



**Wells Fargo Limited v Dzuya (Appeal 25 of 2020)  
[2022] KEELRC 13354 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13354 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL 25 OF 2020  
AK NZEI, J  
DECEMBER 1, 2022**

**BETWEEN**

**WELLS FARGO LIMITED ..... APPELLANT**

**AND**

**THOMAS LWAMBI DZUYA ..... RESPONDENT**

*(Appeal from the Judgment of the Hon. M.L. Nabibya – PM delivered  
on the 24th July 2020 in Mombasa SRM Cause No. 322 of 2018)*

**RULING**

1. On 19<sup>th</sup> May 2022, this Court delivered its judgment vide which it struck off the Appellant/Applicant's appeal with costs for having been filed outside the time provided for in Rule 8(1) & 2 of the Employment and Labour Relations Court (Procedure) Rules 2016. The Court stated as follows:-

“ 1. the appeal herein is against the judgment of Mombasa Principal Magistrate (Hon. M.L. Nabibya) delivered on 24<sup>th</sup> July 2020 in Mombasa Senior Resident Magistrate's Court Cause No. 322 of 2018.

The Memorandum of Appeal, dated 18<sup>th</sup> August 2020, is shown to have been filed in this Court's Registry on 24<sup>th</sup> August 2020 and paid for on the same date vide Court payment receipt No. A1051839 dated 24<sup>th</sup> August 2020.

Time for filing an appeal from the Lower Court's said Judgement dated 24<sup>th</sup> July 2020 started running on 25<sup>th</sup> July 2020, and the appeal herein was filed on the 31<sup>st</sup> day from the date of the said judgment.



The appeal herein ought to have been filed within 30 days from the date of the judgment appealed from. The upshot of the foregoing is that there is no valid appeal before me. Consequently, the Appellant's appeal herein is hereby struck off with costs."

2. On 13<sup>th</sup> June 2022, the Appellant filed a Notice of Motion dated 10<sup>th</sup> June 2022. Orders sought by the Appellant at this point are as follows:-
  - a. that the Court do review and set aside the judgment issued on 19<sup>th</sup> May 2022 and determine the appeal on its merits.
  - b. that the costs of the application be provided for.
3. The application is expressed to be brought under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, Order 50 Rule 3 of the Civil Procedure Rules and all enabling provisions of the law; and is supported by a supporting affidavit of Willis Ayieko sworn on 10<sup>th</sup> June 2022. It is deponed in the said affidavit:-
  - a. that the Calendar for 2020 shows that the 30<sup>th</sup> day from the date of the lower Court's judgment, that is 23<sup>rd</sup> August 2020, fell on a Sunday and 24<sup>th</sup> August 2020 fell on a Monday.
  - b. that order 50 Rule 3 of the Civil procedure Rules 2010 provides that where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.
  - c. that it was not possible for the Appellant to file its memorandum of appeal on a Sunday; and that the same was validly filed on the next day in line with Order 50 Rule 3.
  - d. that the Court's decision to strike out the appeal without considering the provisions of Order 50 Rule 3 was in error, which the Court has power to review and correct.
  - e. that the application was made without unreasonable delay.
4. A copy of the calendar for the month of August 2020 was annexed to the said affidavit, and according to the calendar, whose validity was not disputed by the Respondent, 23<sup>rd</sup> August 2020 fell on a Sunday while 24<sup>th</sup> fell on a Monday.
5. The application was opposed by the Respondent vide a Notice of Preliminary Objection dated 22<sup>nd</sup> June 2022; which was, by an Order of the Court dated 23<sup>rd</sup> June 2022, treated as the Respondent's response to the Appellant's application. The Respondent stated as follows in the said response:-
  - a. that the Appellant's Notice of Motion dated 10<sup>th</sup> June 2022 is a non-starter and therefore fatally defective, having been brought under Order 50 Rule 3 of the Civil Procedure Rules 2010, as it does not meet the threshold stipulated under Rule 32(2) of the Employment and Labour Relations Court (Procedure) Rules 2016, which rule qualifies instances when a party before the Employment & Labour Relations Court may invoke the Civil Procedure Rules.
  - b. that Order 50 rule 3 of the Civil Procedure Rules is alien to the Employment and Labour Relations Court (Procedure) Rules 2016, with the latter providing a strict time frame for the lodging of appeals under Rule 8(1) and (2) thereof.
  - c. that consequently, the Notice of Motion dated 10<sup>th</sup> June 2022 ought to be struck out and/or dismissed with punitive costs against the Appellant/Applicant.



6. This Court's rules, the Employment and Labour Relations Court (Procedure) Rules 2016, are silent on the issues of computation of time. Thus, whereas Rule 8(1) & (2) gives strict timelines within which to file appeals in this Court, the Rules contain no provision on how time within which to file the appeals or to take any other proceeding, is to be computed. There is no saving of the Civil Procedure Rules in this Court's Rules, save for provisions of the Civil Procedure Rules on execution of the Court's decrees, which provisions are saved in Rule 32 of this Court's Rules.
7. In instances where this Court's Rules are silent on any particular procedural issue, this Court's practice over the years has been to resort to the Civil Procedure Rules in a bid to keep the wheels of justice moving, as they must. Such instances abound, and are captured in numerous decisions of this Court, which include:-
  - a. *Slok Constructions Limited -vs- Erick Odhiambo Odongo* [2022] eKLR where Judge Maureen Onyango, having regard to the provisions of Order 50 Rule 4 of the Civil Procedure Rules which provides on when time does not run, held that the appeal in that case had been filed within time.
  - b. *John Nyangena -vs- Okoth Jamali t/a Alfa Bridge Security Services* [2018] eKLR where the Judge (Onesmus Makau) held that Section 57 of the *Interpretation and General Provisions Act* and Order 50 Rule 2 of the Civil Procedure Rules, 2010 exclude Sundays and Public holidays when computing time.
8. I agree with the Appellant/Applicant that the provisions of Order 50 Rule 3 of the Civil Procedure Rules on computation of time ought to apply in the present case as this Court's Rules are silent on that particular issue.
9. The next issue is whether the striking out of the Appellant/Applicant's appeal on account of having been filed out of time when the last day of filing the same fell on a Sunday amounted to an error apparent on the face of the record. The Black's Law Dictionary defines "apparent" as:-
 

"that which is obvious, evident or manifest"
10. The Court of Appeal stated as follows in the case of *Muyodi -vs- Industrial and Commercial Development Corporation & Another* [2006] I EA243:-
 

"In *Nyamogo & Nyamogo -vs- Kago* [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefinites inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear error apparent on the face of record would be made out. An error which has to be established by long drawn process of reasoning or on the points where there may conceivably be two opinions can hardly be said to an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error or wrong view, is certainly no ground for a review although it may be for an appeal."
11. As already stated in this ruling, this Court's Rules are silent on the issue of computation of time within which to file an appeal as provided in the Rules. Although this Court has almost routinely reverted to the Civil Procedure Rules when confronted with issues of computation of time, the possibility of there being two different opinions on the issue is real. The striking off by this Court of the Appellant's



- appeal on account of having been filed out of time is not, and cannot be an error apparent on the face of the record.
12. This Court's power to review its own decree or order is provided for in Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 which provides:-
- (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 new or 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 was made.
  - b. On account of some mistake or error apparent on the face of the record.
  - c. If the judgment or ruling requires clarification, or
  - d. For any other sufficient reason.
13. Rule 33(5) provides that where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again. The word "suit" as defined in Rule 2 of the Employment and Labour Relations Court (Procedure) Rules, 2016 includes an appeal.
14. The Appellant/Applicant having demonstrated that the 30<sup>th</sup> day from the date of the lower Court's judgment appealed from fell on a Sunday and that the appeal was filed on the following day which was a Monday, and this Court having appreciated the fact that it is just for this Court to revert to the provisions of the Civil Procedure Rules when this Court's rules are silent on any particular procedural issue, I find and hold that the Appellant/Applicant has established a sufficient reason for this Court to exercise its discretion and to review its judgment dated 19<sup>th</sup> May 2022.
15. Consequently, the Notice of Motion dated 10<sup>th</sup> June 2022 is hereby allowed in the following terms:-
- a. this Court's judgment dated 19<sup>th</sup> May 2022 striking off the Appellant's appeal is hereby reviewed and set aside.
  - b. the appeal shall be determined on its merits.
  - c. both parties having filed their respective written submissions on the appeal, a date for judgment shall be fixed.
  - d. costs of the application shall be in the appeal.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST 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. Mugambi for Appellant/Applicant

Mr. Oduor for Respondent

