



REPUBLIC OF KENYA



**Musango v DHL Express (Civil Application E261 of 2024)
[2024] KECA 1609 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KECA 1609 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E261 OF 2024
F SICHALE, JA
NOVEMBER 8, 2024**

BETWEEN

URBHANUS MUSANGO APPLICANT

AND

DHL EXPRESS RESPONDENT

(Being an Application for Extension of Time to file and serve Record and Memorandum of Appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Rutto, J), dated 24th November 2023 in Nairobi ELRC Cause No. 1510 of 2018)

RULING

1. By the Motion on Notice dated 27TH May 2024, brought pursuant to the provisions of Rule 4 of the Court of Appeal Rules 2010, Sections 66 & 95 of the *Civil Procedure Act*, Articles 159 (2) (d) of the *Constitution* of Kenya; and all the other enabling provisions of the Law; Urbhanus Musango (the applicant herein), has invited this Court sitting as a Single Judge to issue the following orders:
 - “i. Spent.
 - ii. That the Honourable Court be pleased to grant leave to the intended appellant to file and serve the Memorandum and Record of Appeal out of time against the whole judgment by Lady Justice Stella Rutto, delivered on 24th November, 2023 at Nairobi in the Employment and Labour Relations Court Case No 1510 of 2018.
 - iii. That the Memorandum of Appeal dated 14th March 2024 and annexed hereto be deemed as duly filed and served and the intended appellant be granted 21 days to file and serve the Record of Appeal.



- iv. That the costs of this application be in the intended appeal.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that the impugned judgment was delivered on 24th November 2023, by Rutto, J but unfortunately he became aware of the same on 1st March 2024, when the same was forwarded to him by his advocates on record, by which time the period under which an appeal could be filled under the law had since lapsed.
 3. He further deposed that the delay in filing the intended appeal was purely due to the fault of his advocates on record having served him with the impugned judgment on 1st March 2024, instead of on or around 24th November 2023, when the same was delivered.
 4. He thus deposed that in the circumstances, the Court should not visit the mistakes of his advocates upon him but rather exercise its discretion in his favour and grant him substantial justice as he had an arguable appeal with high chances of success as per the annexed Memorandum of Appeal.
 5. The motion was opposed vide a replying affidavit sworn on 7th June 2024, by John Irungu the Head of Human Resource of the respondent, who deposed inter alia that the applicant contended that he received the judgment in March 2024, which was roughly 3 months after the decision was delivered in November 2023 and that similarly, the instant motion had been filed 6 months after the judgment which delays raised questions about the applicant’s diligence in pursuing the judgment and the appeal.
 6. He further deposed that the applicant through his advocates on record had on 4th December 2023, demanded payment of the decretal sum within 7 days, failure to which they would proceed with execution and that the respondent being keen on resolving the matter, remitted the decretal amount together with the agreed costs to the applicant’s advocates who acknowledged receipt.
 7. He thus deposed that the decretal amount having been paid in full, the respondent assumed that the dispute between the parties had been resolved in finality.
 8. It was submitted for the applicant that the delay in filing the appeal was caused by the inadvertent failure by his advocates to forward the impugned judgment to him for his consideration and that further, the initial application filed on 4th April 2024, was returned for not having the certified judgment.
 9. Consequently, the applicant urged the Court to find that he had satisfactorily explained the delay. For this proposition, reliance was placed on the case of Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR.
 10. It was further submitted that no prejudice would be occasioned to the respondent if the extension was granted as the judgment amount forwarded by the respondent was still with the applicant’s advocates and in the unlikely event that the appeal did not succeed, then the said amount would still be used to satisfy the judgment and that in any event, the respondent would have a chance to argue the appeal on its merit or otherwise.
 11. On the other hand, it was submitted for the respondent that they have never been served with a Notice of Appeal and that further, the impugned judgment was delivered on 23rd November 2023, in presence of both counsels and that with the applicant’s lawyers in attendance, it can be presumed that the applicant was informed of the reliefs that were granted.
 12. That, subsequently on 7th December 2023, the applicant’s lawyers wrote to the respondent’s advocates demanding payment of the decretal sum, failing which execution would issue and that the respondent’s



being serious of settling the decretal sum, the parties agreed on the issue of costs to avoid taxation and a cumulative sum of Kshs 1,075, 144/= was remitted to the applicant's account and it was now perplexing why the applicant would pursue and accept payment of the decretal sum without fully appreciating the contents of the judgment and that if the applicant disagreed with the judgment, then pursuing the decretal sum was not done in good faith.

13. Turning to prejudice, it was submitted that the respondent had paid the decretal sum under the understanding that it would resolve the dispute between the parties entirely and that had there been any indication of dissatisfaction from the applicant regarding the judgment, it would have awaited the outcome of the appeal.
14. It was therefore submitted that the respondent had been compelled to secure representation for the purposes of this application and already incurred expenses in terms of the decretal sum and costs that had already been paid and that thus, the degree of prejudice to be suffered by the respondent was significantly higher.
15. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival written submissions by the parties, the cited authorities and the law.
16. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not are now old hat. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion the Court should do so judiciously.
17. See *Mwangi V Kenya Airways Limited* (2003) KLR 486 where this Court stated thus:

“Over the years, the Court has set out guidelines on what a single Judge Should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus;

It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account 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.”

18. In the instant case and as regards the length of the delay, it is indeed not in dispute that the impugned judgment was delivered on 24th November 2023 and the instant motion is dated 27th May 2024, which a period of about 6 months from the date of the impugned judgment, which period is inordinate.
19. Turning to reasons for the delay, it was contended by the applicant that the impugned judgment was delivered on 24th November 2023, but it was not until 1st March 2024 that his advocates informed him of the same by which time the statutory period for filling the appeal had since lapsed.
20. I don't find the reasons advanced for this delay by the applicant to be plausible for the following reasons; firstly, the impugned judgment was delivered on 24th November 2023 in presence of counsel for both parties.
21. Secondly, whereas the applicant contends that he only became aware of the judgment on 1st March 2024, as early as 4th December 2023, he had through his advocates written to the respondent demanding payment of the decretal sum within 7 days failure to which they would proceed with execution and the respondent indeed duly remitted the decretal amount to the applicant's advocates together with



costs as agreed between the parties, a fact which the applicant never disclosed in his application which I find to be in bad faith.

22. The contention by the applicant that he only became aware of the judgment on 1st March 2024 therefore beats logic because as early as 4th December 2023, his advocates had written to the respondent demanding payment of the decretal sum and it is highly unlikely that they would do so without express instructions of their client (the applicant).
23. Additionally, whereas it is the duty of counsel to inform their clients of the status of their case, the client as well equally, has a corresponding duty to follow up on the status of their case. Ultimately therefore I do not find the reasons offered for the delay to be plausible/reasonable.
24. With regard to the possibility of the intended appeal succeeding, it would not be in my place to determine the merits or otherwise of the same and I will therefore make no further comments regarding the same.
25. As regards prejudice, the respondent has contended that it paid the decretal sum under the understanding that it would resolve the dispute between the parties once for all and that had there been any dissatisfaction from the applicant regarding the judgment, it would have awaited the outcome of the appeal.
26. I am therefore in agreement with the respondent that it has been compelled to secure representation for the purposes of the instant application and has already incurred expenses in terms of the decretal sum and costs that have already been paid and I am satisfied that the decree of prejudice to be suffered by the respondent would be significantly higher as opposed to the applicant if the instant motion were to be allowed.
27. Given the circumstances, I find that the applicant has not demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court's Rules to extend time within which to file the intended appeal.
28. Accordingly, the applicant's motion dated 27th May 2024, is without merit and the same is hereby dismissed in its entirety with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

