



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NO. 12 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR AN ORDER OF PROHIBITION

AND

IN THE MATTER OF

**REPUBLIC.....APPLICANT
VERSUS**

NATIONAL SOCIAL SECURITY FUND.....RESPONDENT

EX-PARTE

KAPI LIMITED.....SUBJECT

RULING

In a Notice of Motion dated 5th December 2011 and filed on 6th December 2011, the Respondent/Applicant sought inter alia orders that -

- (a) the applicant be granted leave to file a Notice of Appeal out of time,***
- (b) the applicant be granted leave to appeal out of time,***
- (c) there be a temporary stay of execution of the Ruling and subsequent decree and orders made by this court in a Ruling delivered on 3rd November, 2011 pending the hearing and determination of the Applicant's intended appeal.***

The Motion was supported by the grounds on the face thereof and the Affidavit of Margaret Osolika sworn on 5th December 2011. It was opposed by the Respondent in Grounds of Opposition dated and filed on 19th December 2011.

The Motion was urged by Mr Bargarit on behalf of the Applicant, and Mr. Kagucia on behalf of the Respondent.

The Motion raises two issues, **firstly**, leave to file and serve Notice of Appeal out of time, under Section 7 of the Appellate Jurisdiction, Rules 75 and 77 of the Court of Appeal Rules, 2010, and **secondly** a stay of execution under Order 22 rule 22 of the Civil Procedure Rules.

Section 7 of the Appellate Jurisdiction Act, (*Cap. 9, Laws of Kenya*) grants this court the discretion to extend time for filing notice of intention to file a Notice of Appeal. Rule 74 of the Appellate Jurisdiction Rules require an Applicant who intends to appeal against a decision of this court to file a notice of appeal within fourteen days with the Registrar of this Court.

The Ruling to be appealed against was delivered on 3rd November 2011. The application herein was filed on 6th December 2011 some 33 days later or some 20 or so days beyond the prescribed 14 days. The Affidavit in Support of the Application does not explain the reason for the delay.

Although the Respondent filed 11 grounds of opposition to the Application, the decision whether or not to extend time is essentially discretionary. The court has unfettered discretion which must be exercised judicially. That was the view expressed in the case of **GITHERE VS. KIMUNGU [1984] KLR 387**, and reiterated by Githinji JA in **NATHAN WASHIKO FEDHA VS. EDWINE ASAVA MAJANI** (*Civil Application No. NAI 322 of 2003*).

The factors which the courts take into account in determining whether or not the discretion should be exercised in favour of an applicant include whether the intended appeal has merit, whether extending the time will cause undue prejudice to the Respondent and whether or not the delay is inordinate, keeping in mind always that the unfettered discretion is to be used in furtherance of the ends of justice (**Nathan Washiko Fedha vs. Edwin Majani**) (*supra*).

The ruling sought to be appealed against relates to claims for casual employees subscriptions for the years 1993, 1994, 1995 and 1996 which the parties were unable to resolve for close to twelve (12) years (*from 1993 to 2005*) when the Respondent herein applied for prohibitory orders against the Applicant herein.

It seems to me to be highly prejudicial to the Respondent herein, to allow the Applicant's application. Casual workers are not permanent employees, and even if they were, keeping records of disputes running for over 12 years without resolution does not augur well for investment and investors. Besides the delay of 33 days before the application was filed makes it an after-thought.

Having come to that conclusion, there is no reason for granting a stay of execution. In any event there is no order to be stayed except the order for costs. No Bill of Costs has been filed and taxed, and therefore nothing to stay.

For those reasons I find no merit in the Applicant's Notice of Motion dated 5th December 2011, and filed on 6th December 2011. The same is dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered at Nakuru this 27th day of January, 2012

M. J. ANYARA EMUKULE
JUDGE