



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1195 OF 2016

PETER MUTUKU NTHUKU.....CLAIMANT

VERSUS

PERIMETER PROTECTION LIMITED.....RESPONDENT

RULING

1. By his Notice of Motion dated 26th February 2021, the Claimant seeks an order for release of the decretal sum of Kshs. 201,610 deposited in joint interest earning account No xxxxxxxx at Co-operative Bank, University Way, plus interest accruing thereon.

2. The Motion is supported by the Claimant's own affidavit and is based on the following grounds:

- a) That the Court delivered judgment on 31st July 2018 in favour of the Claimant;
- b) That upon delivery of the judgment, the Claimant extracted the decree, which was served upon the Respondent for approval;
- c) That the Respondent filed a Notice of Appeal, indicating its dissatisfaction with the judgment, pursuant to a ruling delivered on 6th December 2018, giving the Respondent leave to file its Notice of Appeal out of time;
- d) That having filed the Notice of Appeal on 23rd November 2018, the Respondent moved the Court with a Notice of Motion dated 28th November 2018, seeking stay of execution of the decree arising out of the judgment delivered on 31st July 2018, pending hearing and determination of the intended appeal;
- e) That vide its ruling dated 9th April 2019, the Court ordered stay of execution on condition that the Respondent deposited the decretal sum in an interest earning joint account;
- f) That the Respondent, having lodged a Notice of Appeal out of time, has failed to institute an appeal to date;
- g) That the intended appeal by the Respondent should have been lodged within 60 days from the date of lodging the Notice of Appeal;
- h) That by a letter dated 21st December 2019, the Deputy Registrar of the Court notified the Respondent's Advocates, with a copy to the Claimant's Advocates that the proceedings were ready for collection upon payment of Kshs. 1,020 for a certified copy and Kshs. 500 for an uncertified copy of the typed proceedings;
- i) That from the date of notification by the Deputy Registrar, it is now over 450 days and the Respondent is yet to file the Appeal and the Record of Appeal at the Court of Appeal as directed by the Rules and the ruling by the Court;
- j) That the delay, failure and neglect by the Respondent amounts to abandoning the intended appeal and that in law, the Respondent is deemed to have withdrawn the Notice of Appeal;
- k) That the termination of employment, then the delay in filing the appeal has placed the Claimant in serious pecuniary distress for over 4 years;
- l) That delay in prosecuting the appeal amounts to abuse of the court process and is occasioning prejudice to the Claimant, who is

unable to access the fruits of his judgment;

m) That it will be reasonable and in the interest of justice to allow this application.

3. The Respondent opposes the Motion by a replying affidavit sworn by its Operations Manager, Daniel Wamarite on 17th March 2021.
4. Wamarite depones that the Respondent's Advocate, Macharia Waiganjo applied for proceedings and judgment on 23rd November 2018 and only received the certified typed proceedings on 26th February 2020.
5. He adds that upon receiving the certified proceedings, the Advocate applied for a Certificate of Delay on 11th March 2020.
6. According to Wamarite, the Respondent's Advocate has fruitlessly pursued the Certificate of Delay to enable him lodge the appeal documents.
7. He points out that when the COVID-19 Pandemic regulations were eased, he wrote an email dated 10th November 2020 seeking confirmation whether the Certificate of Delay had been signed. He states that there was no response to that email by the time the Advocate's office was closed for the December 2020 festivities.
8. Wamarite goes on to state that on 24th February 2021, the Respondent's Advocate requested his Associate, Robinson Maina to follow up physically with the Registry as the Advocate's calls to the Registry were mostly always unanswered and fruitless.
9. It is deponed that upon the visit to the Registry, the Associate was asked to resend a copy of the Certificate of Delay via email, for signature.
10. Wamarite concludes that the delay in filing the appeal has not been intentional and has been occasioned by *inter alia*; delay of communication from the Court Registry and closure of courts due to the COVID-19 Pandemic.
11. The Claimant swore a supplementary affidavit on 30th September 2021 stating that the Respondent has not explained why, having been notified by the Court on 5th December 2019, that the proceedings were ready, it took up to 80 days to pay for and obtain them on 26th February 2020.
12. The Claimant points out that the Respondent has failed to explain why it took 13 days to apply for a Certificate of Delay, having obtained the proceedings on 26th February 2020.
13. Further, the Claimant states that the Respondent has not explained why having applied for a Certificate of Delay on 11th March 2020, it took more than 350 days to follow up the matter with the Registry and why it did not copy any of the letters or emails to the Claimant's Advocates.
14. This application turns on the issue of delay by the Respondent in filing its appeal at the Court of Appeal. The Respondent assigns the lapse to delay in communication from the Court Registry and closure of courts as a result of COVID-19 containment measures.
15. The Respondent submits that the Certificate of Delay is the only missing piece to complete the Record of Appeal. In my understanding, a Certificate of Delay is issued to confirm that the delay in filing an appeal was occasioned by the Court and not by the parties.
16. In its decision in *Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority [2019] eKLR* the Court of Appeal affirmed the position that a Certificate of Delay is issued to account for time consumed in typing proceedings, which period is discounted in computation of time within which an appeal is to be filed.
17. In this case, the Court itself notified the parties that proceedings were ready for collection as early as December 2019 but the Respondent did not take any action until 26th February 2020, by which time the appeal window had shut. I must add that at this time, COVID-19 had not even been detected in the Country and it is therefore erroneous to assign any delay on the Pandemic.
18. The delay by the Respondent in filing its appeal has therefore not been explained, there is no appeal on record and there is no reason to continue keeping the Claimant from accessing the fruits of his judgment.
19. The Claimant's Motion dated 26th February 2021 is consequently allowed. The decretal sum of Kshs. 201,610 held in account No xxxxxxxx at Co-operative Bank, University Way, plus interest accruing thereon shall be released to the Claimant, through his Advocates.
20. Each party will bear their own costs in this Motion.
21. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF JANUARY 2022

LINNET NDOLO

JUDGE

Appearance:

Miss Wavinya h/b Mr. Nyabena for the Claimant

Mr. Macharia Waiganjo for the Respondent