



**Biyondi v Aura (Miscellaneous Case E025 of 2023)
[2023] KEELRC 3239 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3239 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS CASE E025 OF 2023**

**AK NZEI, J
DECEMBER 7, 2023**

BETWEEN

TAHERA KHANA BIYONDI APPLICANT

AND

JAMES MUNYANYA AURA RESPONDENT

RULING

1. The application before me is the Applicant’s Notice of Motion dated 7/6/2023, expressed to be brought under Sections 1A, 3A, and 79G of the [Civil Procedure Act](#), Order 42(6) and Order 51(1) of the [Civil Procedure Rules](#) and Article 159 of [the Constitution](#) of Kenya. The following orders are sought at this stage:-
 - a. that leave be granted to the Applicant to file an appeal out of time against the judgment delivered on 8th March 2023 by the Honourable Lesootia Saitabau in Mombasa CM ELR Case No. 1089 of 2019 (James Munyanga Aura -vs- Tahera Khana Biyondi t/a Mara Metal & Landscaping Co. Ltd) and the decree arising therefrom.
 - b. that pending hearing and determination of the intended appeal, there be issued an order of stay of execution of the judgment delivered on 8th March 2023 by the Honourable Lesootia Saitabau in Mombasa CM ELR Case No. 1089 of 2019 (James Munyanga Aura -vs- Tahera Khana Biyondi t/a Mara Metal & Landscaping Co. Ltd) and decree arising therefrom.
 - c. that costs of the application do abide the outcome of the intended appeal.
2. The application sets out on its face the grounds on which it is founded, and is premised on a supporting affidavit of Tahera Khana Biyondi sworn on 7/6/2023. It is deponed in the said application, inter-alia:-



- a. that the lower Court suit was last in Court on 18/11/2021 when parties confirmed filing of submissions and judgment was reserved for delivery on notice as the trial magistrate had been transferred to a different station.
 - b. that the matter went quiet for over one year and 3 months until 27/4/2023 when Counsel for the Applicant received a letter from the Respondent's Advocate informing them that judgment had been delivered on 8/3/2023, and subsequently send a copy of the judgment to the Applicant's Advocates vide a letter dated 9/5/2023 and received on the same date.
 - c. that the period between when the matter was last in Court and the date when Counsel for the Applicant were furnished with a copy of the judgment was in excess of one year and six months, and that due to the said passage of time, Counsel for the Applicant had lost contact with the Applicant.
 - d. that delay in filing the present application after receipt of the judgment of about 19 days, was occasioned by the fact that the Applicant's Advocates had lost contact with him after delivery of the judgment was delayed for over one year.
 - e. that the judgment was delivered without notice to the Applicant and his Advocate and the Applicant is dissatisfied with the judgment and intends to appeal against it; hence the application to appeal out of time.
 - f. that the Applicant has an arguable appeal because:-
 - i. the Respondent was not the Applicant's employee at the time of the alleged termination, but was employed by Royal Zanzibar Beach Resort as confirmed by documents filed in Court.
 - ii. that the Applicant did not terminate the Respondent as alleged.
 - iii. that the Respondent is not entitled to compensation as awarded in the trial Court's judgment.
3. The application is opposed by the Respondent vide a replying affidavit sworn by Kitonga O. Kiiva Advocate on 19/6/2023. It is deponed in the said affidavit:-
- a. That the application is mischeivous, misleading, a mere red-herring and devoid of merit, and can only be construed as malicious attempt to by the Applicant to deny the Respondent from enjoying his rightful fruits of judgment, and overlooks:
 - i. that a competent Court has already heard, analysed and rendered its judgment which remains lawful and binds the parties herein.
 - ii. that the Applicant's right of appeal does not automatically supercede the Respondent's right in as far as the Court's final judgment is concerned.
 - iii. that execution remains a lawful process and follows a favourable judgment, and any application to defer the same must appreciate both parties' unalienable rights.
 - b. that the Applicant has not demonstrated sufficient cause to warrant stay as the appeal has no chance of success, and there is no proof that substantial loss may result to the Applicant unless the stay is granted.
 - c. that if the Court is inclined to grant a stay, then it should direct that the Applicant furnishes security for due performance of the entire decree, including costs, to be deposited in Court.



4. Both parties filed written submissions on the application pursuant to the Court's directions in that regard, which I have considered.
5. Rule 8(1) & (2) of the *Employment and Labour Relations Court (Procedure) Rules 2016* provides as follows:-

“ 8.

- (1) Where any written law provides for an appeal to the 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. I recently stated as follows in *P.N. Mashru Limited -vs- Anthony Wachira Kabiga [2023]* eKLR:-

“6. Section 79G, on the other hand 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 Applicant of a copy of the decree or order.

By dint of Article 162(2) (a) *the Constitution* of Kenya 2010, this Court is a Court of equal status with the High Court. Appeals to this Court must therefore, be filed within thirty days from the date of the decree or order appealed against.

7. The proviso to Section 79G states 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.”

8. It was stated in *Feroz Begum Quareshi & Another -vs- Maganbhai Patel & Others [1964] E.A 633* that there is “no difference between “good cause and sufficient cause”. It was held in *Dalphine Parry -vs- Murray Alexander Carson [1963] E.A. 633* that although “sufficient cause” should receive liberal interpretation so as to advance substantive justice where no negligence, inaction or want of bonafides is imputed to the Appellant, its interpretation must be in accordance with Judicial principles.

In *First American Bank Of Kenya Ltd -vs- Gulab P. Shah & 2 Others [2002] 1EA 65* the Court set out factors to be considered in deciding whether or not to grant an application for extension of time as follows:

- a. The explanation if any, for the delay.
- b. The merits of the contemplated action, whether the matter is arguable or deserving a day in Court, or whether it is a frivolous one which would only result in delay of the course of justice.



- c. Whether or not the Respondent can be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.”

7. In the present case, I have noted that the matters of fact deponed to in the Applicant’s supporting affidavit in explaining the delay involved have neither been denied nor controverted by the Respondent. Delivery of the trial Court’s judgment is shown to have been delayed for over one year and 3 months, and was finally delivered without notice to the Applicant and his Counsel. The Applicant’s Counsel became aware of the lower Court’s judgment after the same was brought to their attention by the Applicant’s Counsel, months after its delivery. I am satisfied with the explanation given by the Applicant as to why an appeal was not filed within 30 days of the impugned judgment as by law provided.
8. On the merits of the contemplated appeal, I have considered the grounds set out by the Applicant at paragraph 2 of this Ruling and, in my view, the same are not frivolous. The Respondent’s rights as vested in him by the lower Court’s judgment (decree), which is a money decree, can be secured by this Court by issuance of appropriate orders on furnishing of security, to hold pending hearing and determination of the intended appeal. In other words, I am convinced that a stay of execution pending hearing and determination of the intended appeal is deserved but on conditions.
9. The Court of Appeal (Madan JA) stated as follows in *Butt-vs- Rent Restriction Tribunal [1979]* eKLR:-

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful, may not be nugatory. A stay that would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be better remedy, will become available to the Applicant at the conclusion of the proceedings. It is in the discretion of the Court to grant or refuse stay, but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the Court as a general, rule ought to exercise its best discretion in away so as to prevent the appeal, if successful, from being nugatory, per Brett LJ in *Wilson -vs- Church (No. 2)* 12 Ch D(1870) 454 at P459. In the same case, Colton LJ, said at P.458:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this Court has to see that the appeal if successful, is not nugatory.”
10. Having said that, and having considered written submissions filed by Counsel for the parties herein, I allow the Notice of Motion dated 7/6/2023 in the following terms:-
 - a. the Applicant is hereby granted leave to appeal against the lower Court’s judgment delivered on 8/3/2023 by Hon. Lesootia Saitabau in Mombasa CM -ELR Case No. 1089 of 2019 (James Munyanya Aura -vs- Tahera Khana Biyondi t/a Mara Metal & Landscaping Co. Ltd) out of time.
 - b. a memorandum of appeal and a complete record of appeal shall be filed and served within thirty (30) days from the date of this Ruling.
 - c. there will be a stay of execution of the lower Court’s decree in Mombasa CM -ELR Case No. 1089 of 2019 (James Munyanya Aura -vs- Tahera Khana Biyondi t/a Mara Metal & Landscaping Co. Ltd) pending hearing and determination of the intended appeal on condition that the Appellant deposits the judgment sum of ksh. 111,800, plus a further sum of ksh.



50,000 being security for costs (a total of ksh. 161,800) in the lower Court suit within thirty days of this Ruling.

- d. costs of this application are awarded to the Respondent, to be agreed upon or taxed as by the law provided.
- e. orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DECEMBER 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.

AGNES KITIKU NZEI

JUDGE

