



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

MISC. APPLICATION NO. 070 OF 2021

SKYLARK CONSTRUCTION LIMITED.....APPLICANT

VERSUS

PASCAL OBURA LAGO.....RESPONDENT

(Being an application for extension of time to file a Memorandum of Appeal out of time against the Judgment of Hon. S.N.Telewa (SRM) delivered on 19th august, 2021 in SRM Court ELRC NO. 9 OF 2019)

PASCAL OBURA LAGO.....CLAIMANT

VERSUS

SKYLARK CONSTRUCTION LIMITED.....RESPONDENT

RULING

Introduction

1. Before Court is the Applicant's application dated 21st October, 2021, wherein she seeks leave to file an appeal out of time against the Judgment of the lower court delivered on 19th August, 2021 in **SRM's Court ELRC Cause No. 9 of 2019**.
2. The application is premised on the grounds on the face of the Motion and the Supporting affidavit of **Geoffrey O. Yogo**, Counsel on record for the Applicant.
3. The reasons espoused for the delay in filing of the appeal, is that the Counsel on record did not receive instructions to appeal in good time, and which instructions are paramount prior to filing of an appeal.
4. The Respondent is opposed to the application vide a replying affidavit sworn on 5th November, 2021 by **Pascal Obura Lago**, the Respondent herein. He avers that the Applicant has not sufficiently explained her reason(s) for not filing her appeal in time, and that the application was filed two months after the impugned Judgment was delivered, rendering the application inordinately late.
5. The Respondent avers that the Applicant has not demonstrated evidence of the loss she will suffer if the orders sought are not granted. The Respondent further avers that an appeal is not a right, but an equitable remedy, and which is only available to a deserving party.
6. The Respondent states that the application is only intended to frustrate recovery and full enjoyment of the fruits of his Judgment and prays that the application be dismissed with costs.
7. Both parties filed submissions in the matter.

The Applicant's Submissions

8. It is submitted for the Applicant that a two months' delay in filing an appeal is not inordinate. The Applicant sought to rely on the holding in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi (Civil Application No. 255 of 1977)** to support this position.
9. It is submitted that the application is meritorious, made in good time, and that the intended appeal lays arguable issues with high chances

of success.

10. The Applicant submitted that it is ready to furnish security for costs.

The Respondent's Submissions

11. It is submitted for the Respondent that failure of a client to issue her Advocates with instructions to appeal, is not sufficient cause to extend time.

12. It is further submitted that for reason that the Applicant's application lacks plausible reasons for the delay, the indulgence sought is not warranted. The Respondent cited *Ratman v Cumarasamy (1964) 3 All ER 933 and Savill v Southend Health Authority (1995) 1 WLR at 1259* to support this position.

13. The Respondent further cited the case of *Alibhahi Musajee v Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998* where the Court of Appeal opined:

“Whereas the Civil Procedure Act allows for extension of time for filing appeal, if good and sufficient cause is shown, failure to act does not constitute a good or sufficient cause.”

Determination

14. I have considered the application, the grounds and the affidavit in support, the replying affidavit in opposition and the parties' submissions. The issue for determination is whether the Applicant is deserving of the orders sought.

15. Section 79G of the Civil Procedure Act, provides as follows on the power of the court to extend time: -

“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.”

16. Extension of time such as prayed in this application, is an equitable remedy and not a right of a litigant. The party that seeks this extension, bears the burden of satisfying the court that her application is worthy of the exercise of this discretionary power. (See *Nicholas Kiptoo Arap Korir Salat V Independent Electoral and Boundaries Commission & 7 Others, SC Application No. 16 of 2014(2014) eKLR*).

17. The principles that guide the grant or otherwise of an application such as this, are the length of the delay, the reason(s) for the delay, the possible chances of the appeal succeeding if the leave is granted and the prejudice to the Respondent if the leave is granted.

18. The impugned judgment was rendered on 19th August, 2021, while the instant application was filed on 22nd October, 2021. The delay is about one month considering that the Applicant had up to 19th September, 2021 to file the appeal.

19. The singular reason given for the delay in filing the appeal is that the Applicant did not issue her Advocates with instructions so to do. The question for this court is whether this is a good or sufficient cause to warrant the grant of leave sought herein. In the case of *Alibhahi Musajee v Shariff Mohammed Al-Bet Civil Appeal No. 283 of 1998* cited by the Respondent, the court held that **“Failure to act does not constitute a good or sufficient cause.”**

20. In *Daphne Parry v Murray Alexander Carson (1963) EA 546*, also cited by the Respondent, the court had this to say on extension of time:

“Though the provision for extension of time requiring “sufficient reason” should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles, if the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy; and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”

21. The common practice is that a litigant would be excused for mistake or oversight on the part of Counsel. It has never been the other way around. Failure to issue instructions in my opinion, simply imply that the Applicant agreed with the judgment of the court, and was not interested in appealing against it. The Applicant did not have the luxury of time to decide whether or not to lodge an appeal.

22. The time assigned by law within which to file an appeal, is couched in mandatory terms, and extension is only warranted where good or sufficient cause is shown for the delay. In the case of *Maulid Magingi mwabaraza v Sifa Investments Limited (2020) eKLR*, the court opined: -

“My view is that whereas litigants instruct Advocates to act for them, the cases belong to litigants and they have a duty to

monitor the progress of their cases.”

24. I find and hold that the reason given for the delay in filing an appeal in this matter, does not meet the threshold expected in the proviso to Section 79G of the Civil Procedure Act.

24. Further, the Judgment subject of this application has not been placed before this court. The court cannot therefore tell if the same is arguable or has chances of success.

25. Lastly, although the Applicant has indicated her willingness to furnish security for costs, she has not indicated in her entire application nor in the draft appeal annexed to the application, the amount decreed. In the absence of the impugned judgment, the court is unable to make orders for such security for costs as the decretal sum is unknown to this court.

26. The upshot is that the Applicant’s application dated 21st October, 2021 lacks merit and is dismissed with costs to the Respondent.

27. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF MARCH, 2022

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Namusubo Present for the Applicant

N/A for the Respondent

Ms. Christine Omollo-C/A