



**Kilifi Moringa Estates Ltd v Chengo (Miscellaneous Application
E004 of 2023) [2023] KEELRC 2833 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2833 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
MISCELLANEOUS APPLICATION E004 OF 2023**

AK NZEI, J

NOVEMBER 9, 2023

BETWEEN

KILIFI MORINGA ESTATES LTD APPLICANT

AND

SAMMY CHENGO RESPONDENT

RULING

1. The Application before me is the Notice of Motion dated 22/5/2023, 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 31st January 2023 at Malindi.
 - b. that the memorandum of appeal annexed hereto be deemed as duly filed and served.
2. The application as filed does not appear complete, and does not appear to have been signed, either by the Applicant (the proposed Appellant) or by its Counsel, but since the application appears to have been filed electronically (at the Malindi Sub-Registry) and there is a possibility of the last page of the application not having been printed before the Court file was forwarded to this Court, I will proceed to determine the application on its merits, in the interest of justice.
3. The application is shown to be based on a supporting affidavit of one Cyril Papu Haroon, the Applicant’s director, sworn on 15th May 2023. A copy of a judgment of Hon. Ong’ondo, Magistrate, delivered on 31st January 2023 in Malindi CM ELR Case No. 11 of 2020 is annexed to the said affidavit and marked “CPHI”. It is depend in the said affidavit:-
 - a. that the (trial) Court delivered its judgment on 31st January 2023 and awarded the respodnent ksh. 298,102, costs of the suit and interest.



- b. that the Respondent has proceeded to extract a decree, and is likely to execute the same at any time if stay is not granted, rendering the intended appeal nugatory.
 - c. that the Respondent will not be able to refund the decretal sum in the event of the intended appeal succeeding.
 - d. that the Respondent will not suffer any prejudice if the application is allowed, as the Applicant is ready to abide by any condition and terms as to scrutiny that the Court may deem fit to impose.
 - e. that the delay occasioned is not great as to be inexcusable.
4. The application is opposed by the Respondent vide a replying affidavit sworn by himself on 12th June 2023. It is deponed in the said replying affidavit:-
- a. that after judgment was delivered in favour of the respondent on 31st January 2023, the Respondent's Advocates wrote to the Applicant's Advocates on 13/2/2023 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 it is not, the Applicant has not met all the conditions for granting of 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 partially been executed, and the Applicant has already paid half of the decretal sum.
 - e. that should the Applicant be granted stay orders, then the same should be on condition that a sum of ksh. 209,138, 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 the delay in filing appeal.
5. On 24/5/2023, I granted an interim order of stay of execution and on 13/6/2023, I directed parties herein to file written submissions on the application. Only the Respondent filed written submissions, which I have considered.
6. 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.”
7. 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.

8. 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.
9. 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.”
10. In the present case, the Applicant has not even attempted to explain the delay in filing an appeal, and has therefore not given sufficient cause for not filing the appeal in time. There is nothing on record for further interrogation by this Court. The applicant has not even denied the Respondent’s allegation that it has already paid half of the decretal sum.
11. I find no merit in the Applicant’s application dated 15/5/2023, and the same is hereby dismissed with costs.
12. For avoidance of doubt, the interim stay order given by this Court on 24/5/2023 is hereby vacated.
13. Orders accordingly.

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

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

.....for Applicant

..... Respondent

