



**Thumbi v Everest Enterprises Limited (Miscellaneous Application
E005 of 2023) [2023] KEELRC 2745 (KLR) (3 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2745 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
MISCELLANEOUS APPLICATION E005 OF 2023
ON MAKAU, J
NOVEMBER 3, 2023**

BETWEEN

MARY WAIRIMU THUMBI APPLICANT

AND

EVEREST ENTERPRISES LIMITED RESPONDENT

RULING

1. This ruling relates to the respondents Notice of Motion dated 27th March 2023 brought under Order 42 Rule 1, Order 50 Rule 6 of the Civil Procedure Rules, Rule 8 and 38 of the Employment and Labour Relations Court (Procedure) Rules 2016 and sections 3A, 79G & 95 of the [Civil Procedure Act](#). The application seeks the following:
 - a. This Court be pleased to grant the Applicant leave to appeal out of time against the judgement and decree delivered by Honourable Susan Mwangi (SRM) in Muranga CMCELRC Cause No. 6 of 2019; Mary Wairimu Thumbi vs Everest Enterprises Limited on 11th January 2023.
 - b. The costs of the Application be provided for.
2. The Application is supported by the affidavit sworn by the Applicant, sworn on date 27th March 2023 and a further affidavit sworn on 3rd July 2023. The gist of the applicant's case is that the trial Court delivered judgement on 11th January 2023 where it dismissed her claim with costs; that her advocates were not present on the said date as they had not been served with a notice; that on 6th December 2022 when the court delivered a ruling on the Respondent's application dated 6th October 2022, her counsel did not attend the virtual court due to internet problem; and that the court file went missing from the registry after the judgment on 2nd March 2023 when it was traced then her advocates confirmed that the judgement had been delivered.
3. It is further applicant's case that she was aggrieved by the said judgement and instructed her advocates to seek leave to appeal out of time. She contended that the delay to file the appeal within the prescribed



time was inadvertent considering the circumstances highlighted above. She stated that, on 13th March 2023, her advocates applied and paid for the certified copies of the proceedings and the decree for purposes of filing the Record of Appeal. She contended that replying affidavit is incompetent for being sworn without authority from the respondent.

4. She stated that the 45 days delay was not deliberate or inordinate and thus there was a good and sufficient explanation for the delay. She also stated that her pursuit of the appeal is underpinned by the right to a fair hearing. Therefore, she prayed for the application to be allowed and undertook to prosecute the appeal expeditiously.
5. The Respondent opposed application by the Replying Affidavit sworn on 8th April 2023 by one its directors Mr. John Karuga. The gist of the respondent's case is that the application is without basis, incompetent and an abuse of Court process; that the Applicant has failed to show any substantial loss that she would suffer if the Application was not allowed; that it is indeed true that the Court delivered its ruling on Respondent's application dated 6th October 2022 on the 6th December 2022 and on that day the Respondent's advocate was present in the virtual court; that the online platform was up and running; that the ruling of the court was in the favour of applicant; and that the Applicant did not exercise diligence to find out what had happened in Court on the said date.
6. It is further respondent's case that the allegation that the court file went missing after judgment is falsehood that could not be proved; that the Applicant has not demonstrated any predicament that was beyond her control; that the delay in filing the appeal for more than 30 days was prolonged, inordinate and inexcusable; that the Memorandum of Appeal filed does not make any justiciable grounds to impugn the decision of the trial court and is only replete with generalities with no serious chance of success; and that granting the orders sought will prejudice the respondent.

Submissions

7. It was submitted for the applicant that she was entitled to notice before delivery of the judgement; and that failure to issue the notice amounts to a sufficient reason for the enlargement of time to file appeal. For emphasis, reliance was placed on the case of Nicholas Mutuku Mwasuna vs Patricia Mueni Kilonzo [2022] eKLR.
8. It was further submitted that the application was filed as soon as the applicant learnt of the court's verdict; that the delay of 45 days was not inordinate in the circumstances of the case; that there is no prejudice to be suffered by the Respondent if the Application is allowed; and that where there is no proof of fraud or intention to overreach and a party can be compensated with costs, then a case ought to be heard on merit rather than on procedural technicalities.
9. It was also submitted that the applicant has already acquired the proceedings, the judgement and the decree of the court and therefore ready to lodge the appeal once the application is allowed. The Applicant also submitted that the draft Memorandum of Appeal sets out arguable points of law and fact.
10. It was submitted for the Respondent that the applicant should not be granted the leave sought since she has not met the threshold for the award of leave as was set out in the case of Nicholas Kiptoo Salat v Independent Electoral and Boundaries Commission and 7 others (2014) eKLR.
11. It was submitted that the intended appeal is not arguable and lacks merits; that the impugned judgment was only based on the applicant's evidence; and that the court exercised its mind judiciously. Consequently, it was contended that the leave sought was unwarranted and therefore the application ought to be dismissed with costs.



Issues for determination analysis

12. Having considered the application, affidavits and the submissions by both sides and the only issue for determination is whether the applicant has laid any basis upon which time to lodge an appeal can be extended.
13. The threshold for the award of leave to appeal out of time was set out in the case of Nicholas Kiptoo Salat v Independent Electoral and Boundaries Commission and 7 others (2014) eKLR where the Court of Appeal held that

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for 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.”
14. Again the Court of Appeal discussed the issue of extension of time in the case of Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR held that:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others – See Fakir Mohamed V Joseph Mugambi & 2 Others, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the [Appellate Jurisdiction Act](#) to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the Court.”
15. Section 79G of the [Civil Procedure Act](#) upon which this application is premised provides that:

“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.”
16. In addition to the above provision, Order 50 Rule 6 provides for enlargement of time where there is limited as follows:

Order 50, rule 6. Power to enlarge time

“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.” Emphasis added.

17. In the instant application, the Applicant has asserted that her advocates were not aware of the date fixed by the trial court for delivery of judgment, and he was not notified after the judgment was delivered. Further, that the Court file went missing after the judgment and as such she was unable to ascertain the directions made therein. The question that arises is whether a court of law has duty to notify all parties before delivering its pending decision.
18. The answer, definitely is in the affirmative. Whenever all or any of the parties to a suit is or are absent when the court fixes a date for the delivery of a pending decision, the court has a duty to issue notice to all the parties. The reason for the notice is to enable any aggrieved party to file appeal within the prescribed time. The nature of the notice to be served is immaterial provided the parties are made aware of the date, place and the manner of delivery. However, for good order, a written notice is what I would recommend.
19. I wish also to add that where the court, for any reason delivers its decision without prior notice to the parties, the court has a duty to make the parties aware, as soon as possible, that the pending decision has been delivered. This action would reduce the number of applications for extension of time like in the present case.
20. I have carefully considered the material before the court and did not see any indication of service of notice of the judgement date to the Applicant. The date was fixed on 6th December 2022 when her Counsel was not present in court. The typed proceedings confirms the foregoing position. There is also no indication that either the court or the respondent notified the applicant that the judgment had been delivered.
21. In view of the foregoing observations, I am satisfied that the applicant has made out a good case warranting grant of the leave sought. I have also considered the draft Memorandum of Appeal and I find that it brings out an arguable appeal. I have also considered the issue of prejudice to be occasioned by the granting or denial of the leave sought and I am satisfied that the scale of justice tilts in favour of granting the leave. Denying the same would banish the applicant away from the seat of justice forever for reasons beyond her control.
22. On the basis of the provisions of the law and the authorities cited above, the court has wide discretion to extend the time for filing appeal. Further, the court is required by Article 159 of *the Constitution* to do substantive justice. Consequently, I allow the notice of motion dated 27th March 2023, and grant leave to file appeal out of time as prayed. The leave is only for 30 days from the date of this ruling. If the applicant fails to file the appeal within the said period, the leave shall lapse automatically. Considering that the application was occasioned by the trial court, I will not condemn any party to pay costs of the application.

DATED, SIGNED AND DELIVERED AT NYERI THIS 3RD DAY OF NOVEMBER, 2023.

ONESMUS N MAKAU

JUDGE

Order



This ruling has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

Onesmus N Makau

Judge

