



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, KIAGE & SICHALE, J.J.A.)

CIVIL APPEAL (APPLICATION) NO. 148 OF 2020

BETWEEN

MARGARET ABUKUTSA VIDOLO.....APPLICANT

AND

ORKISTUDIO COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT

ALLAN BROOKS.....2<sup>ND</sup> RESPONDENT

*(Being an application to strike out the appeal filed against the judgment/decree of the Employment & Labour Relations Court (Hon. Abuodha, J) dated 20th February, 2020*

in

ELDORET ELRC 265 OF 2018

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RULING OF THE COURT

[1] The applicant was the successful claimant in Eldoret Employment and Labour Relations Court (ELRC) Cause No. 265 of 2018. The respondents, who were dissatisfied with the judgment of the ELRC, filed Eldoret Civil Appeal No. 47 of 2020 against the judgment.

[2] By a notice of motion dated 4th November, 2020, the applicant sought to have the memorandum and record of appeal lodged by the respondents struck out on the grounds that: the respondents did not serve her with the letter beseeching copies of certified proceedings and judgment; and that the certificate of delay relied upon by the respondents is invalid. In addition, the applicant contends that the record of appeal was filed outside the prescribed period of 60 days.

[3] The application is opposed by the respondents who rely on a replying affidavit sworn by the 1st respondent's Chief Executive Officer, **James Mitchell** in which he asserts that the application for typed proceedings was served upon the applicant's advocate who duly stamped a copy of the letter. The respondent also maintains that the certificate of delay is genuine having been issued by the Registrar of the ELRC Court.

[4] **Tobias Nyaberi Mugambi** the applicant's advocate has sworn a supplementary affidavit in which he denies that the letter beseeching proceedings was served upon the firm.

[5] We have carefully considered this application, the affidavit in support and in reply as well as the submissions. It is clear from a copy of the notice of appeal dated 2nd March 2020 which was annexed to the applicant's affidavit filed in support of the motion, that the same was served on the applicant's advocate on the 6th March, 2020 and a stamp of the advocate duly affixed on the notice. It is also evident from the replying affidavit that a letter beseeching the proceedings was served on the applicant's advocate on the same date 6th March, 2020 and the stamp of the advocate duly affixed on the letter. A certificate of delay from the court was also exhibited by the respondents. Consequently, we reject the contention of the applicant's advocate that he was not served with a copy of the respondent's letter beseeching copies of the proceedings.

[6] Although the record of appeal was not filed within 60 days, we are satisfied that the respondent is entitled to benefits from the *proviso* to **Rule 82(1)** as read with **Rule 82(2)** of the **Court of Appeal Rules**. It is evident that if the period that has been certified as necessary for preparing and supplying the proceedings is excluded there will still be some few days' delay and the respondent has filed an appropriate

application for extension of time which is pending for hearing. The applicant has simply jumped the gun by raising the issue of the competence of the appeal.

[7] For these reasons, we find no substance in this application.

It is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**