



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISC. APPLICATION NO E197 OF 2021

TWIGA CONSTRUCTION COMPANY LIMITED.....APPLICANT

VERSUS

LAWRENCE PWORA.....RESPONDENT

(Being Application for leave to file an appeal out of time from the Ruling

of Hon E. Kagoni (Mr) Principal Magistrate delivered on 8th September,

2021 in CMCC No. 7762 of 2013 at Nairobi)

RULING

1. Before me for determination is a Notice of Motion Application dated 2nd November, 2021, expressed to be brought under Order 42 Rule 6, Order 50 Rule 6 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A, 63(e), 70G and 95 of the Civil Procedure Act and all other enabling provisions of the law.

2. The Application seeks the following orders;

1. Spent.

2. THAT the Applicant/proposed Appellant be granted leave to appeal out of time against the whole Ruling of the Honorable M. Kagoni, Principal Magistrate in CMCC No. 7762 of 2013 delivered on the 8th day of September, 2021.

3. THAT this Honourable Court be pleased to issue directions in respect of the Memorandum of Appeal herein annexed and marked "ZJ-3" as being duly filed and served.

4. THAT costs of this Application be provided for.

3. The Application is premised on the grounds that the Ruling which is sought to be appealed against, was delivered on 8th September, 2021 and the Memorandum of Appeal was due for filing on 8th October, 2021. Further, that there has been no unreasonable delay in making the Application and that the delay in filing the Memorandum of Appeal within time, was inadvertent as there were challenges in obtaining a typed copy of the Ruling. That it is in the interest of justice to grant the orders sought.

4. The Application has been supported by the grounds on its body and a supporting affidavit of **Zehrabanu Janmohamed**, Advocate on record for the Applicant.

5. Counsel depones in her Supporting Affidavit that the Applicant filed a preliminary objection in respect of the jurisdiction of the Court to hear and determine the matter, being a work injury related claim. That the court delivered its Ruling on 8th September, 2021 dismissing the Preliminary Objection. That subsequently, there was a delay in obtaining a certified typed copy of the Ruling and which Ruling was necessary for analysis and preparation of the Memorandum of Appeal. Further that, they could not get a certified copy of the ruling as the physical file was missing and the court registry staff could not locate it in good time. That as such, they had to wait for the Ruling to be uploaded on the e-filing portal on 9th October, 2021, by which time the period granted by the court for leave to appeal had expired. A copy of the draft Memorandum of Appeal was annexed to the Affidavit.

6. The Application was certified urgent on 4th November, 2021 and the Applicant directed to serve the same upon the Respondent within 5 days.

7. When the matter came up for interpartes hearing on 24th November, 2021, the Respondent was absent from court and had not filed any response to the Application. Counsel for the Applicant Ms. Kithinji informed Court that they had effected service of the Application by electronic means. In this respect, Ms. Kithinji directed the Court to the Affidavit of Service sworn by Ms. Bianca Olunga who deponed that she had served the Application on the firm of Barongo Ombasa & Co. Advocates.

8. Upon perusal of the Affidavit of Service, the Court noted that the email address through which the Application was transmitted to, was not indicated. As such, the court was not satisfied with the service and directed Counsel to effect service afresh. In the premises, the matter was rescheduled to 25th January, 2022.

9. When the matter came up for hearing on 25th January, 2022, the Respondent was absent and had not filed any response to the Application. Ms. Obwori, counsel appearing for the Applicant informed court that Counsel on record for the Respondent had been served physically and, in this case, directed the court to the Affidavit of Service sworn by Florence Atieno Obonyo. Counsel urged the Court to allow the Application as prayed as the same was unopposed.

10. The Court being satisfied with the return of service, the Affidavit of service directed Counsel to submit orally on the Application. She relied on the averments contained in the Affidavit in support of the Application and by way of highlight, attributed the delay in lodging the Appeal to the challenges encountered in obtaining the typed copy of the Ruling from the lower court.

11. I have considered the Application and prayers sought and note that it substantially seeks for leave to appeal out of the statutory stipulated period. Therefore, the sole issue for determination is whether the Application is merited.

12. The relevant statutory provision in respect of such an Application is Section 79G and 95 of the Civil Procedure Act. Section 79G provides as follows;

“[79G. 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.]”

13. Section 95 on its part provides as follows;

“[95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.]”

14. From the record, the Ruling which is sought to be applied against, was delivered on 8th September, 2021 hence the time for lodging the Appeal expired on 8th October, 2021 while the instant Application was filed on 2nd November, 2021. Obviously, this was beyond the stipulated 30 days under section 79G of the Civil Procedure Act.

15. Counsel for the Applicant has attributed the delay to its failure to obtain a typed copy of the Ruling within time. As there was no response to the Application, this fact was not controverted.

16. This court does not find the delay inordinate and inexcusable as to deny the Applicant an opportunity to present its case by way of an appeal to this Court. The court further finds that the reasons advanced for the delay, are plausible.

17. Against this background, I find and hold that the prayer for leave to appeal out of time is merited. The Application is allowed and the Applicant granted 14 days from the date hereof to file and serve the Memorandum of Appeal upon the Respondent. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Obwori for the Applicant

No appearance by the Respondent

Court Assistant Barille Sora

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE