



**Mombasa Aviation Training Institute v Charles Maina Joseph (Appeal
E026 of 2021) [2022] KEELRC 1457 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1457 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E026 OF 2021**

**AK NZEI, J
JUNE 9, 2022**

**BETWEEN
MOMBASA AVIATION TRAINING INSTITUTE APPELLANT
AND
CHARLES MAINA JOSEPH RESPONDENT**

*(Being an Appeal from the Judgment delivered and orders made by
the Employment & Labour Relations Court at Mombasa – Hon. F.
Nabibya – SRM, on 4th March 2021 in Mombasa CM-ERC 102/2019)*

RULING

1. The Appeal herein was instituted on 27th April 2021 vide a memorandum of appeal dated 19th April 2021. It is indicated on the said Memorandum of Appeal that the appeal is against the judgment of Honourable F. Nabibya –SRM delivered on 4th March 2021 in Mombasa ELR Case No. 102 of 2019. The memorandum of appeal is not shown to have been filed alongside the documents specified in Rule 8(1) of the Employment and Labour Relations Court (Procedure) Rules 2016, that is, copies of proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings being appealed against. Indeed, no single document from the lower Court proceedings has been placed before this Court.
2. The judgment said to have been appealed against is shown on the memorandum of appeal to have been delivered on 4th March 2021. The memorandum of appeal was filed in this Court on 27th April 2021, fifty four (54) days after delivery of the judgment said to be appealed against.



3. Rule 8(1) and (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 is delivered.”
4. On the other hand, Section 79G of the *Civil Procedure Act* provides that every appeal from 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. 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 Courts to this Court must be filed within thirty days from the date of the decree or order appealed against as stated in the foregoing Section of the *Civil Procedure Act*.
5. I have not seen on this Court’s record any certificate of delay by the lower Court certifying any number of days as having been requisite for the preparation and delivery of the said Court’s decree to the Appellant.
6. It follows, therefore, that the appeal herein, having been filed fifty four (54) days after the date of the lower Court’s decree, was filed out of time and is therefore statute-barred.
7. On 13th September 2021, the Respondent filed a Notice of Motion dated 13th September 2021, seeking to have the appeal dismissed with costs for heaving been filed out of time and without leave. The application was opposed by the Appellant, which filed grounds of opposition on 27th September 2021 and subsequently filed a replying affidavit on 17th January 2022. On the same date (17th January 2022), the Appellant filed a Notice of Motion dated 14th January 2022, seeking enlargement of time to lodge an appeal against the lower Court’s judgment dated 4th March 2021, grant of unconditional leave to lodge an appeal against the said judgment of the lower Court and admission of the memorandum of appeal lodged in Court on 27th April 2021.
8. I must point out that the Appellant’s said Notice of Motion was filed after I had, on 13th September 2021, given directions on filing of submissions on the Respondent’s Notice of Motion dated 13th September 2021, and after the Appellant had on 28th October 2021, 30th November 2021 and 18th January 2022 sought to be given time to file a replying affidavit and submissions on the Respondent’s Notice of Motion dated 13th September 2021.
9. The Respondent opposed the Appellant’s Notice of Motion dated 14th January 2022 vide a Replying Affidavit sworn on 8th February 2022 and filed in Court on 9th February 2022.
10. The two applications, dated 13th September 2021 and 14th January 2022, are before me for determination. The Appellant filed written submissions on both applications on 16th February 2022, while the Respondent opted to rely on his submissions filed on 9th February 2022.

The Notice of Motion dated 14th January 2022

11. As already stated in paragraph 7 herein, the Appellant is seeking enlargement of time to lodge an appeal against the lower Court’s Judgment delivered on 4th March 2021, grant of unconditional leave to lodge



an appeal against the lower Court's said judgment and admission of the memorandum of appeal lodged herein on 27th April 2021.

12. The Appellant stated in his application that the delay in lodging the appeal was an inadvertent, excusable mistake/error which ought not be relied upon to condemn the Appellant unheard on her wholly credible appeal the subject of the application.
13. It was deponed in support of the application that the lower Court suit proceeded for hearing ex-parte on 29th September 2020 and an application by the Appellant for setting aside the ex-parte proceedings was disallowed on 28th January 2021, and that the Respondent's submissions having been filed on 9th October 2020, the suit was fixed for judgment on 4th March 2021, and was delivered on the said date. The appeal herein is shown to be against the ex-parte judgment.
14. The Appellant has not explained the nature of the inadvertence, excusable mistake and/or error as a result of which the appeal herein was not filed in time.
15. An applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause or sufficient cause for doing so. There is no difference between good cause and sufficient cause. See *Feroz Begum Qureshi & Another v Maganbhai Patel & Others* [1964]E.A. 633. It was held in *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.
16. In the case of *First American Bank Of Kenya Ltd v Gulab P. Sha & 2 Others* [2002]IEA 65, the Court set out the factors to be considered in deciding whether or not to grant such an application, and these are:-
 - i. the explanation if any, for the delay.
 - ii. the merits of the contemplated action, whether the matter is arguable one deserving a day in Court or whether it is a frivolous one which would only result in the delay of the course of justice.
 - iii. whether or not the Respondent can adequately 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.
17. In the present case, the Appellant has not disclosed the nature and quality of the alleged inadvertence, excusable mistake and/or error. The proviso to Section 79G of the *Civil Procedure Act* states 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.”
18. In the case of *Dilpack Kenya Limited v Wiliam Muthama Kitonyi* [2018] the Court stated 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 shall be no indulgence. See *Ratman –vs- Cumarasamy* [1964] 3 All Er 933; *Avil-vs- Southend Health Authority* [1995] Iwlr 124 At 1259.”

19. In the Dilpack case (*supra*), the Court referred to Court of Appeal Civil Application No. 166 of 1997 - *Itute Ngui & Another vs- Ismail Mwakavi Mwendwa* where Omolo J.A held that whereas Advocates bona fide error is a special 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. It is not enough to simply state that failure to appeal within the prescribed time was due to inadvertence. Failure to act does not constitute good or sufficient cause.
20. To some extent, the Appellant attempted to explain the issue of its failure to file witness statements in the lower Court and its failure to participate in the trial before that Court. It is to be noted the memorandum of appeal herein filed on 27th April 2021 states that the Appellant is appealing against the lower Court’s judgment dated 4/3/2021, but not the Ruling dated 28th January 2021 declining to set aside the ex-parte proceedings. The reason for filing the memorandum of appeal out of time has not been explained.
21. As already stated in this Ruling, the Appellant has not presented the lower Court’s proceedings and the impugned judgment before this Court. It is, therefore, not possible for me to comment on the merits or urguability or otherwise of the appeal, once admitted.
22. In his affidavit sworn on 8th February 2022 in opposition to the application, the Respondent deponed and demonstrated that the Appellant has already paid to the Respondent the sum decreed in the lower Court. This fact is admitted in paragraph 18(ii) of the Appellant’s supporting affidavit.
23. So, what is the intended appeal aimed at achieving? The Respondent stands to be prejudiced if the Appellant’s application is allowed, and no award of costs will sufficiently atone for, or compensate the Respondent for such a prejudice.
24. I find no merit in the notice of motion dated 14th January 2022, and the same is hereby dismissed with costs.

The Notice of Motion dated 13th September 2021.

25. As stated in paragraph 7 of this Ruling, the application is opposed by the Appellant. It is a common ground that the judgment sought to be appealed against was delivered on 4th March 2021, whereas the memorandum of appeal herein was filed on 27th April 2021, fifty four (54) days after the date of the said judgment.
26. Under Rule 8(2) of the Employment and Labour Relations Court (Procedure) Rules 2016 and Section 79G of the *Civil Procedure Act*, the appeal ought to have been filed within thirty days from the date of the judgment appealed against. The appeal herein was filed out of time and without leave. It is statute-barred. The Notice of Motion dated 13th September 2021 is allowed, and the appeal is hereby dismissed with costs.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH 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 Appellant

..... for Respondent**

