



Beshom Limited v Ong'ayo (Employment and Labour Relations Appeal E157 of 2022) [2022] KEELRC 13543 (KLR) (15 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13543 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E157 OF 2022
BOM MANANI, J
DECEMBER 15, 2022**

BETWEEN

BESHOM LIMITED APPELLANT

AND

BOSIRE FRANCIS ONG'AYO RESPONDENT

RULING

Introduction

1. This is an application for stay of execution of the decree issued in CMEL No E 763 of 2021, Nairobi by the Chief Magistrate. The decision was rendered on August 19, 2022.
2. The appellant was dissatisfied with the decision. Consequently, it filed the current appeal through the memorandum of appeal dated September 16, 2022 but filed on September 20, 2022.
3. The respondent is opposed to the application. In line with the applicable rules, he has filed a replying affidavit dated October 18, 2022.

Grounds for and in Opposition to the Application

4. The applicant contends that it is aggrieved by the decision of the trial court. As a result, it has moved this court to have the said decision set aside.
5. As is required of parties that wish to stay enforcement of a trial court's decision that is on appeal, the applicant has filed an application for stay of execution of the trial court's judgment pending the hearing and determination of the appeal. The application is dated September 22, 2022.
6. The application is expressed to be brought under various provisions of the *Civil Procedure Act* that, in effect, underscore the overriding objective of the Act and entitle a party to invoke the court's inherent powers to issue orders that are desired in the interest of justice and to prevent abuse of the court process.



These include sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#). The applicant also invokes Order 22 rules 22 and 25 of the [Civil Procedure Rules](#) which deal with stay of execution of decrees and orders for reasons other than that the decree or order is the subject of an appeal. Yet, the law on stay of execution is adequately set out under Order 42 of the [Civil Procedure Rules](#) as read with rule 32(2) of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#).

7. This court has previously expressed its reservations about the practice of parties invoking inapplicable provisions of law to move it for orders (see [Prisca Jepngétich v Generation Career Readiness Social Initiative Limited](#) [2021] eKLR). Be that as it may, I reckon that in addition to the inapplicable provisions of law, the applicant has relied on the omnibus “and any other enabling provisions” as the basis for moving the court. I will therefore consider the application as legitimately before me but only on account of this omnibus clause.
8. According to the applicant, if stay of execution of the decree appealed from is not granted, the appeal will be rendered nugatory. That the failure to grant stay of execution orders will unduly prejudice the applicant as it will lose most of its movable assets.
9. As pointed out earlier on in the ruling, the respondent has opposed the application. From the replying affidavit on record, the following are the discernible grounds upon which the respondent opposes the application:-
 - a. That the application is premised on an incompetent appeal that was filed out of time without leave of the court.
 - b. That the applicant does not satisfy the grounds for the grant of an order for stay of execution as stipulated under the applicable law.

Analysis

10. Since the question whether the appeal is competent goes to the jurisdiction of this court to entertain the appeal, I will address this matter first. According to the respondent whilst the impugned judgment was delivered on August 19, 2022, the memorandum of appeal was lodged on September 20, 2022. That the filing of the appeal was therefore outside the statutory period of thirty (30) days. The respondent has referred to section 75G of the [Civil Procedure Act](#) which decrees that appeals challenging a decision of a trial court be filed within thirty (30) days of the impugned decision.
11. Although the respondent cites provisions of the [Civil Procedure Act](#) in support of his argument on the matter, I think that the right provision of law in relation to the timelines for filing appeals in employment disputes is rule 8 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#). The rule provides in part as follows:-

“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.

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 was delivered.”
12. Section 12 of the [Employment and Labour Relations Court Act, 2011](#) which grants this court appellate jurisdiction does not set the timeframe for filing of such appeals. It is therefore without doubt that all appeals from the magistrates’ courts on employment matters must be filed within thirty (30) days of the impugned decisions in terms of rule 8 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#).



13. The record shows that the decision of the trial court that triggered the appeal was delivered on August 19, 2022. The record also shows that the appeal was lodged on September 20, 2022. The receipt for filing fees shows that court fees for the memorandum of appeal were paid on September 20, 2022 at 7.45 am.
14. Section 57 of the *Interpretation and General Provisions Act* Cap 2 Laws of Kenya, deals with the question of computation of time. It provides as follows:-

“In computing time for the purposes of a written law, unless the contrary intention appears:-

 - a. a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
 - b. if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
 - c. where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
 - d. where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”
15. From this provision of statute, it is clear to me that in computing time for doing an act that is sanctioned by law, one is required to exclude the first day of the event but include the last day. Where the time for doing the act falls on a Sunday or other non working day, the day shall be excluded from computation of time. In such case, the next following working day is reckoned for purposes of computation of time. Finally, excluded days are reckoned in computation of time if the time set for doing of an act is in excess of six days.
16. The decision of the trial court was delivered on August 19, 2022. In terms of section 57 of the *Interpretation and General Provisions Act*, time begun running for purposes of filing the appeal on August 20, 2022. Thirty days from August 20, 2022 ran up to September 18, 2022. As this date fell on a Sunday, the next working day for purposes of computation of time fell on September 19, 2022. This then became the thirtieth day on which the applicant had to file its appeal.
17. The record shows that the applicant lodged the appeal on September 20, 2022, a day after the thirtieth day. The appeal having been lodged on the thirty-first day was clearly filed outside time.
18. Surprisingly, despite the respondent having raised this concern in his objection to the application for stay, the applicant did not address the issue. There is no supplementary affidavit by the applicant to address the concern. And neither is the matter alluded to in the applicant’s submissions in support of the application for stay.
19. There is no indication that the applicant moved the court for leave to appeal outside time. Consequently, the application for stay pending appeal is incompetent for want of a competent appeal.
20. Having found that the appeal before me is incompetent, there will be no need to address the merits of the application for stay of execution. Such need will only arise if there was a competent appeal in place.



Determination

- 21. The application being incompetent for the reasons aforesaid, it is declined.
- 22. As there was no request to strike out the appeal for having been filed outside time, I will make no orders in this regard.
- 23. Costs of the application are granted to the respondent.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF DECEMBER, 2022.

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Applicant

..... for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

