



ARN Security & Training Services v Eregayi (Miscellaneous Application E017 of 2023) [2023] KEELRC 2752 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2752 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E017 OF 2023
DN NDERITU, J
NOVEMBER 2, 2023

BETWEEN

ARN SECURITY & TRAINING SERVICES APPLICANT

AND

ISAAK EKAI EREGAYI RESPONDENT

RULING

1. In a notice of motion dated 24th March, 2023 (the application) filed through Wanjiku Wamae Advocates the petitioner is seeking the following –
 1. That owing to the extreme urgency of this matter this Honourable Court be pleased to certify this application as urgent and that the same be heard ex-parte in the first instance.
 2. That this Honourable Court be pleased to extend and/or enlarge the time within which to file an appeal against the judgment of the Honourable Y.I. KHATAMBI delivered on 11th February, 2022 in Nakuru.
 3. That subject to the grant of prayers 2 above this Honourable Court be pleased to stay execution of the judgment delivered on 11th February, 2022.
 4. That subject to the grant of prayers number 2 and 3 above, the draft Memorandum of Appeal be deemed as properly filed.
 5. That the cost of this application be provided for.
2. The application is expressed to be brought under Article 159(2) of *the Constitution* of Kenya, Sections 3A, 79(G) & 95 of the *Civil Procedure Act*, and Orders 42 Rule 6, 50 Rule 5 of the Civil Procedure Rules, 2020.



3. The application is based on the grounds on the face of it and supported with the supporting affidavit of Anthony Rebo Ngure, a director of the respondent, sworn on even date. There are two annexures to the affidavit, a draft memorandum of appeal and a copy of the judgment of Y.I. Khatambi (PM) dated 11th February, 2022.
4. In response to the application the respondent, through Kipruto Gitau & Co Advocates, filed a replying affidavit sworn by himself on 6th April, 2023 with several annexures thereto.
5. This court issued orders for stay of execution pending the hearing and determination of the application on 24th April, 2023. The application was heard by way of written submissions; counsel for the applicant, Miss Wamae, filed her submissions on 16th May, 2023 while counsel for the respondent, Miss Gitau, filed her submissions on 24th May, 2023.

II. Analysis

A. Affidavits

6. Essentially, the applicant is seeking for leave to file an appeal against the judgment alluded to above out of time and hence the court has been requested to enlarge or extend the time within which the appeal is to be filed.
7. The above-named director of the applicant states in the supporting affidavit that judgment in Nakuru CMC ELR Cause No. 33 of 2020 was delivered on 11th February, 2022. The deponent alleges that he was engaged in campaigns, presumably for a political seat, in 2022 as a result of which this matter escaped his mind. In his view, the delay in filing the appeal is not inordinate and the same is excusable.
8. It is further alleged that the applicant shall suffer irreparable loss if the application is not granted and stay of execution given and the applicant allowed to file an appeal out of time as the respondent shall proceed to execute the decree against the property of the applicant.
9. A draft memorandum of appeal praying that the judgment of the lower court be set aside is annexed to the supporting affidavit raising the following grounds of appeal –
 1. The learned trial magistrate erred in law and in fact by giving judgment against the Appellant without any sufficient grounds in law.
 2. The learned trial magistrate erred in law and in fact by disregarding all the evidence that was adduced by the Appellant in support of their case.
 3. The learned trial magistrate erred in law and in fact by arriving at a judgment that was against the weight of evidence in record.
 4. The learned magistrate erred in law and in fact by failing to consider that it was the Claimant/Respondent who voluntarily resigned.
 5. The learned magistrate erred in law and in fact by taking into account irrelevant factors and failing to take into account relevant factors thereby occasioning a miscarriage of justice.
 6. The learned magistrate erred in law by failing to act fairly and thereby occasioning a miscarriage of justice.



10. In the replying affidavit by the respondent, it is deposed that upon delivery of the judgment of the lower court on 11th February, 2022 the applicant herein through his counsel applied for stay of execution and the same was granted for a period of 30 days. Within the said 30 days the applicant neither settled the decretal sum nor filed an appeal.
11. In an application dated 28th March, 2022 the applicant sought leave in the lower court to file an appeal out of time but the same was dismissed on 8th November, 2022. In the intervening period the applicant enjoyed stay of execution pending the hearing and determination of the said application.
12. It is upon the dismissal of the above application that the respondent commenced execution proceedings and on 9th February, 2023 the properties of the respondent were proclaimed for attachment in satisfaction of the decretal sum plus costs. A copy of the decree, warrants of attachment, and the notice of proclamation are annexed to the supporting affidavit.
13. However, an objection was raised against the execution and the impending attachment and the said objection is said to be pending before the lower court with an order for stay of execution in force pending the hearing and determination of the said objection.
14. It is deposed that this instant application for leave to appeal out of time has been filed over one year after the judgment intended to be appealed. It is further stated that since the judgment was rendered in the lower court the applicant has enjoyed orders for stay of execution in one form or another, completely denying the respondent the fruits of the judgment.
15. It is stated that the applicant has not advanced any persuasive or probative reasons as to why no appeal was filed within the 30 days allowed in law and that the conscious decision by the director of the applicant to pursue his alleged political ambitions at the expense of filing an appeal is such a ridiculous choice that should not be allowed to benefit the applicant at the expense of the respondent who holds a decree whereof he has not enjoyed the fruits. In any event, it is further deposed, there is no evidence that the said director was engaged in any political campaigns.
16. It is deposed that there is no explanation as to why this instant application was filed five months after the dismissal of the earlier application in the lower court which was seeking for the same prayers. It is urged that this application is filed in bad faith, in abuse of court process, and with the sole purpose and intention of buying time endlessly, hence denying the respondent the fruits of the lawful decree.
17. It is emphasized that the delay in filing the application is inexcusable, unreasonable, and inordinate which demands that the same be dismissed with costs.
18. It is further deposed that the draft memorandum of appeal does not raise any triable issues and the applicant has not offered or proposed any security in satisfaction of the decree. It is stated that there are no reasons at all for this court to exercise its discretion in favour of the applicant.

B) Submissions By Counsel

19. Counsel for the applicant submits that the delay of eight months taken by the applicant to file the application, from the date of the judgment, is neither inordinate nor unreasonable. It is alleged that the director of the applicant vied for a parliamentary seat, in un-named constituency, and as a result lost track of the matter. Counsel concedes that she mistakenly filed an application to appeal out of time in the lower court, which application was dismissed, and in the process more time was lost. It is submitted that mistake of counsel should not be visited upon a client.



20. Counsel for the respondent is emphatic that the delay in filing of the application is inordinate, unreasonable, unexplained, unsupported, and that the application is filed in bad faith with the sole purpose of further delaying the settlement of the decree. It is argued that it took over one year for the applicant to file this application and that the reason given for the delay is alleged campaigns in which the director of the respondent was allegedly engaged. In any event, it is further submitted, no evidence whatsoever has been availed to prove that indeed the said director was engaged in any political campaigns for any seat.
20. It is submitted that although the court has discretionary powers to extend the time within which an appeal may be filed, such discretion shall be exercised within judicial beacons delineated in tenets of fairness and justice. It is submitted that no reason has been advanced for the unreasonable and inordinate delay in filing this application, no security has been offered in satisfaction of the decree, and the draft memorandum of appeal does not raise any triable issue(s).
22. The court is urged to dismiss the application with costs and counsel has cited several authorities in support of the dismissal.

III. Determination

23. The issues for determination in this application are derived from the prayers sought and they are –
 - a. Should the applicant be granted leave to appeal out of time?
 - b. If (a) above is in the affirmative, should the applicant be granted stay of execution of the decree pending the hearing and determination of the intended appeal?
 - c. What are the appropriate orders on costs?
24. Section 79G of the *Civil Procedure Act* provides as follows –

79G. 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.

25. It is evidently clear that the discretion given to the court in extending the time for filing an appeal is not a blank cheque for the court to routinely grant such requests. The discretion has to be attached to necessary judicial caution wherein an applicant is only allowed to file an appeal out of time for good and sufficient cause. It is for this reason that courts have spent considerable amounts of time in determining what amounts to “good and sufficient cause”. In *Mutiso v Mwangi* [1997] KLR 630 as cited in *Thuita Mwangi v Kenya Airways* [2003] eKLR which was in turn cited in *Geofrey Maina Njuguna v Waweru Ndirangu* [2022] eKLR the court held as follows in part – “the matters which this court takes into account in deciding whether to grant an extension of time (to file an appeal) are; first, the length of the delay; secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”



26. The above position was put to rest by the Supreme Court in *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 Others* [2014] eKLR wherein the apex court provided that the factors for consideration in an application for extension of time to file an appeal include the following –
1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
27. In terms of the applicant not filing the appeal within the 30 days granted in law, it is alleged that the director named above was engaged in political campaigns. However, it is noted that the said deponent has not named the seat that he was contesting and in which county, constituency, or ward. It is also noted that the judgment in the lower court was delivered on 11th February, 2022 and elections were held in August, 2022. Further, there is no evidence that the said deponent is the only director, officer, or official of the applicant who could have given instructions on the appeal. This ground must fail as the same is hollow, ludicrous, and empty.
28. It is noted that upon delivery of the judgment in the lower court, the applicant was given a stay for 30 days. There is no explanation whatsoever as to why an appeal was not filed within that time. Instead, and after exhausting the 30 days, the applicant made an application on 28th March, 2022 (a month and a half after the judgment was delivered) seeking for leave to appeal out of time and for stay of execution. The applicant, as noted elsewhere in this ruling, was granted stay of execution pending the hearing and determination of that application which was subsequently dismissed on 8th November, 2022.
29. Certainly, by 8th November, 2022 elections had been held way back in August and the political campaigns had long ended, assuming for a moment that the said director was contesting a political seat. The applicant did not act on the matter until it filed the application herein on 27th March, 2023 about four months since the dismissal of a similar application in the lower court. Luckily for the applicant, on 24th April, 2023 orders for stay of execution were granted pending the hearing and determination of this application.
30. Political ambitions or campaigns, let alone pressure of work, cannot and should not be a ground for the failure by a litigant to take a time-bound action or step. If courts were to allow such grounds, then all applications for extension of time should be allowed. The applicant has absolutely no reason or explanation for its failure to appeal within the time allowed and the application herein is in total abuse of the court process and the same is vexatious. Further, the delay in presenting this application is unexplained, unreasonable, inordinate, and in bad faith and taste.
31. The applicant has not demonstrated steps and efforts so far made in ensuring that the proceedings are ready for compiling the record and lodging of the appeal in case this application is allowed. The applicant has not proposed or offered any security in satisfaction of the decree.
32. It is not in the province of this court at this juncture to speculate on the probability of success or how arguable the grounds of appeal are. However, the grounds as presented in the draft memorandum of



appeal are sweeping statements raised in most appeals as general grounds. In any event, the delay has been found to be unreasonable and inordinate in the foregoing paragraphs.

33. It would be contradictory for this court to refuse to extend time of filing the appeal as above yet allow the prayer for stay of execution as such an order for stay shall be pending nothing.

34. For the foregoing reasons, the application by the applicant is hereby denied and dismissed in its entirety.

IV.Orders

35. For all the foregoing reasons, the notice of motion by the applicant dated 24th March, 2023 is dismissed in its entirety with costs to the respondent which are hereby assessed at Kshs.20,000/=, all inclusive.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 2ND DAY OF NOVEMBER, 2023.

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DAVID NDERITU

JUDGE

