



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. E019 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

LENNY KIMATHI MURUNGI

APPELLANT

VERSUS

KENYA WINE AGENCIES LIMITED

RESPONDENT

(Being an appeal from the judgement and decree of Hon. E. M. Kagoni, Principal Magistrate at the Milimani Commercial Courts, Nairobi in Chief Magistrate's Civil Case No. 3516 of 2006 delivered on 25th January 2021) – Lenny Kimathi Murungi v Kenya Wine Agencies Limited)

RULING

Introduction

1. Vide an application dated 9th March 2021, the Appellant/Applicant seeks the following orders –

(i) THAT this Honourable Court be pleased to extend time for filing of this Appeal against the Judgment of Honourable Kagoni E. M, Principal Magistrate delivered on 26th January, 2021 in Nairobi CMCC

3516 of 2006.

(ii) THAT the Applicant's Appeal dated 25th February, 2021 be admitted by this Honourable Court as duly filed and served.

(iii) THAT the costs of this application be provided for.

2. The grounds in support of the application are that –

(a) The Respondent being aggrieved by the Judgment of Honourable Kagoni E.M (Mr.), PM delivered on 26th January, 2021 has filed an Appeal before this Court being ELRC Civil Appeal No. E016 of 2021.

(b) The Applicant herein being partially aggrieved by the said judgment has also lodged a cross appeal before this Honourable Court on the grounds appearing on his Memorandum of Appeal dated 25/2/2021.

(c) This Memorandum of Appeal may have been filed outside the 30 day window period provided in law. This is because although the Judgment was delivered on 26/02/2021 and this Appeal filed on 26/03/2021 which on the face of it appears to have been within time, the Applicant appreciates that the month of January consists of 31 days and hence he may have filed the Appeal about 24 hours late.

(d) Although the Memorandum of Appeal was drawn and was ready for filing on 25/02/2021, the filing of the Memorandum of Appeal out of time was occasioned by a technological hitch at the Applicant's offices making it impossible for the Applicant to lodge the said document in the Judiciary's e-filing portal on 25/01/2021 for assessment and consequent filing of the same. The technological hitch was the inability of the Applicant's law firm to access the e-filing portal so as to file the Appeal in time.

(e) The Applicant has since been able to lodge the Memorandum of Appeal in the e-filing portal possibly one day late and prays that this Honourable Court extends time and admits it as duly filed and served.

(f) No prejudice will be occasioned on the Respondent herein as the delay on the part of the Applicant to file his Memorandum of Appeal out of time has been brought just possibly one day after the expiry of the thirty days period provided in law. This delay is therefore not inordinate as to warrant the striking out of the Applicant's Memorandum of Appeal on the

ground of it being filed outside the stipulated time.

(g) Further, the act/omission on the part of the Applicant's advocates should not be visited upon the Applicant for the interest of justice to be upheld.

(h) The Application is well merited and it serves in the interest of justice for the same to be.

3. The application is further supported by the affidavit of JOHN OBOR OTIENO sworn on 9th March 2021. He states that he is Legal Clerk in the firm of Lawrence Mbabu and Associates Advocates on record for the Appellant here. That he was given the memorandum of appeal to file through the e-filing portal on 25th February 2021 but encountered challenges on the online portal. He was only able to file on 26th February 2021. At the time he was under the impression that the memorandum of appeal had been filed within the statutory period of 30 days.

4. The Affiant states that he is apologetic for the error and that the same should not be visited upon the Applicant. He prays that the application be allowed and be deemed to have been filed in time.

5. The Respondent opposed the application and filed grounds of opposition as follows –

(i). *There exists another appeal filed by the respondent ELRC Appeal E016 of 2021 Kenya Wine Agencies Limited versus Lenny Kimathi Murungi arising from the same judgment. The applicant ought to cross-appeal in that matter.*

(ii). *The applicant has not shown cause why he should be allowed to pursue a separate appeal arising from the same judgment.*

(iii). *This application is an abuse of court process.*

6. The application was disposed of by way of written submissions. The Applicant filed submissions dated 17th June 2021 while the Respondent opted to rely entirely on its grounds of opposition and list of bundle of authorities in which it has listed the case of **Bulsho Trading Company Ltd v Rosemary Likhola Mutakha & another [2020] eKLR**.

7. The issues for determination are whether the Applicant has adduced sufficient grounds to justify the grant of the orders sought and whether the application should be granted.

8. Section 17 of the Employment and Labour Relations Court Act provides for appeals as follows –

17. Appeals

(1) Appeals from the Court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the Court in accordance with Article

9. Rule 8 of the Employment and Labour Relations Court (Procedure) Rules further provides –

8. Appeals

(1) 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.

(2) 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.

(3) A memorandum of appeal shall be in Form 1 set out in the First Schedule with necessary modifications.

(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.

10. Appeals from the Magistrates Courts is further provided for under **Civil Procedure Act at Section 79G** as follows –

79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

11. The memorandum of appeal herein was filed on 26th February 2021 while the judgment which is the subject of the appeal was delivered on 26th January 2021.

12. Section 57 of the **Interpretation and General Provisions Act** provides for computation of time as follows –

57. Computation of time

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.

13. The Act further provides for extension of time at **Section 59** as follows –

59. Construction of power to extend time

Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.

14. **Order 50 Rule 5** of the **Civil Procedure Rules** also provides for enlargement of time as follows –

[Order 50, rule 5.] Power to enlarge time.

6. Where a limited time has been fixed for doing any

act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

15. In the case of **Charles Karanja Kiiru v Charles Githinji Muigwa [2017] eKLR**, the Court of Appeal observed that –

*“20. Whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek, J.J.A in **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR**, thus*

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others...”

There is also a duty now imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.”

16. In the said judgment the Court of Appeal further observed as follows at paragraph 23 and 25 –

23. *Be that as it may, this Court in Kamlesh Mansukhalal Damji Pattni vs. Director of Public Prosecutions & 3 others [2015] eKLR articulated that-*

“It must be realized that courts exist for the purpose of dispensing justice. Judicial Officers derive their judicial power from the people or, as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” ... For these reasons, decisions of the Courts must be redolent of fairness and reflect the best interest of the people whom the law is intended to serve. Such decisions may involve only the rights and obligations of the parties to the litigation inter se (and hence only the parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”

25. *Having expressed ourselves as herein above the other issue that falls for consideration is whether the appeal filed out of time on 24th October, 2014 could be deemed as being properly on record. There is a plethora of authorities from the High Court which interpret the proviso to Section 79G of the Civil Procedure Act to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule, J. in the Gerald M’limbine vs. Joseph Kangangi [2009] eKLR stated that-*

“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out the stipulated period. To do so would actually be an abuse of the court’s process under Section 79B”.

Similarly, Aburili, J. in Martha Wambui vs. Irene Wanjiru Mwangi & another [2015] eKLR held,

“In my view, the use of the term “admitted” connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time ...”

17. The Applicant submits that it is apprehensive that it may have filed the memorandum of appeal one day late which was due to a technological error as set out in the replying affidavit of JOHN OBOR OTIENO in support of the application. It submits that this was an unprecedented challenge that was beyond the control of Counsel. It prays that the Court takes judicial notice of the fact that e-filing system is a new system only recently introduced by the Judiciary and amenable to delays and abrupt system failures, which is what happened to the Applicant’s Counsel on 25th February 2021.

18. It is submitted that the delay was not inordinate amount to unjustifiable delay.

19. The Applicant further relied on the decision in **Edith Gichugu Koine v Stephen Njagi [2014] eKLR** where the Court observed –

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others ...”

20. The Respondent has not controverted the averments in the Applicant’s grounds in support of the application or supporting affidavit. The grounds upon which it opposes the application is the existence of another **Appeal No. E016 of 2021 Kenya Wine Agencies Limited v Lenny Kimathi Murugi**. No copy of pleadings in the said appeal have been availed to this Court. The grounds of appeal therein have not been stated.

21. The Court has no clue whether such an appeal exists and if it does, whether the grounds in the appeal are similar to those in the instant appeal.

22. Grounds of objection cannot take the place of evidence and cannot be used to adduce facts. There is no application before the Court for striking out the appeal on the grounds cited by the Respondent.

23. The authority relied upon by the Respondent specifically sought the striking out of the cross appeal on grounds that it was an abuse of Court process. I find the authority not helpful in the present circumstances as there is no cross appeal.

24. It is my view that the only valid considerations in the instant application are those set out in the case of **Edith Gichugu Koine (supra)** being the period of delay, the reason for delay and the prejudice to the Respondent.

25. I find the delay of one (1) day to be insignificant and of no prejudice to the Respondent, as no such prejudice has been cited or raised by the Respondent. I further find the reasons for delay, being the inability of the Counsel for the Applicant to access the e-filing portal, to be reasonable.

26. For the foregoing reasons, I find the application merited and accordingly order as follows –

(i) The time of filing the Appeal against the Judgment of Honourable Kagoni E. M, Principal Magistrate delivered on 26th January, 2021 in Nairobi CMCC 3516 of 2006 be and is hereby extended.

(ii) The Applicant's Appeal dated 25th February, 2021 be and is hereby admitted by this Court as duly filed and served.

(iii) The costs of the application shall be in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2021

MAUREEN ONYANGO

JUDGE

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 Civil 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.

MAUREEN ONYANGO

JUDGE