



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tsuma v Tudor Services Ltd (Appeal E080 of 2021)  
[2022] KEELRC 4001 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4001 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E080 OF 2021  
AK NZEI, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**ROBERT MATANO TSUMA ..... CLAIMANT**

**AND**

**TUDOR SERVICES LTD ..... RESPONDENT**

*(Originating from Mombasa CMC-ELRC No. E146  
of 2020 Robert Matano Tsuma vs Tudor Services Ltd)*

**RULING**

1. The application before me is the respondent's notice of motion dated March 23, 2022. The application seeks the following orders:-
  - a. That the court be pleased to issue stay of proceedings in regard to the directions of the court dated February 23, 2022 pending hearing and determination of this application.
  - b. That the court do grant the applicant leave to cross-appeal out of time the award of service pay that was granted to the appellant by Hon Lesootia Saitabau in Mombasa CMC-ELRC No E146 of 2020 Robert Matano Tsuma vs Tudor Services Ltd.
  - c. That costs of the application be provided for.
2. The application is supported by the supporting Affidavit of Clifford O tolo Advocate sworn on March 23, 2022. It is deponed in the said affidavit, *inter-alia*:-
  - a. That the respondent/applicant seeks leave to cross-appeal out of time the award of service pay granted by the trial court.
  - b. That the applicant failed to file a cross-appeal in time due to inadvertent mistake that occurred in the applicant's advocate's office.



- c. That it came to the advocate's attention that he (the advocate) had not filed the applicant's cross-appeal after taking the court's directions on February 23, 2022 and after being served with the appellant's submissions.
  - d. That the applicant believes that the intended cross-appeal has high chances of success, and that it is only fair that the court allows the application to give the respondent an opportunity to prosecute its cross-appeal as envisaged in the constitution and the laws of the land.
3. The application is opposed by the appellant/respondent, who on March 28, 2022 filed a replying affidavit sworn by himself on the same date. It is deponed in the said replying affidavit:-
- a. That the appeal herein is against the judgment of Hon Lesootia Saitabau, Principal Magistrate, delivered on October 25, 2021 in Mombasa Employment Case No E0146 of 2020.
  - b. That on February 23, 2022, this court directed parties herein to file and serve their respective written submissions and that the applicant/respondent's submissions were filed and served on March 14, 2022, while the respondent/applicant has not filed theirs.
  - c. That the respondent/applicant had filed in the trial court an application dated November 10, 2021 seeking review of the said court's judgment dated October 25, 2021 regarding an award of ksh 83,940 (being) service pay which had not been pleaded, and that the said judgment be corrected.
  - d. That the appellant/respondent opposed the said application by filing a replying affidavit, and that the trial court is yet to deliver a ruling on the said application dated November 10, 2021.
  - e. That the issue in question cannot be heard and determined by two different courts concurrently.
4. The appellant/respondent annexed copies of the respondent/applicant's application dated November 10, 2021 filed in the trial court to his replying affidavit filed in this court, and I have perused the same.
5. In a further affidavit sworn by the applicant's advocate, Clifford O Tollo on April 4, 2022, the respondent/applicant agrees that the trial court stood over generally the application dated November 10, 2021 in view of the present appeal. Both parties agreed that the application for review filed by the respondent/applicant in the trial court was never heard, and that no determination thereon was or has been rendered by the trial court.
6. Turning to the application before this court, the single issue for determination is whether the respondent/applicant's prayer for leave to file a cross-appeal out of time is merited.
7. This court's rules, the Employment and Labour Relations Court (Procedure) Rules 2016, are silent on filing of cross-appeals in the court. The rules are also silent on extension and/or enlargement of time within which to file an appeal and/or cross-appeal against the decision of the subordinate court. In such situations where this court's rules are silent on any particular procedural issue, the court's practice has been to revert to the Civil Procedure Act and the rules made thereunder.
8. Although cross-appeals are not specifically provided for in the Civil Procedure Rules, order 42 rule 32 of the Civil Procedure Rules provides as follows:-

“the court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour



of all or any of the respondents although such respondents may not have filed any appeal or cross appeal” (emphasis by court)

9. Citing the court’s decision in *Kenya Power & Lighting Co Ltd vs Peter Langi Mwasi* [2018] eKLR, the court in the case of *Christine Aloo vs Mary Ouma* [2021] eKLR, held that:-

“ whereas the timelines for filing of cross-appeal was not provided for in the *Civil Procedure Rules*, the same ought to be filed without any delay. In the mind of the court, the cross-appeal ought to be filed at least before directions under order 42 rule 11 of the *Civil Procedure Rules* have been given in the main appeal.”

10. This court fully associates itself with the foregoing decision on timelines for filing of cross-appeals in this court.

11. In the present case, directions on hearing of the appeal were given on February 23, 2022 when parties were ordered to file written submissions on the appeal within specific timelines. The appellant was granted fourteen days to file and serve written submissions while the respondent/applicant was to file within fourteen days of being served with the appellant’s written submissions. The appeal was then fixed for mention on March 28, 2022 to fix a date for delivery of the court’s judgment.

12. There is on record the appellant’s written submissions dated March 7, 2022 and shown to have been filed on March 14, 2022. The respondent/applicant is not shown to have filed any written submissions on the appeal, either as directed by the court or at all.

13. The application before me is shown to have been filed on March 24, 2022. As already stated in this ruling, the respondent/applicant’s counsel deponed that it came to his attention that he had not filed the applicant’s cross-appeal after taking the court’s directions on February 23, 2022 and after being served with the appellant’s submissions. Counsel further deponed that failure to file the applicant’s cross appeal in time was due to an inadvertent mistake that occurred in his office.

14. The respondent’s counsel did not, however, state the nature or quality of the inadvertent mistake that occurred in his office, and as a result of which he failed to file the appellant’s cross- appeal in time. There is thus no material before me for consideration. The delay has not been explained, and the respondent/ applicant has not shown why the court’s discretion should be exercised in its favour.

15. In the case of *Dilpack [k] Limited vs Willian 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...”

16. In the *Diplack Case* (supra), the court referred to the Court of Appeal’s decision in Civil Application No 66 Of 1997 *Itute Ngui & Another vs Ismail Mwakavi Mwendwa*, where Omolo JA held: -

“ 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.”

17. In view of all the foregoing, I find no merit in the notice of motion dated March 23, 2022. The same is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF SEPTEMBER 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:**

Mr. Iddi for Applicant

Miss Katu for Respondent

