



**Protective Custody Limited v Omukuba (Appeal E036 of 2021)
[2022] KEELRC 3931 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3931 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E036 OF 2021
CN BAARI, J
SEPTEMBER 22, 2022**

BETWEEN

PROTECTIVE CUSTODY LIMITED APPELLANT

AND

TOM OMUNABI OMUKUBA RESPONDENT

(R.K. Ondieki in Kisumu CM Employment Cause No. 223 of 2019- Tom Omunabi Omukuba v Protective Custody Limited delivered on 23rd September, 2021)

RULING

1. Before court is the Respondent's Notice of Motion application dated 20th January, 2022, wherein, the Respondent seeks orders that:
 - i. The Honourable Court do grant leave to the Respondent/Applicant to file a cross appeal out of time against the judgment of Honourable R.K. Ondieki in Kisumu CM Employment Cause No. 223 of 2019- Tom Omunabi Omukuba v Protective Custody Limited delivered on 23rd September, 2021.
 - ii. The Respondent/Applicant does file his cross appeal within such time as the Honourable court should direct.
 - iii. The costs of the application be provided for.
2. The application is supported by grounds on the face of the motion and an affidavit sworn by Tom Omunabi Omukuba, the basis being that upon the Respondent reading the judgment in the matter, he discovered that the analysis by the learned magistrate in not awarding his prayers for house allowance, overtime, off days, leave allowances and certificate of service was wrong, necessitating the need to appeal.



3. The Respondent further argues that although the Appellant filed a memorandum of appeal on October 5, 2021, it is yet to file its record of appeal, and that directions are yet to be taken in respect of the main appeal by the Appellant.
4. The Appellant opposed the application through grounds of opposition dated February 7, 2022, and filed on February 9, 2022.
5. The Appellant argues that the application is an afterthought, and that the Applicant has not given sufficient cause for not filing his appeal within time.
6. It is the Appellant's position that the prayers sought are not provided for in law and can therefore not be granted by the court.
7. Parties canvassed the application through written submissions and which have been dully considered.

Determination

8. Upon a perusal of the documents before me, and the written submissions of counsels, the issue that fall for determination is whether an extension of time to file a cross appeal should be granted.
9. The Supreme Court has, in the case of *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & Others*, *Supreme Court Application No. 16 of 2014*, [2014] eKLR enunciated the following principles to guide it, in an application for the enlargement of time:

“ ...

1. extension of time is not a right of a 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 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, is a consideration to be made on a case- to-case basis;
 4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court whether there will be any prejudice suffered by the respondents, if extension is granted;
 6. whether the application has been brought without undue delay; and
 7. whether in certain cases, like election petitions, public interest should be a consideration for extending time”
10. Further, the Court of Appeal in *Aviation Cargo Support Limited v St. Mark Freight Services Limited* [2014] eKLR stated as follows in respect to enlargement of time:

“ For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the court why it occurred and what steps the applicant took to ensure that it came to court as soon as was practicable.”



11. By the decisions of the court in the foregoing precedents, it is not enough for an Applicant to just express his intention to file an appeal out of time, he/she bears the obligation to demonstrate that the delay in filing his appeal is not inordinate or give reasons for the delay.
12. The judgment that the Applicant/Respondent intends to appeal against was rendered on September 23, 2021, while the instant application was lodged on January 20, 2022. The time between the delivery of the judgment and the filing of the application herein, is about three (3) months. I do not consider the delay inordinate.
13. In the upshot, I allow the application and order as follows:
 - i. That the Respondent is hereby granted leave to file a cross appeal out of time against the judgment of Honourable R.K. Ondieki in Kisumu CM Employment Cause No. 223 of 2019-Tom Omunabi Omukuba V Protective Custody Limited delivered on 23rd September, 2021.
 - ii. That the Respondent files and serves his cross appeal within 30 days of this ruling
 - iii. That the costs of the application shall abide the appeal.
14. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Ochieng present for the Appellant

Mr. P.D. Onyango present for the Respondent/Applicant

Christine Omollo – C/A

