



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

MISC. CAUSE NO. E069 OF 2021

MUHORONI SUGAR COMPANY LIMITED..APPLICANT

VERSUS

FREDRICK JONAM OKECH.....RESPONDENT

RULING

1. This ruling relates to a Notice of Motion application dated 21st October, 2021 by the Applicant herein and the Respondent's Notice of Preliminary Objection dated 8th November, 2021. I will first deal with the application and the Preliminary Objection shall follow.
2. The Applicant in its application seeks to file an appeal out of time, against the Judgment of the Subordinate Court delivered on 13th July, 2021, in **Kisumu CMEELRC No. E32 of 2020- Fredrick Jonam Okech v Muhoroni sugar Company Limited**. The Applicant further seeks a stay of execution of the Judgment and decree of the aforementioned judgment.
3. The Application is premised on the award of Kshs. 320,593.98 to the Respondent herein by the trial court, as contribution for the National Social Security fund (NSSF), which was deducted but not remitted on behalf of the Respondent, and costs of the suit taxed at Kshs.111,900.
4. The Applicant's argument is that the Court erred in making the award, the same being statutory deductions, and which can only be recovered on behalf of the Respondent by the NSSF. The Applicant contends that if execution ensues as is envisaged, it will suffer as it will be forced to dig deeper into its pocket to remit the contribution to the fund.
5. The reason put forward for not filing the appeal earlier, is mistake on the part of Counsel then on record for the Applicant. The Applicant further states that Counsel now on record came on board on 29th September, 2021 upon grant of leave so to do, by the trial court. The Applicant submitted that mistake of counsel should not be visited on a litigant.
6. The Applicant asserts that its intended appeal has high chances of success, and thus, it will only be fair to stay the judgment of the trial court until the intended appeal is heard and determined. The Applicant cited the case of **Mbukoni Services Ltd & Another v Mutinda Reuben Nzili & 2 others (2021) eKLR**, where Justice Odunga quoted **First American Bank of Kenya Ltd v Gulab P. shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000(2002) 1 EA 65**, where the Court of Appeal listed factor to consider in exercising judicial discretion in granting leave to file an appeal out of time.
7. The Applicant submitted that the ends of justice will only be served if it is allowed leave to file its intended appeal out of time. It placed reliance in the holding in **Patel v E.A Cargo Handling Services Ltd (1974) EA 75** to buttress this position.
8. On the issue of stay, the Applicant submitted that the court is no longer limited by the Provisions of *Order 42 Rule 6(2)* of the Civil Procedure Rules, but is enjoined to give effect to the overriding objective in the exercise of its power under Section 1A and 1B of the Civil Procedure Act.
9. The Applicant further argues that being a public body, it is excluded from the need to furnish security pending the hearing and determination of an appeal.
10. The Respondent opposed the application vide a replying affidavit sworn by the Respondent on 8th November, 2021. The Respondent's case is that the Applicant deducted NSSF contributions from his salary totaling to Kshs. 320,595.68/- but failed to remit it to the NSSF for seven years, hence the suit.
11. The Respondent's position is that this application is an abuse of the court process for reason that the intended appeal does not raise triable issues, as the grounds upon which it is premised, are issues that never arose during trial before the subordinate court.

12. The Respondent's further contention is that the Applicant has not intimated their willingness to provide security as required under the law

Determination

13. I have considered the application, the grounds and affidavit in support thereof, the replying affidavit in opposition and the parties' written submissions. The issues for determination are:

- i. Whether the application meets the threshold for grant of leave to file an appeal out of time; and
- ii. Whether the judgment and decree of the court subject of this ruling, should be stayed pending the hearing and determination of the intended appeal.

14. The power of the court to enlarge time and allow a party to file an appeal out of time, is provided for under Order 50 Rule 6 of the Civil Procedure Rules, which provides as follows:

“where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or summary Notice or by Order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

15. The Court of Appeal in **First American Bank of Kenya Ltd v Gulab P. shah & 2 Others Nairobi (Milimani) HCCC No. 2255 of 2000(2002) 1 EA 65** cited by the Applicant, set out the principles to be considered in exercising the discretion on whether or not to enlarge time as:

“.... the length of the delay, the explanation if any for the delay, the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which will only result in delay of the course of justice, whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.”

16. The reason for the delay is that counsel then on record for the Applicant failed to lodge the appeal within the legally provided time frame, and the time of the delay is about 2 months. I would not deem this time as being inordinate delay. It is not. I will also not penalize the Applicant for mistake of counsel.

17. The Applicant has admitted non-remission of the statutory dues deducted from the Respondent's salary, and further evidence indicates that the Applicant had held the deductions for more than seven years before the suit subject of the judgment in question was filed. The Court of Appeal in **Edith Gichugu Koine v Stephen Njagi Thoithi (2104) eKLR** reiterated the principles set out in **First American Bank of Kenya Ltd v Gulab P. shah & 2 Others (Suprra)** where the decree of prejudice to the Respondent was set out as an important consideration to guide the grant or none thereof of leave to lodge an appeal out of time.

18. The Respondent was in the service of the Applicant between the years 1999 and 2001. Today, it is 21 years since the Applicant made the deductions subject of this ruling, and admittedly, has to date not remitted the deductions either to the Respondent, or the Statutory body for which it ought to have been remitted (NSSF).

19. The grounds put forward in support of the Applicant's intended appeal, are as submitted by the Respondent, not arguable in view of the admission of non-remission.

20. In my view, granting the Applicant leave to file an appeal out of time, is denying the Respondent the fruits of his judgment which he has waited for 21 years already, and the only result, is delay of the course of justice. In **Misc. Application No. E45 of 2020 Evans Mwangangi & Another v Agnes Kanini (2020) eKLR**, Justice Odunga stated that in the exercise of its unfettered discretion, the court should look at who will suffer more.

21. Considering the principle of overriding objective espoused in Sections 1A and 1B of the Civil Procedure Act, I find and hold that the application for grant of leave to file an appeal out of time is without merit.

22. Having declined the application for leave, the prayer for orders of stay of execution, fall by the way side, and so does the Preliminary Objection. In the absence of an appeal, the stay orders are untenable.

23. The upshot is that the application lacks merit and is hereby dismissed in its entirety with costs to the Respondent.

24. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Anuro h/b for Mr. Osewe for the Applicant

Mr. P.D Onyango h/b for Mr. Odhiambo for the Respondent

Ms. Christine Omollo-C/A