



**Dreamline Express Limited v Kilonzo (Appeal E007 of 2021)
[2022] KEELRC 13467 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13467 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E007 OF 2021
AK NZEI, J
DECEMBER 8, 2022**

BETWEEN

DREAMLINE EXPRESS LIMITED APPELLANT

AND

MUTIE KILONZO RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Lesootia A.S – PM at Mombasa delivered on 12th February 2021 in Mombasa CMCC No. 743 of 2019)

RULING

1. The appeal herein was instituted *vide* a memorandum of appeal dated February 23, 2021 and filed in this court on February 26, 2021. No documents are shown to have been filed together with the memorandum of appeal in compliance with rule 8(4) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016, which provides as follows:-
 - “(4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.
Provided that where copies of proceedings are not filed with the Memorandum of appeal, the appellant shall file such copies as soon as possible and within a reasonable time.”
2. On October 28, 2021, the court granted the appellant thirty days to file and serve a record of appeal, but it did not comply with that order. The appellant was given more time on December 2, 2021, March 8, 2022, and on June 20, 2022 to file a record of appeal, but did not file.
3. On June 20, 2022, the court granted the appellant sixty more days to file a record of appeal, failing which the appeal would stand dismissed. The appellant did not comply with the said order, and the



- appeal stood dismissed upon the lapse of sixty days from the date of the said order; and was so marked on September 20, 2022.
4. On September 28, 2022, the respondent herein filed a notice of motion, evenly dated, seeking an order that a sum of ksh 325,335 deposited in the trial court pending the outcome of the dismissed appeal be released to the respondent. The appellant, which was shown to have been served with the application on September 29, 2022, did not file any response to the said application, and the same was allowed by this court when it came up for hearing in the morning of October 12, 2022.
 5. The court's record shows that later in the day on October 12, 2022, at 14.50:18 to be specific, the appellant filed a replying affidavit shown to have been sworn by one Abdulrahman Abdulaziz on the same date (October 12, 2022). It is not clear why the appellant proceeded to file an affidavit in response to an application that had been allowed by the court earlier in the day.
 6. On October 17, 2022, the appellant filed a notice of motion dated October 14, 2022 seeking an order that this court reviews, vary/or sets aside its orders made on October 13, 2022 allowing the respondent's motion seeking the release of the decretal sum deposited in the lower court. That is the application before me, and it is predicated on a supporting affidavit of Wafula Wanjala Advocate sworn on October 14, 2022. It is deponed in the said affidavit, *inter-alia*:-
 - a. that the motion dated September 28, 2022 seeking release of the decretal sum deposited in the lower court as a condition for the dismissed appeal herein had been made in the wrong court.
 - b. that counsel for the respondent/applicant had appeared (in court) and explained the delay, and prayed for time to place a response in the court file.
 - c. that delay in filing a replying affidavit was excusable.
 7. As I have preceded to point out in this ruling, the appellant's notice of motion dated September 28, 2022 was unopposed when it was called out for hearing in the morning of October 12, 2022. The court declined to give the respondent time to file a replying affidavit as there was an affidavit of service on record indicating that the respondent/applicant had been served with the application dated September 28, 2022 on September 29, 2022. The application was allowed as unopposed.
 8. It is not honest for the respondent to now come back to court and to say that all that it sought to do in the morning of October 12, 2022 was to place on record a filed replying affidavit. The court receipt issued upon filing of a replying affidavit by the respondent/applicant's counsel later in the day clearly shows that filing was done on October 12, 2022 at 14.50:18 (at 2.50:18pm). The application purportedly being replied to had already been allowed in the morning of the same date.
 9. Parties should never assume that adjournments will be allowed by courts or court proceedings will be delayed simply because a party has not filed one document or the other. Again, the era of parties and/or their counsel failing to act on their cases and then turning around to accuse the courts of wrong doing when orders are made against them must come to an end.
 10. Nevertheless, the application is opposed by the respondent *vide* his replying affidavit sworn on November 4, 2022 and a further affidavit sworn on November 22, 2022. It is deponed in the further affidavit, and demonstrated, that the decretal sum said to have been deposited pending determination of the dismissed appeal has since been released to the respondent's advocates.
 11. The appellant is seeking review of this court's orders dated October 13, 2022. There are no orders of this court dated the said date. I will, however, proceed on assumption that the appellant/applicant is seeking review of this court's orders dated October 12, 2022.



12. This court's jurisdiction to review its orders is provided for in rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules* 2016, which provides as follows:-

- “(1) a person who is aggrieved by a decree or order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within a reasonable time, apply for a review of the judgment or ruling:-
- a. If there is discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made.
 - b. On account of some mistake or error apparent on the face of the record.
 - c. If the judgment or ruling requires clarification;
 - d. For any other sufficient reason.”

13. It is my finding that the application before me does not meet the threshold for review as set out in the foregoing rule. If the appellant/applicant was of the view that the court should have made orders that are different from those made on October 12, 2022, or that the court made a wrong decision, then it should have appealed.

14. I find no merit in the notice of motion dated October 14, 2022. The same is hereby dismissed with costs.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF DECEMBER 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. Wafula for Appellant/Applicant.

Mr. Iddi Respondent

