



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL MISC APPL. NO. 536 OF 2019**

**JULIET WANJIKU MULLI.....APPLICANT**

**VERSUS**

**DAVIS & SHIRTLIFF LIMITED.....RESPONDENT**

**RULING**

1. The Application dated 26<sup>th</sup> July, 2019 seeks orders that:

**1. Spent;**

**2. The honourable court be pleased to direct the Deputy Registrar of the Civil Appeal Division of the High Court to receive, admit and register the Memorandum of Appeal dated the 21<sup>st</sup> of June, 2019 for adjudication as it has been prepared and presented for filing within the statutory timeline;**

**3. Without prejudice to prayer (2) above and in the alternative, this honourable court be pleased to grant leave to the Applicant to file a Memorandum of Appeal against the Ruling and Order of the Nairobi Senior Resident Magistrate Civil Case No.8438 of 2017, Davis & Shirliff Ltd v Juliet Wanjiku Mule delivered on 28<sup>th</sup> September, 2018 out of time;**

**4. The Memorandum of Appeal dated 21<sup>st</sup> June, 2019 be deemed as properly filed subject to payment of Court filing fees;**

**5. Spent;**

**6. The honourable court be pleased to order stay of proceedings in Senior Resident Magistrates Court Civil Case No. 8438 of 2017, Davis & Shirliff Ltd v Juliet Wanjiku Muli pending the hearing and determination of the appeal;**

**7. The honourable court be pleased to call for the file in Senior Resident Magistrates Court Civil Case No. 8438 of 2017, Davis & Shirliff Ltd Juliet Wanjiku Muli for examination of the court records;**

**8. The costs of this application be provided for;**

2. The Applicant is dissatisfied with the ruling on the Preliminary Objection raised on the court's jurisdiction and wishes to appeal. The delay in the filing of the appeal is blamed on the failure by the lower court to supply the Applicant with the typed proceedings and the ruling in time.

3. The application is opposed. It is stated in the replying affidavit that the case in the lower court relates to a claim of Ksh.3,210,524/= alleged to have been misappropriated by the Applicant in the course of her employment by the Respondent. It is denied that there was delay on the part of the lower court or any failure to provide the typed proceedings and judgment. It is averred that the delay herein of ten (10) months is inordinate and that the application is an afterthought.

4. I have considered the application, the response to the same and the submissions made.

5. Section 79G of the Civil Procedure Act provides that:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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.”**

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

6. The delay has been explained. The Applicant has exhibited a letter dated 18<sup>th</sup> October, 2018 and stamped as received in the lower court on 25<sup>th</sup> October, 2018 and a payment receipt for Ksh.400/= deposit for payment for the typed proceedings. Also exhibited is a letter dated 23<sup>rd</sup> May, 2019 still requesting for the certified copies of the typed proceedings. There is no evidence that the lower court furnished the Applicant with the typed proceedings. Even the Respondent has exhibited a hand written copy of the ruling .

7. It is noted that the ruling the Applicant wishes to appeal from is on a Preliminary Objection raised in respect of the lower court’s jurisdiction to hear the suit. It would therefore be prudent to hear the appeal first.

8. On the question of this court’s jurisdiction, the Court of Appeal stated in **The Owners of Motor Vessel “Lillian s” v Caltex Oil Kenya Ltd [1989] KLR 1** thus:-

**“Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”**

9. With the foregoing, I allow the application in terms of prayer 2, 3, 4 and 6. The Applicant to compile and serve the Record of Appeal within 60 days from the date hereof. The Deputy Registrar to avail the lower court record for directions on 4<sup>th</sup> February, 2020. Costs in cause. The court fees for the filing of the Memorandum of Appeal to be paid within 7 days from the date hereof.

Dated, signed and delivered at Nairobi this 11<sup>th</sup> day of Dec., 2019

**B THURANIRA JADEN**

**JUDGE**