasn't lost sight of the fact that according to the Applicant's Counsel, he received notification of the decision on 11<sup>th</sup> April 2023, a fact that isn't disputed by the Respondent. The time between 11<sup>th</sup> April 2023, to 4<sup>th</sup> May 2023, cannot in the circumstances of this matter be said to amount to an inordinate delay.

19. The Respondent argued that the Applicant's application is fatally defective failure as the Applicant didn't file an appeal before approaching this Court for an extension of time. To them, this court cannot give an order of extension on a non-existent appeal. With due respect, these submissions by the Respondent do not find any anchor in law, I have agonized over the same [submissions] and I am unable to discern what informs them. In *Nicholas Salat (supra)*, on this issue, the Supreme Court held thus:-

“In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the *Court's Rules*, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the *Court's Rules*, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for an extension of time; and not to file an appeal and seek to legalize it.”

20. Further, fortified by the holding, I hold that the Respondent's argument on this point is wholly erroneous.
21. In the upshot, I allow prayer (b) of the Notice of Motion dated 4<sup>th</sup> May 2023 and direct that the Applicant files their Memorandum of Appeal within thirty days of the date of this Ruling.
22. The Applicant is further directed to pay the Respondent thrown away costs of Kshs. 20,000/- for this Application.
23. It is so ordered.

**READ, DELIVERED AND SIGNED THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023.**



**OCHARO, KEBIRA**

**JUDGE**

In the presence of:

Mr. Nyawade for the Respondent

No appearance for the Applicant

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with order 21 rule 1 of the *Civil Procedure Rules*, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the *Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**

