



REPUBLIC OF KENYA



KENYA LAW
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**Protective Custody Limited v Kiilu (Appeal 35 of 2020)
[2022] KEELRC 3979 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3979 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 35 OF 2020
K OCHARO, J
SEPTEMBER 20, 2022**

BETWEEN

PROTECTIVE CUSTODY LIMITED APPELLANT

AND

CHRISTINE MUTHEU KIILU RESPONDENT

RULING

1. Through its notice of motion Application dated November 29, 2021, expressed to be brought under the provisions of section 3A, 79G and 95 of the [Civil Procedure Act](#) cap 21 of the laws of Kenya, the Applicant seeks for the following orders: -
 - a. That this Honourable Court be pleased to grant the applicant leave to Appeal out of time against the Judgment of Hon. D. W. Mburu, Senior Principal Magistrate in Nairobi CMCR No. 673 of 2019
 - b. Nairobi ELRA No. 35 of 2010 – Protective Custody Limited vs. Christine Mutheu be deemed duly filed with leave so granted.
 - c. Costs of the Application be in the cause.
2. The Application is premised on the grounds obtaining on the face of the Application and those in the supporting affidavit sworn by counsel for the Applicant, Abel Githiri Kimani.
3. The respondent did not file either a replying affidavit or grounds of opposition to the Application. However, when the Application came up for hearing on the March 29, 2022 she indicated that she is opposed to the Application as it has been filed with inordinate delay.
4. The applicant contended that judgment in the lower court matter was delivered on the March 13, 2020, same day when the first case of corona virus was announced in the country. On the March 15,



2020, the Judiciary scaled down its operations, allowing only Applications under certificate of urgency to be dealt with.

5. The applicant stated that, on the March 16, 2020, it wrote to court requesting for a copy of the judgment. However, the registry declined to accept the letter, directing that copy of the judgment be pursued when the registry resumed full operations.
6. Operations and services in all registries scaled up effective April 21, 2020. On the April 22, 2020, the appellant wrote to the lower court seeking for a copy of the judgment.
7. The appellant stated that with only the benefit of the holding of the Court, it proceeded to prepare and file a memorandum of Appeal. Upon assessment of Court fees, it promptly paid the requisite filing fees. However, the court registry was not able to trace the payment. Consequently, a stamped copy of the memorandum was not immediately sent to the applicant.
8. After a host of follow ups as exhibited by the copies of emails to court by the Applicant, the payment was traced and the Memorandum of Appeal stamped on the June 5, 2020. The memorandum was forwarded to its Counsel on the June 9, 2020.
9. Its failure to file the Appeal in time was not deliberate therefore.

The Applicant's submissions

10. Counsel for the applicant submitted that it is trite law that a decision whether or not to extend time for filing of an Appeal out of time is essentially discretionary. To buttress this point, reliance was placed on the decision in *Annah Mwibaki Wairuru v Hannah Wanja Wairuru* [2017] eKLR where the court cited with approval the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [Civil Application No Nai 255 of 1997] [unreported], where the court stated:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general matters which this court considers in deciding whether to grant an extension of time are: first, the length of the delay; secondly the reason for the delay; thirdly [possibly], the chances of the Appeal succeeding if the Application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.”

11. In support of the reason advanced for the delay, reliance was placed on the holding in the case of *Maryanne Camene Ojiambo v Samuel Muchoki* [2021] eKLR, thus:

“[20] It is plain that the applicant was not solely to blame for the delay; which he attributed to the prevailing Covid-19 Pandemic and the scaling down of services at the court registries. Again, I am convinced that the explanation is plausible. Indeed, the court takes judicial notice that Covid-19 Pandemic has placed challenges and impacted adversely on service delivery at the court registries.”

Determination

12. It is trite law that a grant of an application for extension of time is discretionary and dependent on the justice of each case. However, the exercise of the discretion must be judicious, not capricious, whimsical and or arbitrary.
13. This court has carefully considered the detailed supporting affidavit whose contents have not been assailed by respondent, the applicant comes out clearly as a party who was not indolent in any respect



regarding its desire to file the Appeal against the decision of the lower court. Its actions did not in any manner suffer from undue delay.

14. This court takes note that the Respondent has not asserted that a grant of the orders sought shall occasion her detriment of any sort. The court sees not the possibility of any prejudice that can be a result of a grant of the orders sought.
15. It has not escaped the mind of this court the Covid-19 Pandemic came in with unexpected challenges and limitations on the operation of the Judiciary in the manner expressed by the Applicant in its Application. I am convinced, therefore, that its failure to file the Appeal within time was not occasioned by deliberateness on its part.
16. In the upshot, I find merit in the applicant's Application herein dated November 29, 2020 and proceed to allow the same subject to the following conditions:
 - a. That the applicant shall prepare, file and serve a record of Appeal within 90 days from the date of this ruling.
 - b. That the record of Appeal to be filed and served contemporaneously with written submissions on the Appeal.
 - c. The matter shall be mentioned on the December 14, 2022 to check on compliance and for further directions.

Dated, delivered and signed on this 20th day of September 2022.

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OCHARO KEBIRA

JUDGE

In presence of:

Mr. Githiri for Appellant/Appellant

Ms Christine in person

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

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OCHARO KEBIRA

JUDGE

