



**Kenya Red Cross v Bende (Miscellaneous Application E013 of 2023)
[2023] KEELRC 3336 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3336 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E013 OF 2023
K OCHARO, J
DECEMBER 19, 2023**

BETWEEN

KENYA RED CROSS APPLICANT

AND

KENNEDY AJAMI BENDE RESPONDENT

RULING

Background

1. The Applicant herein moved this Court vide a Notice of Motion dated 6th February 2023 seeking the following orders that:-
 - a. Spent.
 - b. Spent.
 - c. This Honourable Court be pleased to grant an order of stay of execution of the Decree and the Judgment of the Honourable Magistrate D.O. Mbeja dated 8th September 2021 in the Chief Magistrate's Court at Nairobi – Milimani Commercial Courts No. 5036 of 2013, pending the hearing and determination of the Applicant's intended appeal.
 - d. That the Applicant be granted leave to appeal out of time against the Judgment and Decree arising out of the judgment of the Honourable Magistrate D.O. Mbeja dated 8th September 2021 in the Chief Magistrate's Court at Nairobi – Milimani Commercial Courts No. 5036 of 2013
 - e. The costs of and incidental to this application abide the result of the intended appeal.
2. The Notice of Motion Application is premised on the grounds set out on the face of it and the Supporting Affidavit of one Cynthia Njagi sworn on 6th February 2023.



3. The Respondent opposed the application through a Preliminary Objection dated 17th February 2023; and a Replying Affidavit sworn on 29th March 2023.
4. The Applicant filed a Further Affidavit sworn on 5th May 2023, in response to the foretasted Respondent's documents.
5. On the 24th of April 2023, this Court directed that the application be canvassed by way of written submissions. In their submissions the parties were expected to inter alia address the preliminary objection. The parties filed their respective submissions.
6. The Applicant's application is expressed to be brought under Section 12 of the [Employment and Labour Relations Court Act](#); Order 42 Rule 6 (2) and Order 50 Rules 6 of the Civil Procedure Rules 2010; Article 159 of [the Constitution](#) of Kenya 2010 and all other enabling provisions of law.
7. The Grounds upon which the Notice of Motion Application is based are that:
 - i. The High Court dismissed the Applicant's Appeal No. E622 of 2022 for want of jurisdiction on 17th January 2023.
 - ii. That the Applicant still intends to appeal against the decision of Honourable D.O. Mbeja (Mr.) delivered on 8th September 2021 in favour of the Respondent in Milimani Chief Magistrate's Court Case No. 5036 of 2013.
 - iii. That following the delivery of Judgment on 8th September 2021 by Honourable D.O. Mbeja, the Applicant orally applied for stay of execution pending appeal. He was granted 30 days stay of execution. That they subsequently filed a formal application for stay dated 5th October 2021 and the same was allowed vide a Ruling dated 26th November 2021, on condition that they deposit the decretal sum in an interest earning account in the joint names of the Advocates of the parties.
 - iv. That the Applicant indeed filed their Appeal in the High Court, but the same was struck out by Justice Majanja on 17th January 2023 on the ground that the High Court lacked jurisdiction to hear and determine the appeal as the same arose out of an employer- employee relationship.
 - v. That the matter at the lower court was heard and determined by the civil court and the issue of jurisdiction never arose, so the filing of the Appeal in the High Court was a genuine mistake on the part of the Applicant's Advocates, and they should not be allowed to suffer prejudice as a result.
 - vi. That the Applicant now wishes to exercise his right of Appeal before the right forum as guided by the High Court.
 - vii. That the intended appeal raises serious, weighty and triable issues of both fact and law and has high chances of success, and will be rendered nugatory if stay of execution of the lower court Decree is not granted.
 - viii. That the Applicant will incur substantial loss if the intended appeal is not allowed to be filed out of time and stay is not granted as the Respondent is likely to execute for a sum of Kshs. 1,000,000/- awarded as general damages and Kshs. 3,000/- awarded as special damages. The Respondent's Advocates have already threatened to execute following the striking out of the Appeal dated 28th September 2022.



- ix. That the Applicant is willing and able to offer security within a reasonable time as shall be deemed fit by the Court.
 - x. That it is in the interest of justice that the orders sought be granted.
8. The Respondent's Preliminary Objection is grounded on the fact that this suit is res judicata as a similar application was made in the appeal, EHCC no. 622 of 2021 Kenya Red Cross Vs Kennedy Ajam Bende which was struck out on 16th January 2023. The Court held that the matter could not be transferred to the Employment and Labour Relations Court, and could only be struck out, and that decision has not been appealed against or sought to be reviewed by the Applicant.
9. The Respondent argues that the Applicant was granted an stay of execution by Justice Serگون on 23rd March 2023 in High Court Civil Appeal E622 OF 2022 and ordered to deposit the decretal sum in an interest earning account, but they failed to comply, despite bank opening forms being forwarded to them by the Respondent's Advocates. Further, the instant application has been brought in bad faith and is meant to prevent the Respondent from enjoying the fruits of his judgment.
10. He urged the Court to consider that litigation herein commenced in 2013, almost 10 years ago and dismiss the present application with costs as the same is an abuse of Court process.

Analysis and Determination

11. I have carefully considered the Notice of Motion dated 6th February 2023, the Grounds thereof and Affidavit in Support thereof; the Preliminary Objection dated 17th February 2023; the Replying Affidavit sworn on 29th March 2023; the Further Affidavit sworn on 5th May 2023; the Submissions filed by both parties, and the authorities relied on and distil the following issues for determination:-
- a. Whether this Court should grant the Applicant leave to file its appeal out of time.
 - b. Whether this Court should grant the Applicant stay of execution of the Judgment of the Hon. D.O. Mbeja delivered on 8th September 2021, and
 - c. Whether this application is res judicata.

a. Whether this Court should grant the Applicant leave to file its appeal out of time.

12. The Applicant intends to appeal against the Judgment of the subordinate court (Hon. D.O. Mbeja, P.M.) delivered on 8th September 2021 in Nairobi CMCC No. 5036 of 2013 and the Decree that emanated therefrom.
13. Under Section 79G of the *Civil Procedure Act* 2010, an appeal of the said decision should have been filed in the relevant forum within 30 days of the decision. Section 79G aforesaid 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.”



14. A perusal of the Judgment delivered on 17th January 2023 by Justice Majanja, which is annexed to the Applicant's Supporting Affidavit sworn on 6th February 2023, and marked CN4, indicates that it did indeed file its Memorandum of Appeal before the High Court on 28th September 2021, following the delivery of Judgment by the subordinate Court on 8th September 2021. The Memorandum of Appeal was therefore filed 20 days after the Judgment was delivered, therefore within the time stipulated by the law.
15. The Applicant has approached this Court seeking leave to file its appeal out of time, and in the right forum. Its above stated appeal was struck out as the High Court lacked jurisdiction to hear and determine the said appeal. In its Judgment, the High Court was categorical that the Employment and Labour Relations Court had the appellate jurisdiction to hear appeals in relation to work injuries.
16. The Applicant now seeks to file an appeal before this Court against the Judgment and Decree of the subordinate court delivered on 8th September 2021, more than 2 years of the date of the judgment that it intends to assail by way of appeal.
17. 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.”

18. No doubt the power to enlarge time is discretionary. The Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & OTHERS* [2014] eKLR, considered at length and re – stated the principles which should guide a Court considering an application for leave to extend 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 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 under-lying principles that a Court should consider in 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.”

19. It is with the lens that I shall consider the instant application. Undoubtedly, the delay here is that of more than 2 years as stated earlier in this ruling. The question that immediately pops up for an answer then, is whether the delay has been satisfactorily explained. The applicant explained that its Counsel filed the appeal in the High Court under an erroneous influence by the fact that the lower court that determined the above stated matter so did in its jurisdiction as a civil court. I am persuaded that the delay was caused by the erroneous misrouting of the appeal to a wrong forum whereat it sat for the two years before it was struck out.
20. Apparently, the delay was heavily caused by circumstances a result of the Applicant’s Counsel’s mistake. In my view, the mistake was an honest mistake. The Court takes note of the fact that for some time there has been unsettled waters as regards the jurisdiction of the High Court and that of Courts of equal status over adjudication of some matters, confusing advocates and litigants alike. This Court is prepared not to allow Counsel’s mistake to visit on the Applicant. I hold that the delay has been satisfactorily explained.
21. The Applicant has indicated that it is ready and willing to deposit the decretal sum as security pending the intended appeal. Considering that I shall hereinafter shortly direct that the full sum of the decretal amount be deposited in a joint interest earning account in the names of both Counsel for the parties, I am persuaded that the Respondent would not suffer substantial prejudice if the order of extension of time is granted.
22. On the issue of whether there has been undue delay in bringing this application, I am persuaded that there hasn’t. This is because the Judgment of the High Court (Hon. Majanja, J) was delivered on 17th January 2023, and this application was filed on 6th February 2023, about three weeks later.
23. I am therefore persuaded to grant the Applicant leave to file its appeal out of time.

b. Whether this Court should grant the Applicant stay of execution of the Judgment of the Hon. D.O. Mbeja delivered on 8th September 2021; and whether this application is res judicata.

24. The Applicant herein has sought stay of execution on the Judgment of the Honourable D.O. Mbeja (P.M.) delivered on 8th September 2021, pending the hearing and determination of the intended appeal.
25. The relevant provisions of the law in relation to stay of execution are Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules 2010 which provide:

“Stay in case of appeal [Order 42, rule 6.]



- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

26. This Court must now turn to consider whether the Applicant has met the conditions for grant of an order of stay of execution, pursuant to Order 42 Rule 6 (2).

27. Firstly, has the Applicant proved that it will suffer substantial loss if the orders are not granted? The test for whether an Applicant will suffer substantial loss was set out in the case of *Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007* where the court held:

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment.”

28. In the present case, the Applicant has averred that the Respondent will at any time proceed and execute the colossal sums against the Applicant. It argues that the Advocates for the Respondent have already threatened commence execution proceedings against it. No evidence of such threats has been put forth. Nonetheless, it is not in dispute that the decretal sum, being Kshs. 1,896,040/- as per the Decree issued on 20th April 2022.

29. The financial ability of the Respondent herein is not known as he has not addressed this issue. Once the Applicant expressed doubt as regards the Respondent’s ability to refund the decretal sum if called to at any time, it became imperative for the to demonstrate that he has or could have the financial capability to refund. The Respondent failed to so demonstrate. This coupled with the foregoing premise, compels this to find that the Applicant has demonstrated that it will suffer substantial loss if stay of execution is not granted.



30. Taking into account the fact that this application was brought within the period above stated, I find no difficulty in concluding that the same was made without unreasonable delay. I also answer this question in the affirmative.
31. The Intended Appellant/Applicant has expressed its willingness to deposit security for performance of any decree or order that may ultimately become binding on it.
32. In the case of Michael Ntouthi Mitheu vs Kivondo Musau [2021] eKLR, the Honourable Court pronounced itself as follows on the reason why security should be given:-

“22. However, the law still remains that where the applicant intends to exercise its undoubted right of appeal, and in the event it was eventually to succeed, it should not be faced with a situation in which it would find itself unable to get back its money. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree. This is the cornerstone of the requirement for security, and it is trite that once the security provided is adequate its form is a matter of discretion of the Court. See Nduhiu Gitahi vs. Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100.

33. The giving of security is the final condition for grant of an order of stay of execution per Order 42 Rule 6 (2) (b). Beyond any doubt, the Appellant/Applicant herein is willing to do so.
34. The Respondent argues that this Application is res judicata, owing to the fact that the Applicant had filed a similar application before the High Court on 5th October 2021, which application was conditionally allowed. The Applicant was ordered deposit the decretal sum in a joint interest earning account in the name of the Advocates within 30 days, but it failed to comply.
35. The doctrine of res judicata is established under Section 7 of the Civil Procedure Act}} Cap 21 of the Laws of Kenya, which states that:-

“7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.



Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

36. This doctrine has been applied in the case of Reference No.1 of 2007, James Katabazi and 21 Others -vs- The Attorney General of the Republic of Uganda EACJ where the Court stated that for the doctrine to apply:

“The matter must be ‘directly and substantially’ in issue in the two suits, the parties must be the same or parties under whom any of them claim, litigating under the same title; and the matter must have been finally decided in the previous suit (See Uhuru Highway Development Ltd. - v- Central Bank & 2 Others – Civil Appeal No. 36 of 1996)”.

37. On the purpose of the doctrine the Court in Lotta vs. Tanaki [2003] 2 EA 556, held that:

“The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit”.

38. I am obliged to consider whether the conditions set out in the above cases have been met in the present suit. In light of the fact that the present application is for stay of execution pending appeal in respect of the same Judgment of the lower Court in CMCC 5036 OF 2013, I return that the matter directly and substantially in issue in the subsequent application was indeed directly and substantially in issue in the former application. Similarly, there is no dispute that the former application was between the same parties litigating under the same title as the present application. However, I hold that the court which decided the former application, being the High Court was not competent to try the same. The judgment by Justice Majanja mentioned hereinabove speaks to this. For the foregoing reason, it follows, therefore, that this application is not res judicata.

39. By reason of the premises, the Applicant’s Notice of Motion Application herein is allowed on the terms;

I. The Applicant is granted leave to appeal out of time against the Judgment of Hon. Magistrate D.O. Mbenja of 8th September, 2021 in the CMC Milimani Commercial, Case No. 5036 of 2013.



II. The Appeal be filed within 14 days of this Ruling.

III. Pending the hearing and determination of the intended appeal, there shall be a stay of execution of the Decree in Case No. 5036 of 2013 foretasted, on condition that the entire decretal sum is deposited in a joint interest earning account in the names of both Counsel for the Parties within 30 days of today.

IV. In the defaulting, execution to issue forthwith.

V. Costs of this Application shall be in the Appeal.

40. Orders accordingly.

READ, DELIVERED AND SIGNED THIS 19th DAY OF DECEMBER, 2023.

OCHARO, KEBIRA

JUDGE

In the presence of:

Mr. Okao for the Respondent

Mr. Ahmed 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 15th March 2020 and subsequent directions of 21st 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 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.

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OCHARO KEBIRA

JUDGE

