



REPUBLIC OF KENYA



KENYA LAW
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**Muravvej Holdings Ltd v Mwadzoya (Miscellaneous Case
E060 of 2021) [2022] KEELRC 21 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 21 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS CASE E060 OF 2021**

**AK NZEI, J
APRIL 28, 2022**

BETWEEN

MURAVVEJ HOLDINGS LTD APPLICANT

AND

RASHID JUMA MWADZOYA RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 29th November 2021, expressed to be brought under order 42 Rule 6, Order 22 Rule 1, Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010 and Section 3A of the [Civil Procedure Act](#). The following orders were sought;-
 - a. That the application be certified as urgent, service be dispensed with thereof and the same be heard ex-parte in the first instance.
 - b. That the Honorable Court be pleased to order a stay of garnishee proceedings pending hearing and determination of the application.
 - c. That the Honourable Court be pleased to order an interim stay of execution of the judgment and decree delivered by Honourable F. Kyambia, Senior Principal Magistrate Mombasa on 3rd September 2021 in Mombasa CM- ELRC No. 318 of 2018, pending hearing and determination of this application.
 - d. That the application be heard inter-partes on such date and time as the Honorable Court may direct.
 - e. That the Honourable Court be pleased to order a stay of execution of the judgment and decree delivered by Honourable F. kyambia Senior Principal Magistrate Mombasa on 3rd September 2021 in Mombasa CM ELRC No. 318 of 2018, pending hearing and determination of the intended appeal.



- f. That the Honourable Court be pleased to grant leave to the Applicant to appeal out of time.
 - g. That the costs of this application abide the outcome of the intended appeal.
2. The application is predicated on the supporting affidavit of Mohamedraza Muravvej Sayed, a director of the Applicant Company sworn on 29th November 2021, wherein it is deponed, inter-alia:-
- a. That the judgment in issue was delivered in the absence of the Applicant and without notice.
 - b. That the Applicant got to know of the judgment/ decree well over a month later when it received a copy of a Notice of Entry or Judgment from the Claimant's advocates.
 - c. That execution proceedings have already been taken out and the Applicant stands to be denied the opportunity to ventilate the intended appeal.
 - d. That the intended appeal raises serious issues of law and fact to be ventilated in the appeal, especially, inter-alia, whether the Respondent was indeed terminated wrongfully.
 - e. That the respondent will not be prejudiced in the event the intended appeal does not succeed as the Applicant is willing and able to deposit the entire decretal sum (ksh.357,978.58) in Court, and to comply with whatever condition the Court may direct as security pending the hearing and determination of the intended appeal.
3. The application is opposed by the Respondent who filed a Replying Affidavit sworn by himself on 6th December 2021. The Respondent deponed, inter-alia:
- a. That the date of delivery of the Lower Court's judgment was set by the Court in the presence of counsel for both parties but the Applicant's counsel failed to attend Court on the date of delivery of the judgment.
 - b. That the Applicant did nothing on the judgment even after being served with a notice of entry of judgment and is an indolent litigant who should not benefit from equity.
 - c. That the Respondent has a regular judgment in his favour, obtained after a full trial, and has the right to proceed with the garnishee proceedings and to compel the applicant to satisfy the decree.
 - d. That the judgment of Honourable Kyambia dated 3rd September 2021 has not been appealed against and hence there is no issue of law or fact to be determined by this Court.
 - e. That the application is an afterthought and the Respondent will suffer prejudice if the same is allowed.
4. Prayers (a),(c), and (d) referred to in paragraph 1 above have since been spend, and I on 8th December 2021 allowed prayer (b) pending hearing and determination of the application. What remains to be determined are the prayer for leave to file an appeal out of time, stay of execution of the Lower Court's decree pending hearing and determination of the intended appeal and the issue of costs of the application.
5. On 25th January 2021, I directed parties to file written submissions on the application, and this has since been done. I have considered the submissions filed for and against the application.



6. Before determining the issues before me, I must address the all important issue of whether this Court is seized of jurisdiction to grant leave to appeal a Lower Court’s judgment out of time. Rule 8(1) & (2) of the *Employment and Labour Relations Court (Procedure) Rules* 2016 provides:-

- “(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
- (3)
- (4)

7. The foregoing Rule is silent on extension of time for filing appeals to this Court. This Court being a Court of equal status with the High Court by dint of Article 162(2) (a) of *the Constitution* of Kenya 2010, Section 79G of the *Civil procedure Act* is quickly called in aid. Section 79G of the *Civil Procedure Act* provides as follows:-

“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.”

8. The reason advanced by the Applicant as to why the intended appeal was not filed in good time is that the lower Court’s judgment dated 3rd September 2021 was delivered in the absence of the Applicant and without notice, a fact which the Respondent disputed. None of the parties, however, placed the relevant proceedings of the Lower Court before this Court in support of their line of argument.

9. The right to appeal is an appendage of the right to fair hearing, and the right to fair hearing is so crucial such that it is secured in *the Constitution*. Article 50(1) of *the Constitution* of Kenya 2010 provides:-

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”

10. Although the applicant has not given cogent reasons as to why the intended appeal was not filed within the prescribed period, I am inclined to allow the filing of an appeal out of time.

11. The Respondent’s right to realize the decretal sum after years of litigation cannot, however, be wished away, and particularly if the intended appeal does not succeed. The Notice of Motion dated 29th November 2021 is allowed in the following terms:-

- a. the Applicant is hereby granted leave to appeal against the Lower Court’s judgment delivered on 3rd September 2021 in Mombasa CM ELRC No. 318 of 2018 out of time. A memorandum of appeal and record of appeal shall be filed contemporaneously within thirty days; failing which the leave herein granted shall automatically lapse.



b. there shall be a stay of execution of the Lower Court's decree pending hearing and determination of the intended appeal on condition that the entire decretal sum amounting to ksh.357,978.58 is deposited in the Lower Court within fourteen days, failing which the stay herein granted shall automatically lapse.

c. costs of the application are awarded to the Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL, 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Abwao for Applicant

Mr. Tolo for Respondent

