



Good Hope Sacco v Naanyu Angeline Kipteng (Miscellaneous Application E004 of 2022) [2022] KEELRC 1616 (KLR) (7 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 1616 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E004 OF 2022**

HS WASILWA, J

JUNE 7, 2022

BETWEEN

GOOD HOPE SACCO APPLICANT

AND

NAANYU ANGELINE KIPTENG RESPONDENT

RULING

1. This ruling is in respect of the applicant's application dated February 28, 2022 filed under certificate of urgency on March 2, 2022 pursuant to article 159(d) of *the Constitution*, section 1A, 1B, 3, 3A, 79G and 95 of the *Civil procedure Act*, order 51 rule 1 and 4, orders 50 rule 6 of the *Civil procedure Rules* and all other enabling provisions of the law, seeking the following orders That;
 1. Spent.
 2. That the application herein be granted leave to lodge an appeal out of time.
 3. That the leave so granted do operate to enable the memorandum of Appeal enclosed herein be deemed as properly filed subject to payment of requisite Court fees.
 4. That the Honourable Court be pleased to issue orders staying any further proceedings in Kilgoris senior Principal magistrate employment and labour Relations Cause file no. 2 of 2019; Naanyu Angeline Kipteng V Good Hope Sacco.
 5. That the costs of this application be provided for.
 6. Any other relief(s) that this Honourable Court may deem fit and just to grant.
2. The application is supported by the grounds on the face of the application and the affidavit sworn on February 28, 2022 by Elvis Alaon Olokipai, the Chief executive Officer of the applicant herein and based on the following grounds: -



- a. That, the trial suit emanated from Kilgoris Principal Magistrates Court where the applicant was the respondent and the respondent was the claimant.
 - b. He avers that in the applicants defence at paragraph 13, the issue of jurisdiction of the Court in Kilgoris was raised however the Trial magistrate ignored it and proceeded with the main course and judgement was delivered in favour of the claimant on the July 29, 2021.
 - c. The Applicant herein was dissatisfied with the judgement and instructed its advocate to appeal. Their Advocate requested for typed judgement and Proceedings on August 9, 2021. Another reminder was send for the proceedings and the judgement on the August 23, 2021 to no avail.
 - d. The Applicant subsequently filed miscellaneous Application seeking to stay further proceedings in Kilgoris Court however this court declined the said orders and therefore time to appeal run out as a result.
 - e. The Applicant now prays for the enlargement of time to enable it file its appeal out of time as they are apprehensive that execution will be commenced to their disadvantage.
 - f. It was averred that the respondent will not be prejudice in any way.
3. In opposing the application, the respondents filed a replying affidavit deposed upon by the claimant on the March 15, 2022, based on the following grounds;
- a. That the Respondent avers that judgement was delivered in this matter on the July 29, 2021 and the Respondent at the very least could have filed a Notice of appeal as they follow up with the proceedings of the trial Court.
 - b. It was averred that if indeed the Applicant had sought for typed judgement and proceedings and not furnished on time, it ought to have furnished this Court with certificate of delay from the Executive officer or the Court Administrator Kilgoris Court. Further more that the letter requesting the proceedings were not copied to the respondent as per rule 82(1) of this court's rules.
 - c. It was also stated that the application offends the provisions of order 42 rule 6(2) (a) of the Civil Procedure Rules as it has been brought 8 months after delivery of judgement. Therefore, that the delay is inordinate and no explanation was given by the Applicant for the delay.
 - d. The affiant deposes that the prayers of the application herein are not specific in nature since it does not state whether the Applicant is appealing against the trial Court ruling, decree or garnishee proceedings.
 - e. It was stated that the application herein is res judicata as this Court had made a determination on a similar matter on December 14, 2021.
 - f. It is contended that the applicant had already lodged an appeal on the March 2, 2022 and now seeking to regularize an appeal that was not properly filed.
 - g. It is averred that the application is brought in abuse of Court process and urged this Court to disallow the application and let the Respondent enjoy her fruits of judgement.
4. The parties herein disposed of the application by way of written submissions.



Applicant submissions

5. The Applicant's Advocate submitted that the judgement which they are seeking to appeal emanated from the decision of Kilgoris senior Principal magistrate who acted in excess of its jurisdiction and granted Orders in favour of the Claimant who has further obtained garnishee Orders against the Applicant's funds at Cooperative Bank in execution of the Orders of the Court. It was argued that if the judgement of the trial Court is allowed to stand the Court would be perpetuating an illegality. In support of its argument the Applicant cited the case of *Phenix of E.A Assurance Company Limited V SM Thiga t/a Newspaper Services*, Civil Appel No. 6 of 2018 where the Court held that; -

“If an act is void then it is in a law a nullity. It is not only bad but incurably bad. There is no need for an Order of the Court to set it aside. It is automatically null and void without more ado, though it is sometime convenient to have the Court declare it to be so and every proceeding that is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse”
6. The Applicant submitted that the issue that was up for determination by the trial Court in Kilgoris emanated from a decision of commissioner for cooperative which appeal fall's within the tribunal and not the Court as per the provisions of section 69 of the Cooperative *Societies Act* cap 49 Laws of Kenya. It was therefore argued that the trial magistrate lacked jurisdiction to hear and determine the cause, which issue is subject of the intended appeal.
7. The Applicant prays for the application to be allowed as prayed.

Respondents' Submissions.

8. The Respondents on the other hand submitted from the onset that the application herein offends the provision of section 7 of the *Civil Procedure Act* for being res judicata. It was argued that the issue at hand on stay of proceedings was heard and determined in this Court miscellaneous application number E025 of 2021 which matter was dismissed in the December 14, 2021, therefore that the court lacks jurisdiction to hear and determine the application herein. In support of its argument the respondent relied on the case of *Nancy Mwangi T/A Worthlin marketers limited (formerly celtel Kenya limited) & 2 others* [2014] eklr where the Court held that;

“The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177* the Court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the Court quoted Kuloba J., in the case of *Njangu Vs Wambugu* and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to curt, then I do not see the use of the doctrine of res judicata.....”
9. It is submitted that the application as filed and the supporting grounds does not meet the threshold for grant of the prayers sought. This was because the Applicant has not given a reason for the delay for over 8 months neither have they offered any security for costs to deserve the Orders sought.



10. On whether the trial Court at Kilgoris had the requisite jurisdiction to handle the matter, it was submitted that the issue was raised before the trial Court who delivered its ruling on the October 15, 2020 affirming the issue of jurisdiction. That decision was never subjected to any appeal by the Applicant herein. It was further argued that if the Applicant was dissatisfied with the decision of trial Court on the issue of jurisdiction which is still subject of its intended appeal, they ought to have appealed the same as soon as the ruling was delivered.
11. The Respondent submitted that the Applicant has not filed any notice of appeal to date as provided for under this Court's Rules. It was argued that, the fact that the Applicant did not obtain a copy of typed judgement and proceedings was not a deter from filing a notice of Appeal and the delay cannot be used as an excuse. In support of this argument the Respondent relied on the case of *Kioko Muthoka V Kalembwani and another* [2021] eklr. Additionally, it was submitted that the memorandum of appeal which was filed out of time and without this court's leave ought to be expunge from record.
12. In conclusion the Respondent urged this Court to disallow the application herein with costs to her.
13. I have examined the averments of the parties herein. The application herein is two fold; stay and enlargement of time for the Applicants to file this application.
14. The Respondents opposed this application and insisted that the issue of stay was overtaken by events in that the matter in the lower Court was heard and determined.
15. The Respondents also aver that the Applicants have not filed any Notice of Appeal and the time for filing this notice has lapsed.
16. In considering this application, I note that the issue of staying further proceedings in the Kilgoris Court cannot lie because the matter has already been heard and determined.
17. In relation to the prayer to allow an appeal out of time, I note that the applicant intimated that they had issues with the court's jurisdiction to handle the matter at the onset which they raised from the onset but were overruled.
18. They also raised the issue of the delay in filing the notice of appeal and they aver that the delay was caused by the fact that they were never served with proceedings in time.
19. That notwithstanding the applicant has a legitimate expectation that they ought to be heard on the intended appeal which expectation should not be thwarted by this court.
20. There is indeed delay in filing the appeal but given the fact that the applicant has explained viable reasons leading to the delay, i exercise my discretion and allow the prayer to extend time for filing an appeal.
21. I grant the applicants 14 days within which to file the appeal in default the orders granted to lapse.
22. Costs of this application to abide the outcome of the appeal.

RULING DELIVERED VIRTUALLY THIS 7TH DAY OF JUNE, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

No appearance for parties

Court Assistant - Fred

