



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 1765 OF 2016**

**JACOB KELLY OMONDI ONYANGO.....CLAIMANT**

**VERSUS**

**THE NATIONAL BANK OF KENYA.....RESPONDENT**

**RULING**

1. By a Notice of Motion brought under Certificate of Urgency dated 12<sup>th</sup> November 2021, the Respondent seeks the following reliefs:
  - a) Leave to appeal to the Court of Appeal against the whole judgment and decree issued by **O.N Makau J** on 30<sup>th</sup> September 2021;
  - b) Stay of execution of the judgment and decree delivered on 30<sup>th</sup> September 2021, pending the hearing and determination of the intended appeal arising from *Nairobi Employment and Labour Relations Court Cause No 1765 of 2016*.
2. The Motion is supported by an affidavit sworn by the Respondent's Counsel, Donald B. Kipkorir, and is based on the following grounds:
  - a) That the Respondent is aggrieved by the judgment of this Court delivered by **O.N Makau J** on 30<sup>th</sup> September 2021;
  - b) That the Respondent, being satisfied (sic) with the said judgment is desirous of commencing an appeal against the judgment at the High Court (sic);
  - c) That the Respondent has moved diligently and expeditiously in bringing this application;
  - d) That the Respondent is willing to abide by any conditions set by this court for the grant of the orders sought herein;
  - e) That the Respondent undertakes to lodge the intended appeal expeditiously within such time as this Court may order upon requisite leave being granted;
  - f) That the Claimant is unlikely to suffer any prejudice or damage that cannot be compensated, should the appeal be successful;
  - g) That if stay is not granted, the Respondent will suffer irreparable loss and its appeal shall be rendered nugatory;
  - h) That the Respondent's appeal has a very high chance of success;
  - i) That this application has been filed without any delay;
  - j) That it is in the interest of justice and fairness that the prayers sought in the application be granted.
3. In his affidavit in support of the application, Counsel for the Respondent, Donald B. Kipkorir, states that the time allowed to file an appeal lapsed on 20<sup>th</sup> October 2021.
4. The Claimant opposes the application by his replying affidavit sworn on 18<sup>th</sup> November 2021.
5. The Claimant laments that judgment was issued on 30<sup>th</sup> September 2021, after 5 years of being subjected to suffering and stress in the

corridors of justice.

6. He points out that at the time of issuance of the judgment, the Respondent was in court and applied for stay of execution, which was declined.

7. The Claimant states that in declining to grant stay of execution, the Court noted that the suit had been in court for a long time. The Claimant adds that during this time:

- a) He was evicted from his home by the Respondent for failure to pay his mortgage after his employment was unlawfully and unfairly terminated;
- b) He has lived as a destitute, unable to meet majority of his bills;
- c) He lost his family, including his wife and children, when the Respondent moved in to sell his house and belongings;
- d) He has been relegated to a second class citizen from a *bona fide* Head of Credit Origination;
- e) He has lost face among his peers, family members and friends;
- f) He had to incur costs in retaining a law firm to defend his interests.

8. The Claimant terms the judgment as a reprieve, marking the end of his misery.

9. The Claimant goes on to depone that his Advocates on record extracted a decree on 8<sup>th</sup> November 2021, which was served on the Respondent, together with a letter asking the Respondent to settle the decretal sum.

10. The Claimant points out that between the date of the judgment and extraction of the decree, the Respondent had not taken any steps to seek leave to appeal or stay of execution. He concludes that the Respondent, through its conduct, has demonstrated a lack of interest in appealing the judgment or staying the execution.

11. The Claimant takes the view that this application is meant to delay justice and to deny him the fruits of the judgment.

12. The Claimant attacks the legal efficacy of the application by stating that there is no formal appeal. He cites Rule 75(2) of the Court of Appeal Rules, which provide that a Notice of Appeal should be lodged within 14 days of entry of judgment. He notes that judgment having been entered on 30<sup>th</sup> September 2021, the Notice of Appeal is yet to be filed 48 days later after entry of the judgment.

13. The Claimant adds that the Respondent has not shown any order from the Court of Appeal allowing it to file its appeal out of time. He states that there is therefore no appeal, which would be rendered nugatory, if the stay order sought is not granted.

14. The Claimant goes on to state that an application to file an appeal out of time can only be granted by the Court of Appeal under Rule 4 of the Court of Appeal Rules. He notes that this step has not been taken by the Respondent and as such, the present application is meant to waste the Court's time and delay justice to the Claimant.

15. The Claimant takes the position that the delay in filing the Notice of Appeal has not been explained.

16. The first plea made by the Respondent is for extension of time for filing its Notice of Appeal. Order 50 Rule 6 of the Civil Procedure Rules states as follows:

***Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by 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 expiration of the time appointed or allowed:***

***Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.***

17. In *Nicholas Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* the Supreme Court stated thus:

***“...it is clear that the discretion to extend time is indeed unfettered.***

***It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. We derive the following as the underlying principles that a court should consider in exercising such discretion:- Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is reasonable [cause] for the delay,***

***the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

18. The Respondent in this case simply asks the Court to extend time for lodging of a Notice of Appeal but does not bother to give any reason for the delay in the first place. Delay in meeting statutory timelines must be explained, because it is from this explanation that the Court makes a decision to exercise its discretion one way or another.

19. As it stands, no reason has been given as to why the Court should exercise discretion in favour of the Respondent. Leave to file a Notice of Appeal out of time is therefore denied and as a consequence, the plea for stay of execution is declined.

20. The Respondent will meet the costs of this Motion.

21. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Omamo for the Claimant

Ms. Anyango h/b for Mr. Kipkorir for the Respondent