



**Chandaria Industries Limited v Masisa (Miscellaneous Civil Application
E059 of 2021) [2022] KEELRC 71 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 71 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION E059 OF 2021**

MN NDUMA, J

JUNE 9, 2022

BETWEEN

CHANDARIA INDUSTRIES LIMITED APPLICANT

AND

JOHN KIMAGUTI RESPONDENT

RULING

1. The Appellants/Applicant filed Notice of Motion Application dated 12th February, 2021 before the Civil Division of the High Court seeking the following orders:-
 - (1) That this Application be certified urgent and be heard *ex parte* in the first instance.
 - (2) That this Honourable Court be pleased to grant the Applicant/Defendant leave to lodge an Appeal out of time against the decision delivered on 4th December, 2020 by the Chief Magistrate, Commercial Courts at Milimani in CMCC No. 1760 of 2016.
 - (3) That this Honourable Court be pleased to order stay of execution of Orders and Decree emanating from the Judgment delivered on 4th December, 2020 pending the hearing and determination of this Application.
 - (4) That this Honourable Court be pleased to stay execution of Orders and Decree emanating from the judgment delivered on 4th December, 2020 pending the hearing and determination of the intended appeal herein.
 - (5) That upon grant of leave to Appeal out of time, the Memorandum of Appeal attached herein be deemed as duly filed.
2. The application was transferred by Sergon J. to Employment and Labour Relations Court.



3. The application is premised on grounds set out on the face of the application to wit that judgment was delivered by the learned magistrate on 4th December, 2020 and the applicant was aggrieved by the said judgment.
4. That the time allowed to file an Application has run out and the applicant seeks leave to file an appeal out of time. That the respondent is unlikely to suffer any prejudice since the delay is not inordinate or so great as to be inexcusable.
5. That both parties to the suit failed to appreciate that the magistrates' Court lacked jurisdiction to hear and determine the matter.
6. That the applicant is ready to abide by the terms and conditions given by the Court. The application is buttressed by an affidavit of Joseph Kamau, a legal officer at M/s Keninda Alliance Company Limited, the insurer of the Applicant who deposes that the Respondent instituted this suit via a plaint dated 23rd March, 2016 seeking damages for injuries sustained in line of employment. That the suit was opposed.
7. That judgment was delivered on 4th December, 2010 in favour of the respondent as against the applicant in the sum of Kshs 325,000 and the decretal sum has been calculated to Kshs 470,590.15.
8. That the suit was handled by himself on behalf of the insurer and due to a breakdown in communication during his absence on leave in December, 2020, the matter was not given due or proper attention and when he resumed on 25th January, 2021, he immediately instructed advocates to challenge the judgment by filing an appeal.
9. That the trial magistrate ought to have transferred the case to the Director of Occupational Safety and Health Services (DOSHS) who has the mandate to deal with Work Injury Benefits Act claims.
10. That the Appeal raises arguable issues on points of law and the respondent shall not be prejudiced if the appeal is admitted and stay of execution pending appeal is granted.
11. The application is opposed vide a replying affidavit sworn to by the respondent on 7th May, 2021 who deposes that the applicant has failed to make full disclosure of material facts in this matter as after judgment was delivered, advocates of both parties agreed on costs payable as documented in letters dated 15th and 16th December, 2020, 5th January, 2021, 13th January, 2021, 25th January, 2021, 12th February, 2021, 23rd February, 2021, 5th March, 2021, 16th February, 2021; 29th March, 2021, 16th April, 2021, 12th January, 2021, 22nd March, 2021 and 6th January, 2021 from M/s Christine Oraro & Company Advocates which letters are attached to the replying affidavit.
12. That the Application was filed on 15th February, 2021, but the applicants surreptitiously withheld the same and did not serve it upon the Advocates on record.
13. That the applicant inordinately delayed to file the Appeal and/or the application having agreed to settle the decretal sum and had agreed on costs only to turn around belatedly to seek leave to file an Appeal out of time.
14. That it is improper to attribute fault on counsel for the insurer when the matter was being handled by competent advocates. That at all material times, the applicant was involved in settlement talks with the advocates for the respondent and there was no oversight alluded to by the applicant in the supporting affidavit on their part or at all.
15. That the application is not brought in good faith, is frivolous, vexatious and abuse of Court process and it be dismissed with costs. The applicant filed a similar application dated 26th November, 2021.



16. The application raises similar issues as the present one and the Court will deal with the issues raised in both applications together.
17. The parties filed written submissions and the issue for determination is whether the applicant has satisfied the preliquisites for the of the discretion of the Court to extend time within which the applicant may file the intended Appeal.
18. Section 76G of the [Civil Procedure Act](#) provides:-

“An Appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filling the Appeal.”
19. Rule 8 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) stipulates that:-
 - (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.
20. In the present case, the Court aquo delivered its judgment on 4th December, 2020. This application was filed on 15th February, 2021 and the applicant attached to the application a draft Memorandum of Appeal where the only ground of appeal is that the learned trial magistrate erred in law in pronouncing himself in the suit while he lacked jurisdiction of hearing and determining this matter pursuant to the Supreme Court judgment delivered on 3rd December, 2019. That the trial Magistrate ought to have referred the matter to DOSH for Assessment under Section 52 of the [Work Injury Benefits Act](#) No. 13 of 2007 [WIBA].
21. It is conceded that the matter of jurisdiction was not raised by any party before the Magistrate and both parties submitted to the jurisdiction of the Court and fully participated in the prosecution of the suit before the learned magistrate.
22. The Supreme Court in the matter of [Nicholas Kiptoo Korir Arap Salat –vs- Independent and Electoral Boundaries Commission and 7 Others](#) 2014 eKLR rendered itself thus:-

“The underlying principles a Court should consider in exercise of such discretion includes:-

 - (1) Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.
 - (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.
 - (3) Whether the Court should exercise the discretion to extend time, it is a consideration to be made on a case to case basis.
 - (4) Whether there is a reasonable reason/ground for delay. The delay should be explained to the satisfaction of the Court.
 - (5) Whether there will be any prejudice suffered by the Respondent if the extension is granted.
 - (6) Whether the application has been brought without undue delay.



23. The Appeal ought to have been filed within 30 days from 4th December, 2020. The period expired on 4th January, 2020. The applicant without disclosing to the Court that it was involved in written exchange of correspondence to have the decretal sum settled with the respondent simply attributes the delay to oversight on the part of a legal officer of Kenindia Assurance Company Limited, the Insurer of the Applicant.
24. The Insurer company was not a party to this suit and clearly the advocates on record on behalf of the applicants were fully seized of the matter and during the material time after delivery of judgment, engaged in numerous written correspondence with the Advocates for the respondent through which correspondence the costs attributable to the suit were agreed upon and a decree duly taken out to be duly settled by the Applicant.
25. The Applicant was not candid with the Court therefore as to the reason for the delay in filing the appeal nor was a proper explanation given for filing this application more than two months after judgment was delivered on 4th December, 2021.
26. The suit was filed on 20th March, 2016, and the respondent got his judgment on 4th December, 2020, more than four (4) years later. Any further delay caused by unexplained delay by the applicant shall greatly prejudice the respondent which prejudice in my view will lead to a failure of justice.
27. In terms of the Work Injury Benefits Act (WIBA), it is the applicant that had the onus of submitting the claim for assessment to DOSH upon the respondent sustaining injuries in the course of employment.
28. The issue of jurisdiction being raised by the applicant is tenuous and though I do not wish to dispose it at this stage, is wholly dependent on the apparent fluid interpretation of the Judgment of the Supreme Court on Work Injury Benefits Act matters in 2019, since different parties and Courts have interpreted the judgment differently making it difficult to determine whether a Work Injury Benefits Act suit, depending on its date of filing, was properly before the magistrate's Court or not. If the decisions of the High Court and Court of Appeal had been stayed pending Appeal at the Supreme Court, no doubt cases filed during that period and those filed before the High Court decision was rendered were properly before the Courts.
29. Since the applicant has the onus of establishing that its application is deserving of the discretion of the Court, the Court finds that onus has not been discharged, the applicant having failed to provide a candid and compelling reason for the delay and the respondent having satisfied the Court that he would suffer substantial prejudice if the application is granted.
30. The applicant did not also offer security for the satisfaction of the judgment and costs in the event the appeal is not successful in his application. To the contrary, the applicant was prior to the filing of this suit ready and willing to satisfy the decretal sum going by the correspondence before Court.
31. Accordingly, the applications dated 12th February, 2021 and 26th November, 2021 lack merit and are dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 9TH DAY OF JUNE, 2022.

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Wambugu for Applicant/Appellant

Mr. Jaoko for Respondent/Plaintiff



