



1.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MISC. APPLICATION NO. 382 OF 2011
AZAR ANWAR T/A

AUTO DOC'S APPLICANT

VERSUS

FRANCIS MWALE RESPONDENT

RULING

Leave to File Appeal out of Time

I. BACKGROUND

1.The applicant herein M/s Azar Anwar T/a Auto Docs has brought this application dated 2nd September 2011 seeking leave to file appeal out of time.

2.In a subordinate court case at Nairobi, judgment was entered against the applicant in favour of the respondent concerning a libel /defamation case and concerning employment contract matter between the parties.

3.Whereas the claim for liable and defamation was dismissed the employment contract case was granted as to the respondent being underpaid, unpaid overtime, unpaid notice on salary, leave and severance pay.

4.The appellatant stated that he was unaware of this award until auctioneers came knocking at his door.

5.When he made enquiries from his former advocates, he was then notified that indeed there was judgment entered against them.

6.The applicant changed advocates who then filed this application before court seeking leave to file an appeal against that said decision out of time.

II APPLICATION DATED 2ND SEPTEMBER 2011

7.The applicant/employer stated that he had an arguable appeal. He would have appealed against the decision but for his former advocate's failure to inform him of the judgment that had been delivered.

8.The appeal has a chance of succession. The calculation of the sum alleged due to the respondent can be questioned.

9.In reply, the respondent relied on the fact that the award arises out of the employee/employer relationship. This means that the case rests exclusively in the jurisdiction of the Industrial Court.

10. Apart from the recent legal nature 9243 dated 27th July 2011

(5th August 2011) vesting the powers in Senior Resident Magistrate to hear the employment matters, only the industrial court has jurisdiction to hear employment matters. This power is exclusive under the Industrial Court Act No. 20 - 2011 Section 12(1) a.

11. The appeal should lie to the Industrial Court and therefore this High Court has no jurisdiction to grant the prayers.

12. As to limitation of action, the relationship between the employer and employee is given for 6 years to bring an action to court.

13. The appeal is intended to delay the fruits of the respondent's judgment.

III OPINION

14. The issue of the court's jurisdiction arises in this matter. Is this application misplaced? Should the application be made at the Industrial Court?

15. There are two acts that have changed the legislation in Kenya on the way litigation between employer/employee is to be carried out. The first legislation is the Labour Institution's Act 12/2007. The Act deals with institutions such as universities whereby disputes that arises between the parties lay exclusively with the Industrial Court. The second act is the Employment Act 2007 that also outlines the relationship between the employer/employee and vests the dispute resolution in the Industrial court.

16. The Industrial Court Act came into play by Act 20/2011 which vests cases with the said court.

17. Under the Labour Institute Act No. 12/2007 special courts are required to hear disputes in the subordinate court. By a Kenya Gazette Notice No. 9243 of 5th August 2011, the Hon. The Chief Justice designated all Senior Resident Magistrates to be special courts to hear and determined employment and labour relations cases in the 47 counties.

18. There is therefore no doubt about the court's jurisdiction.

19. The applicant herein is not an institution under the Labour Institutions Act and would therefore not fall under this Act but under the Employment Act No. 12 of 2007.

20. The suit in the subordinate court was nonetheless filed in the year 2004 before the Employment Act came into operation. It therefore means that the said new act would not apply to the said suit. If it did then the decision of the trial magistrate awarded to in the year 2011 was in itself null and void at the commencement of the Employment Act No. 12/2007.

21. When a new Act comes into operation and, unless the Act states that it will be applied respectively, then the laws prior to the enactment of the Act would proceed under the old Act until finalized.

22. I believe this is what occurred in this case.

23. In the application for leave to appeal out of time the issue would arise as to whether the applicant had good reasons not to file his appeal in time.

24. The only explanation I could get is that it was due to the former advocate's negligence. This advocate had failed to notify the applicant that his judgment had been delivered.

25. In the case

Muchina

Vs

Muchina

[2003] Kenya Law Report 613

Waki J.

Ruhara

Vs

Ruhara & 6 Others

[2002] 2 Kenya Law Report 663

Bosire J

The issue of the fault, negligence of the advocate on record should not prejudice the litigant.

26. In the case law of

Mwangi –

Vs

Kenya Airways Ltd,

2003 Kenya Law Report 486

(Omolo, Tunoi, Keiwua JJA)

In which the case outlines the matters to be taken into account in already whether or not to grant an extension of time.

This being:

- “ i) The length of delay
- ii) The reasons for delay
- iii) Possibly the chances of the appeal succeeding if the application is granted.
- iv) The degree of prejudice to the respondent if the application granted.”

27. Whereas this was applied to Court of Appeal matters, its principles may and can be used herein.

28. I would find that the application filed herein has merits. It is allowed with costs to the respondent.

29. Leave to file appeal out of time is granted.

A notice of appeal be filed and served within 14 days of this ruling on the respondent.

DATED THIS 19TH DAY OF OCTOBER 2011 AT NAIROBI

M.A. ANG'AWA
JUDGE

Advocates :

i) *A. Wandabwa instructed by Wandabwa & Co Advocates for the Appellant/original defendant*

ii) *N.H. Muturi instructed by M/s Nelson Harun & Co advocates for the respondent/original plaintiff*