



**Brinks Security Services Limited v Karani (Appeal E004 of 2021)
[2022] KEELRC 1343 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1343 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E004 OF 2021**

**AK NZEI, J
JUNE 23, 2022**

BETWEEN

BRINKS SECURITY SERVICES LIMITED CLAIMANT

AND

VINCENT AMWANGA KARANI RESPONDENT

(Being an Appeal against the Judgment and Decree of the Hon. Lesootia Saitabau – PM given in Mombasa CM-ELR Cause No. 633 of 2019 delivered on 26th January 2021.)

RULING

1. Vide its Ruling dated December 9, 2021, this Court found that no Memorandum of Appeal had been filed herein and that as such there was none that was capable of being amended as was being sought by the “Appellant”. This Court stated as follows:-

“2. The aforesaid document, though expressed to be a memorandum of appeal, is Nota memorandum of appeal. Vide the said document, the Appellant simply gave notice of its intention to appeal against the decision of Honourable Lesootia in Mombasa ELRC 633 of 2019 given on January 28, 2021. It is not clear under what law or procedure the said notice was filed.

Perusal of the Court record before me shows that no appeal has been filed todate, either within the time prescribed by the relevant law or at all.

8. The notice of intention to appeal referred to in paragraph 2 of this Ruling was, from its wording and content, not meant to be a memorandum of appeal. The document simply expresses an intention to appeal. It is not a memorandum of appeal. It does not set out any grounds of appeal.



13. There is no memorandum of appeal on record that is capable of being amended. Allowing the Applicant to introduce a memorandum of appeal at this stage will be tantamount to allowing the Applicant to file an appeal outside the time set by the law. As counsel for the Respondent put it, it will be tantamount to allowing the Applicant to steal a match.
14. I find no merit in the application dated October 18, 2018, and I hereby dismiss the same with costs to the Respondent.
15. Either party may move the Court as may be appropriate as the proceedings herein must be brought to a close.”

2. On January 4, 2022, two applications were filed by the parties herein as follows:-

- a) the Respondent’s Notice of Motion dated January 10, 2022 seeking the following orders:-
 - (i) that this Court be pleased to extent time to file an appeal against the judgment of the trial Court dated January 26, 2021.
 - (ii) that this Court be pleased to order a stay of proceedings in the matter pending hearing and determination of the intended appeal.
 - (iii) that this Court deem the memorandum of appeal filed herewith as duly filed.
 - (iv) that costs of the application be in the cause.
- b) The Respondent’s Notice of Motion dated January 14, 2022 whereby the following orders are sought.
 - (i) that this Court be pleased to strike out the memorandum of appeal dated February 9, 2021.
 - (ii) that upon grant of prayer 1 above, the money deposited in the joint interest earning account pursuant to the consent order made on March 22, 2021 be released to the Respondent/Applicant’s Advocates.
 - (iii) that costs of the application be borne by the Appellant/Respondent.

3. On January 24, 2022, Counsel for both parties sought to have the two application heard together, and I directed that the two applications be heard together. The two applications are now before me for determination.

The Appellant’s Notice of Motion dated January 10, 2022

4. The application generally sets out the grounds upon which it is brought, and is supported by the affidavit of Bernard Kyengo Kawea sworn on January 10, 2022. The Appellant states in the application and supporting affidavit, inter-alia:-

“failure (by the Appellant) to file a memorandum of appeal was brought by ineptness of its previous counsel, that the intended appeal has merit, that the application is brought in good faith and that the right to appeal is a constitutional right which should not be impeded.”

5. The application is opposed by the Respondent, who on January 31, 2022 filed grounds of opposition dated January 28, 2022 stating that:-



- a) the application is grossly incompetent, fatally defective and a non-stata.
 - b) the Court has no jurisdiction to issue the orders sought whilst a memorandum of appeal, though defective, is still on record.
 - c) the Appellant’s application amounts to gross abuse of Court process, and ought to be dismissed.
6. Although the right procedure would have been for the Appellant/Applicant to first bring the proceedings herein to an end by withdrawing the notice of intention to appeal filed herein on February 18, 2021 and thereupon filing an application for leave to appeal out of time, possibly by way of a miscellaneous cause, I will, nevertheless, proceed and determine the Applicant’s application on its merits.
 7. As already stated herein, the Appellant is seeking enlargement/extension of time to lodge an appeal against the trial Court’s judgment delivered on January 26, 2021. This Court’s Rules, that is, the *Employment and Labour Relations Court (Procedure) Rules* 2016, are silent on extension and/or enlargement of time within which appeals to the Court against decrees and orders of the subordinate Courts are to be filed in this Court. Where this Court’s Rules are silent on any given procedural issue, the Court’s practice has been to revert to the *Civil Procedure Act* and Rules made thereunder.
 8. 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 a copy of decree or order. The proviso to Section 79G 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.”
 9. By dint of Article 162(2) (a) of *the Constitution* of Kenya 2010, this Court is a Court of equal status with the High Court. Appeals from the Subordinate Court to this Court must be filed within 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 “good and sufficient cause” for not filing the appeal in time.
 10. In the present case, the Appellant/Applicant blames the ineptness of its previous counsel for its failure to file the appeal within the prescribed time. The Appellant filed a document whose content and purpose was to give notice of intention to file an appeal against the decision of Hon. Lessotia in ELRC Cause No. 634 of 2019 given in Mombasa on January 26, 2021. The said document, filed in Court on 18th February 2021, reads:-

“Take Notice That Brinks Security Services Limited having been dissatisfied with the decision of Hon. Lesootia in ELRC No. 634 of 2019 given at Mombasa on January 26, 2021 intends to appeal to the High Court against the whole of the said decision. The address of service of the Appellant is care of Mulago -arika & Co. Advocates, Taiyebi House 2Nd Floor Suite 6, Nkuruma Road P.O. BOX 2682 – 80100 Mombasa. Dated at Mombasa this 9th day of February 2021.”
 11. As already stated in this Ruling, this Court ruled on December 9, 2021 that the aforesaid document is not a memorandum of appeal, and that there is no appeal on record herein.



12. The question here is, has the Applicant demonstrated that it had good and sufficient cause for not filing the appeal in time? It was held in the case of *Feroz Begum Qureshi & Another -vs- Maganbhai Patel & others* [1964] E.A. 633 that there is no difference between good cause and sufficient cause.
13. It was held in the case of *Daphine Parry-vs- Murray Alexander Carson* [1963] E.A. 546 that although the extension of time requiring “sufficient cause” should receive liberal interpretation so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the Appellant, its interpretation must be in accordance with judicial principles. If the Appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the Court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred even at the risk of injustice and hardship to the Appellant.
14. In the case of *Dilpack -vs- William Muthama Kitonyi* [2018] eKLR, the Court held as follows:-

“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...”
15. In the Dilpack case (*supra*), the Court referred to Court of Appeal Civil Application 166 of 1997 – *Itute Ngui & Another -vs- Ismail Mwakavi Mwendwa* where Omolo JA held that:

“whereas Advocates bona fide error is a reason for extension of time within which to appeal, the nature and quality of the mistake must be considered. What this means is that whereas inadvertence may be a ground for extension of time, the nature and quality of the inadvertence must be disclosed for consideration by the Court”
16. Failure by an Advocate to act or acting in the wrong manner does not constitute good or sufficient cause. The alleged “ineptness” on the part of the Applicant’s previous Counsel does not constitute good and sufficient cause.
17. Consequently, I find no merit in the Appellant/Applicant’s Notice of Motion dated January 10, 2022, and I dismiss the same with costs to the Respondent.

The Notice of Motion dated January 14, 2022

18. The following orders are sought in the application: -
 - a) That this Court be pleased to strike out the memorandum of appeal dated February 9, 2021.
 - b) That the money deposited in the joint interest earning account pursuant to the consent order made on 22nd March 2021 be released to the Respondent/Applicant’s Advocates.
 - c) That costs of the application be borne by the Appellant/Respondent.
19. The application is supported by the affidavit of Lucy W. Ngigi Advocate sworn on January 14, 2022. It is deponed in the said affidavit that the memorandum of appeal filed herein is merely a notice of an intended appeal and is therefore incompetent and incurably defective, and that an application to cure the defect by way of an amendment was rightly dismissed by this Court.



20. The application is opposed by the Appellant, which on February 17, 2022 filed grounds of opposition dated February 14, 2022 stating that:-
- a) The application is incompetent and amenable to be struck out.
 - b) The application is brought in absolute bad faith with the sole intention of unjustly punishing the Appellant.
 - c) The application offends the provisions of judicial authority where the Constitution of Kenya provides that justice should be done to all parties without undue regard to technicalities.
21. In their written submissions filed herein, Counsel for the Appellant cited the following authorities: -
- a) *Coast Projects v Mr. Shah Construction [K] Ltd* [2004] 2 KLR 118 where it was held:
“striking out a pleading is to be resorted to in very clear plain and obvious cases. It is a summary procedure and by virtue of that, it is a radical remedy and a Court of law should be slow in resorting to this procedure.”
 - b) *Geminia Insurance Co. Ltd -vs- Kennedy Otieno Onyango* [2000] eKLR where it was held:-
“it is trite law that striking out of pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”
22. It is to be noted and appreciated that there is no pleading on record herein. All that the Appellant filed on February 18, 2021 was a notice of intention to appeal, though titled “memorandum of appeal”. In its Ruling herein dated 9th December 2021, this Court found that there was no memorandum of appeal herein, and that there is no appeal. A pleading is defined in Rule 2 of the Employment and Labour Relations Court (Procedure) Rules 2016 as:-
“a statement in writing of the claim or demand of an Applicant. Petition, judicial review application, and defence by a respondent thereto, the reply of an Applicant to any defence to a counter-claim of a respondent.”
23. A Notice of intention to file an appeal to this Court is not a pleading and is not provided for under any law or procedure applicable in this Court. The proceedings herein are not anchored on an appeal, as there is no appeal on record. The proceedings must be struck off.
24. Consequently, I allow the Notice of Motion dated January 14, 2022 in the following terms: -
- a) the document dated February 9, 2021 and titled “memorandum of appeal”, together with the proceedings herein, are hereby struck off with costs to the Respondent/Applicant.
 - b) the decretal sum or any part thereof that may have been deposited in any account on the basis of the proceedings/appeal herein shall be released to the decree holder’s Advocates.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD 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:

Arika for Appellant

N/A for Respondent

