



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 1 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 16th September, 2019)

ISINYA ROSES LIMITEDAPPLICANT

VERSUS

WILLIAM WAMBASI MURUMBA.....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion on 15th January 2019 seeking the following Orders:-

1. Spent.

2. That the Applicant be and is hereby granted leave to appeal out of time.

3. That interim order of stay of execution of the Judgment delivered in Kajiado- PMCC N.513 of 2015 be granted pending hearing and determination of this Application.

4. That orders of stay of execution of the Judgment delivered in Kajiado-PMCC No. 513 of 2015 be granted pending hearing and determination of the intended appeal.

5. That costs of this application be provided for.

2. The application is supported by the grounds on its face, the supporting and supplementary affidavits of Nathan Muthabuku Mwaura, the Applicant's counsel, and the annexures thereto. Amongst the grounds of the application are that Judgment was delivered on 28th September 2018 in excess of the Kshs. 153,000/= but the Advocates were only served with a letter on 16th November 2018 informing them of the Judgment.

3. Therefore, the application was made without undue delay and that the delay in making the application is for the reason that the instructing client delayed in issuing the Firm with further instructions.

4. In response to the application, the Respondent filed his Replying Affidavit sworn on 9th February 2019. He avers that the application is not made in good faith as it aims at delaying payments due to him and prays the Court does order the Applicant to pay half the decretal amount of Kshs. 123,437.50 and that it deposits the said amount in a joint account.

5. The Application was heard by way of written submissions with each party filing its respective submissions.

Applicant's submissions

6. The Applicant relied on the decision in **Jennifer Njuguna & another v Robert Kamiti Gichuhi [2017] eKLR** and submitted that the Applicant in this case was granted leave to file an appeal out of time for the sole reason that they were not served with a Judgment Notice.

7. The Applicant submitted that the Judgment was delivered on 28th September 2018 in the absence of both parties and that it was never served with a Judgment notice. It further submitted that it had made a case to warrant this court to exercise its discretion in the Applicant's favour and that there will be no prejudice should the orders sought be granted.

8. It relied on Order 42 Rule 6 (2) of the Civil Procedure Rules and submitted that it is willing to furnish security and abide by the Court's directions in so far as such security is concerned. It further submitted that should it be ordered to pay the decretal sum of Kshs. 123,437.50 and deposit it in a joint account as stated by the Respondent, the Applicant will not be in a position to recover the said amount should the appeal be successful. It therefore urged the Court to grant the orders sought in the interest of justice.

Respondent's submissions

9. It is the Respondent's submission that the guiding principles for stay order were settled in the case of **Antoine Ndiaye v African Virtua University [2015] eKLR**. He submitted that the application was brought to Court on 15th January 2019 after the lapse of the 30 days stay of execution which had ordinarily been granted by Court on the date of the delivery of Judgment. Therefore, the application lacks merit and delays the plaintiff from enjoying the fruits of his lawful judgment.

10. He submitted that the Applicant has not demonstrated that he would suffer substantial loss and it had not shown that the Respondent is a person of straw. He argued that it had not discharged its obligation and thus it had not established that substantial loss would occur. He relied on the decision in **Equity Bank Ltd v Taiga Adams Company Ltd [2006] eKLR**.

11. He further submitted that the Applicant has not offered or proposed any security for the due performance of the decree of lower Court and relied on the decision in **Masisi Mwita v Damaris Wanjiku Njeri [2006] eKLR**.

12. He submitted that the Applicant had also failed to demonstrate any substantive reason to show why there was a delay in filing an appeal. In support of this position, he relied on the decision in **Benedict Ojou Jume & 10 others v A. J. Pereira & Sons Limited [2016] eKLR**. In conclusion, he submitted that the application lacks merit and prayed that it be dismissed with costs and in alternative the Court does apply the balancing act and have the Applicant pay part of the decretal sum of Kshs. 123,437.50.

13. I have examined all the submissions before me. From the affidavit of the Applicant, the judgement was delivered on 28th September 2015 but was served upon them on 13th November 2018. Despite knowledge of the Judgement, the Respondent filed this application on 15/1/2019 almost 2 months later.

14. In this Court's view, the Applicant slept on the job and dragged their feet on coming to Court to seek orders now being sought.

15. Since the Applicant seeks stay orders and leave to file an appeal out of time, they must demonstrate to this Court that they have an arguable appeal. The Applicants must also demonstrate that the period of delay is not inordinate but reasonable. The Applicant is also mandated to show that they stand to suffer prejudice if orders sought are not granted.

16. Section 79 G of the Civil Procedure Act provides as follows:-

“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”.

17. The time for filing an appeal from a Subordinate Court to the High Court is 30 days. The Applicant as indicated above filed this application 2 months after they had knowledge that a judgement had been delivered. In my view, this was delay, which was inordinate and is not explained.

18. On issue of whether this appeal is arguable or not – this application is supported by a supporting affidavit sworn on 4th November 2018 by the Applicant and filed on 15/1/2019. There is no aota of evidence that the affidavit explains the appeal is arguable or not. The affidavit is deafeningly silent on this important aspect. In the same vein, the Applicant has not ever mentioned or even demonstrated that they stand to suffer any harm if the appeal is not admitted.

19. In the circumstances of this case, the application by the Applicant cannot stand due to the delay in filing this application and the non-demonstration of the harm or damage they stand to suffer if the application is not allowed on the demonstration that the appeal is arguable.

20. I therefore exercise my discretion and decline to grant orders sought and dismiss this application accordingly.

21. Costs for the Respondent

Dated and delivered in open Court this **16th day of September, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties