



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISC APPLICATION NO 502 OF 2017**

**AMLOY ENGINEERING LIMITED.....APPLICANT**

**VERSUS**

**LUMBASI YOHANA.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated on 27<sup>th</sup> September 2017 and filed on 5<sup>th</sup> October 2017 was brought pursuant to the provisions of Order 7 Rule 17 (1), Order 51 Rule 1 of Civil Procedure Rules 2010, Section 3A (sic) and all other enabling provisions of the law. It sought the following prayers:-

- 1. THAT leave be granted to the Appellant to file an Appeal in the High Court out of time.**
- 2. THAT costs of this application be in the cause.**

2. It was supported by the Affidavit of Njeri Kariuki that was sworn on 27<sup>th</sup> September 2017. The Applicant's Written Submissions were dated 29<sup>th</sup> May 2018 and filed on 30<sup>th</sup> May 2018. The Respondent did not file his response to the Applicant's present application and/or Written Submissions despite having been given ample opportunity to do so on 16<sup>th</sup> May 2018.

3. Although the Respondent was served with Hearing and Mention Notices with the last being the Mention Notice that was dated 1<sup>st</sup> October 2018 and acknowledged on the same date as was evidenced by the Affidavit of Service of Japheth Milembe that was sworn on 2<sup>nd</sup> October 2018 and filed on 8<sup>th</sup> October 2018, the firm of M/s Nelson Kaburu & Co Advocates for the Respondent never attended court.

4. When the matter came before the court on 9<sup>th</sup> October 2018, the Applicant requested it to rely on its Written Submissions in their entirety in rendering its decision herein. The Ruling herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

5. The Applicant pointed out that it was forced to consider filing an Appeal herein after the Respondent's advocates attached its goods to recover a sum of Kshs 210,059.63 on 30<sup>th</sup> June 2017. It pointed out that this was without any legal basis because after the lower court in **CMCC No 6025 of 2013** delivered its judgment on 17<sup>th</sup> May 2016 in favour of the Respondent against it for a sum of Kshs 322,000/= plus costs and interest, it paid the Respondent a sum of Kshs 233,956/= less the Work Injury Benefits Act Award of Kshs 96,618/= he had been on 12<sup>th</sup> November 2013.

6. It contended that it had been under the impression that the matter had been fully settled until the said attachment on 28<sup>th</sup> June 2017 and consequently, there had been no delay in seeking orders to file its Appeal out of time.

7. It relied on several cases amongst them **Nicholas Kiptoo Arap Korir Salat vs IEBC [2014] e KLR**, **James Kamau Gachau vs Dorcas Wairimu Kamau [2009] eKLR** and **Kenya Commercial Bank Ltd vs Kenya Planters Co-operative Union [2010] eKLR** where the holdings were that when exercising its discretion, a court has to consider if there had been a reasonable reason for delay, that the applicant had presented an arguable case on appeal and that an applicant ought not to be denied his day in court.

8. Having considered the Affidavit evidence, the Applicant's Written Submissions and the case law it relied upon, this court came to the firm

conclusion that the Applicant had demonstrated that it filed its application without delay, it was justified in filing the application when it did as it appeared to have been under the impression that the matter had been settled and that it had raised an arguable appeal on whether or not the Respondent was entitled to the sum of Kshs 210,059.63 following the payments it had made to him.

9. It was also not lost to this court that the Applicant's present application was unopposed. This court was therefore persuaded to find and hold that the aforesaid application ought to be granted as prayed to give the Applicant an opportunity to exercise its right to fair hearing as it enshrined in Article 50 of the Constitution of Kenya, 2010.

**DISPOSITION**

10. For the reasons foregoing, the upshot of this court's Ruling is that the 2<sup>nd</sup> Applicant's Notice of Motion application that was dated on 27<sup>th</sup> September 2017 and filed on 5<sup>th</sup> October 2017 was merited and the same is hereby allowed. Costs shall be in the cause.

11. It is so ordered.

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> day of October 2018**

**J. KAMAU**

**JUDGE**