



**Motrex Limited v Wanyonyi (Miscellaneous Application
E038 of 2021) [2022] KEELRC 1403 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1403 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS APPLICATION E038 OF 2021**

**AK NZEI, J
JUNE 30, 2022**

BETWEEN

MOTREX LIMITED APPLICANT

AND

JOHN WANJALA WANYONYI RESPONDENT

RULING

1. The application before me is the Applicant's Notice of Motion dated 6th July 2021, wherein the Applicant prays:-
 - a. that the Honorable Court be pleased to enlarge the time within which the Applicant herein is to file appeal, and that the appeal herein be admitted out of time.
 - b. that the memorandum of appeal filed herein be deemed to have been filed within time.
 - c. that costs of the application be costs in the cause.
2. The application sets out grounds upon which it is predicated, and is supported by the supporting affidavit of Iqbal Ahmed Bayusuf sworn on 6th July 2021. It is deponed in the said supporting affidavit:-
 - a. that the Applicant had been sued by the Respondent (in Mombasa CMC ELR Cause No. 265 of 2019) and that after a full trial, judgment was reserved for 19th March 2020, a date on which the Court did not sit due to Covid-19.
 - b. that the Applicant became aware of the trial Court's judgment on 11th August 2020 when its Advocates were served by the Respondent's Advocates with a letter attached to a decree and a certificate of costs, demanding a sum of ksh. 316,372 and threatening execution if the said sum was not paid within seven days.



- c. that after applying for and obtaining certified copies of proceedings and judgment, the Applicant found that time for lodging an appeal had lapsed. The Appellant exhibited a copy of his Advocates' letter to the Court dated 13th August 2020 requesting to be furnished with certified copies of the Court's proceedings and judgment. The Applicant also exhibited a copy of the lower Court's judgment shown to have been delivered in the absence of both parties on 16th June 2020.
 - d. that the Applicant has an arguable appeal. The Applicant exhibited an unsigned draft copy of a memorandum of appeal.
 - e. that no prejudice will be suffered by the Respondent as the Applicant has deposited the entire decretal sum in Court as a condition for a stay of execution. The Applicant exhibited a photocopy of a Court deposit receipt for ksh. 316, 372 dated 12th March 2021, issued in the Lower Court's Case nNo. 265/2019.
3. The application is opposed by the Respondent. The Respondent filed a replying affidavit on 23rd July 2021, sworn by himself on the same date. The Respondent deponed, inter-alia:-
 - a. that the Applicant has been acting frivolously to delay justice for the Respondent.
 - b. that on 9/3/2021, the trial Court ordered the Applicant to deposit the entire decretal sum in Court within 14 days, and the Applicant has never notified the Respondent whether that order was complied with.
 - c. that the same matter was filed in the High Court, and later transferred to this Court upon which the Applicant withdrew it on unclear grounds, hence causing a delay of justice.
 - d. that the application should be dismissed with costs.
 4. Counsel for both parties filed written submissions on the application, which I have considered.
 5. This Court's rules, the *Employment and Labour Relations Court (Procedure) Rules* 2016, are silent on enlargement/extension of time within which to file an appeal from the subordinate Court's to this Court. In such cases where this Court's rules are silent on any procedural issue, the Court's practice has been to revert to the *Civil Procedure Act* and the Rules made thereunder.
 6. Section 79G of the *Civil Procedure Act* 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 from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of copies of the decree or order. The proviso to that Section provides as follows:-

” 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.”
 7. Under Article 162(2) (a) of *the Constitution* of Kenya 2010, this Court is a Court of equal status with the High Court. It follows that appeals from the subordinate Court to this Court must be filed within a period of thirty days from the date of the decree or order appealed against. A party applying for enlargement and/or extension of time within which to file such an appeal, or admission of an appeal filed out of time, must show that he had a “good and sufficient cause” for not filing the appeal in time.
 8. In the present case, the Applicant deponed that judgment of the lower Court was initially scheduled to be delivered on 19th March 2020, a date on which the Court did not sit due to Covid-19, and that the



- Applicant became aware of the said Court's Judgment on 11th August 2020 when its Advocates were served by the Respondent's Advocates with the lower Court's decree and a certificate of costs, and a demand for payment. The Respondent did not deny these facts.
9. Indeed, a look at the subordinate Court's judgment in issue shows that the same was delivered on 16th June 2020 in the absence of parties, and that this was in mitigation of the effects of Covid-19. Nothing was placed before this Court to show that the Applicant and/or its counsel were made aware of the said judgment before the expiry of thirty days from the date of delivery thereof.
 10. The Court has taken judicial notice of the advent of the Covid-19 global pandemic in or about early 2020, and the resultant scaling down of Court operations in Kenya during part of the year 2020. The Applicant seems to blame this situation for the predicament in which it found itself following delivery of the lower Court's judgment on a date other than that initially scheduled and in the absence of the parties and without notice to them.
 11. It was held in the case of *Dilpack [k] Limited -vs- William Muthama Kitony* [2018] eKLR that:-

“in an application for extension of time, where the Court is being asked to exercise discretion, there must be some material before the Court to enable its discretion to be exercised. Once there is non-compliance, the burden is upon the party seeking indulgence to satisfy the Court why the discretion should nevertheless be exercised in his favour, and the rule is that where there is no explanation, there is no indulgence. See *Ratman -vs- Cumarasamy* [1964] 3. All ER 933...
 12. I am satisfied that the Applicant has demonstrated that it had “good and sufficient cause” why it did not appeal against the lower Court's judgment within the prescribed time; and why the Court's discretion should be exercised in its favour.
 13. I have noted from the draft memorandum of appeal that the Applicant intends to challenge the lower Court's findings on the issues of legality and fairness or otherwise of termination of the Respondent's employment and awards made in favour of the Respondent by the said Court. These are arguable issues that cannot be said to be frivolous.
 14. The Applicant deponed, and indeed demonstrated, that the decretal sum was on 12th March 2021 deposited in the lower Court by the Applicant as a condition for stay of execution pending appeal. This fact was not disputed by the Respondent. With the decretal sum already secured vide the said deposit in the lower Court, the Respondent does not stand to be prejudiced if leave to appeal out of time is granted to the Applicant.
 15. Consequently, I find merit in the Notice of Motion dated 6th July 2021, and allow the same in the following terms:-
 - a. the Applicant is hereby granted leave to appeal against the lower Court's judgment in Mombasa CMC ELR Case No. 265 of 2019, delivered on 16th June 2020, out of time.
 - b. the Applicant shall file and serve a memorandum of appeal together with a complete record of appeal within thirty days of this Ruling, failing which the leave granted herein shall lapse, and execution shall thereupon issue on the lower Court's decree.
 - c. costs of this application are awarded to the Respondent, to be agreed or taxed.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JUNE 2022

AGNES KITIKU NZEI



JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling 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:

..... for Applicant

..... for Respondent

