



**Kilifi Moringa Estates Ltd v Chai (Miscellaneous Application
E003 of 2023) [2023] KEELRC 2830 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2830 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
MISCELLANEOUS APPLICATION E003 OF 2023**

AK NZEI, J

NOVEMBER 9, 2023

BETWEEN

KILIFI MORINGA ESTATES LTD APPLICANT

AND

KARISA CHENGO CHAI RESPONDENT

RULING

1. The application before me is the Notice of Motion dated May 15, 2023, and is expressed to be brought under section 1A,1B, 3,3A,79G and 95 of the [Civil Procedure Act](#), order XLIX rule 5 and order XLII rule 6 of the [Civil Procedure Rules](#). The application seeks the following orders:-
 - a. that the proposed appellant be granted leave to appeal out of time against the whole judgment of the hon. Ong'ondo Magistrate, delivered on January 31, 2023 at Malindi.
 - b. that the Memorandum of Appeal annexed hereto be deemed as duly filed and served.
 - c. That upon granting of (a) & (b) above, the Court does grant a stay of execution of the judgment by hon. Ong'ondo delivered on January 31, 2023.
 - d. That pending hearing and determination of the appeal, the Court be pleased to grant a stay of execution of the judgment entered on January 31, 2023.
 - e. That costs of the application be provided.
2. The application sets out on its face the general grounds on which it is brought, and is premised on the Supporting Affidavit of Cyril Papu Haroon, the applicant's director, sworn on May 15, 2023. Annexed



to the said Affidavit is a copy of a judgment of hon Ongo'ndo, Magistrate, delivered on January 31, 2023 in Malindi CM ELR Case No 13 of 2020. It is deponed in the said affidavit:-

- a. that the trial court delivered its judgment on January 31, 2023 awarding the Applicant ksh. 500,292, costs of the suit and interest.
 - b. that the respondent has extracted the decree and may execute the same at any time if stay is not granted.
 - c. that upon delivery of judgment, the applicant wrote a letter on February 6, 2023 requesting for a copy of typed proceedings and the judgment in order to appreciate the trial court's reasons and thereupon make an informed decision on whether to lodge an appeal. That the typed proceedings were not received on time or at all, and that the appellant has decided to appeal, anyway.
 - d. that by the time sufficient instructions were received from the applicant (proposed appellant) the time for appealing had run out.
 - e. that the applicant has an arguable appeal with probability of success, and is aggrieved by the judgment.
 - f. that the applicant has reason to believe that the respondent is not a man of means and financial strength to refund the sum awarded in judgment if the appeal succeeds; hence substantial damage and the appeal is likely to be rendered nugatory.
 - g. that the respondent is not likely to suffer prejudice as the applicant is ready and willing to abide by any condition and terms on security as the Court may deem fit to impose.
 - h. that the delay involved is not inordinate or so great as to be inexcusable.
3. The application is opposed by the respondent *vide* a Replying Affidavit sworn by him on June 12, 2023. It is stated in the said Affidavit:-
- a. that after judgment was delivered in favour of the respondent on January 31, 2023, the respondent's advocate wrote to the applicant's advocate on February 13, 2023 asking them to pay the decretal sum, which letter was ignored.
 - b. that the applicant's application is incompetent as there is no valid appeal filed on the basis of which a stay order can issue. That in the absence of a valid appeal, the court has no jurisdiction to grant stay pending appeal.
 - c. that even assuming that the application is competent, which is not the case, the applicant has not met all the conditions for granting of a stay pending appeal as set out in order 42 Rule 6 of the *Civil Procedure Rules*.
 - d. that the application herein has been overtaken by events as the issued warrants have been partially executed, and the applicant has already paid a half of the decretal sum.
 - e. that should the applicant be granted stay orders, then the same should be on condition that the sum of ksh 322,733.50, being the balance of the decretal sum, be deposited in a joint interest earning account held by both advocates.



- f. that the applicant has not given sufficient reasons for delay in filing appeal.
4. On May 24, 2023, I granted an interim stay of execution and on 13/6/2023, I directed parties herein to file Written Submissions on the application. Submissions have since been filed.
5. Rule 8(1) & (2) of the *Employment and Labour Relations Court (Procedure) Rules 2016* provides as follows:-
- “(1) where any written law provides for an appeal to this Court, an Appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.
- (2) where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.”
6. Section 79G of the *Civil Procedure Act*, which in this case, in my view, is the “written law”, provides that every appeal from the 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 such period of 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.
7. By dint of article 162(2) (a) of the *Constitution of Kenya 2010*, this court is a court of equal status with the High Court. Appeals to this court from the subordinate courts must, therefore, be filed within thirty days from the date of the decree or order appealed against.
8. The proviso to section 79G of the *Civil Procedure Act* provides as follows:-
- “provided that 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.”
9. In the present case, the applicant has not explained the delay in filing an appeal, and has not given sufficient cause for not filing the appeal in time. There is nothing on record for this court to interrogate. The applicant has not even denied the respondent’s allegations that it has already paid half of the decretal sum to the respondent.
10. I find no merit in the application dated May 15, 2023, and the same is hereby dismissed with costs.
11. For avoidance of doubt, the interim stay order given by this court on May 24, 2023 is hereby vacated.
12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9th NOVEMBER 2023

AGNES KITIKU NZEI

JUDGE

