



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

MISCELLANEOUS APPLICATION NO E003 OF 2021

COUNTY SECRETARY, LAMU COUNTY.....1ST APPLICANT

LAMU COUNTY PUBLIC SERVICE BOARD.....2ND APPLICANT

JULIUS OKINDO.....3RD APPLICANT

VERSUS

LAWRENCE CHOKERA MUGO.....RESPONDENT

RULING

1. Principally, this is an application for leave to file appeal out of time. The application is dated 21st June 2021 and supported by the affidavit of John Mburu, the current occupant of the office of the 1st Applicant. Through the motion, the Applicants seek the court's leave to lodge an appeal against the judgment of Hon. T A Sitati delivered on 3rd May 2021 in Lamu Chief Magistrate's court ELRC No. 1 of 2019. In addition, the Applicants have prayed for orders of stay of execution pending appeal.

2. The Respondent is opposed to the application. He has filed a replying affidavit dated 22nd March 2022.

3. Broadly, the basis of the application is that the court's decision was delivered online. That the trial court only read the final part of the decision. That from the court's pronouncement, the Applicants' Advocates understood the court to have dismissed the entire of the Respondent's case.

4. The Applicants further state that on 19th May 2021, their lawyers wrote to the court asking for a copy of the judgment for their record. However, this request was not honoured by the court.

5. The Applicants state that in the meanwhile, the Respondent filed Civil Appeal No. E004 of 2021 at the Employment and Labour Relations Court, Malindi challenging the entire of the trial court's decision. Basking in the comfort of the fact that the claim against them had been dismissed in its entirety, the Applicants did not file an appeal against it. Their Advocates only filed a Notice of Address for Service in the Appeal by the Respondent.

6. It is the Applicants' case that they were later to be rattled by information circulating on social media that the Respondent had in fact succeeded in the case before the trial court. This was in late May 2021 prompting the Applicants' Advocates to write to the court on 24th May 2021 seeking an explanation about the apparent discrepancy between the judgment delivered by the court online and the one circulating on social media.

7. It is unclear whether the Advocates got a response to their request from the court. However, the Applicants appear to have come to the conclusion that what the court delivered online may in fact have been inaccurate. Consequently, they sought to appeal against the decision. A copy of the judgment is contained in their annexure JM 5.

8. However, being out of time to lodge the appeal, the Applicants could not lodge their appeal except with the leave of the court. This necessitated the filing of the current application. Meanwhile, the Applicants have by the same application asked the court to stay execution of the impugned decision pending this process.

9. The Respondent opposes the application on three fronts: -

a. That there is no appeal to justify the grant of orders for stay of execution pending appeal.

b. That the application has been prosecuted after inordinate delay.

c. That the grant of the orders sought is likely to prejudice the Respondent's appeal pending before the Public Service Commission challenging the lawfulness of the 2nd Applicant's decision to retire him in public interest.

10. Upon deliberation on 29th March 2022, the court asked that the application be canvassed through written submissions. On this date, the Respondent's Advocates were not in court. However, the date had been taken by consent on 8th March 2021.

11. I have considered the rival positions by the parties to the application. It is not in doubt that the trial court delivered its judgment on 3rd March 2021. At least the Respondent does not deny this fact.

12. It is also not in dispute that the Respondent appealed against the whole of the trial court's decision through Civil Appeal No. E004 of 2021, Malindi. The Appeal has since been withdrawn.

13. Contemporaneous with this appeal, the Respondent also lodged an appeal against the decision of the 2nd Applicant to the Public Service Commission (PSC). This matter, according to the Respondent, is still pending before the PSC.

14. The circumstances leading to the filing of this application are rather discomfoting. The Applicants have sworn an affidavit stating that the decision of the trial court as read on 3rd May 2021 left them with no doubt that the Respondent had lost the case. To support their case, they mention the fact that the Respondent appealed against the entire of the trial court's decision. However and to their complete shock and disbelief, the Applicants were later confronted with details of an apparently different version of the decision circulating on social media. That the version on social media suggested that the Respondent's case had in fact partially succeeded.

15. In an effort to verify these developments, the Applicants aver that they wrote to the court through their Advocates seeking an explanation on the alleged new twist in the matter. They have annexed a copy of this letter dated 24th May 2021. Interestingly, the Respondent has elected not to say anything about these averments by the Applicants. And neither has the trial court given an account of what may have transpired on the material date. This leaves this court in a rather discomfoting position regarding the insinuation by the Applicants that the trial court's judgment may have been tampered with.

16. Importantly, because of this mix up the Applicants did not file an appeal against the decision in question. In their mind, they had succeeded in the cause and there would be no need to appeal.

17. The letter calling for the court's explanation was drawn around 24th May 2021 towards the tail end of the period for lodging an appeal against the impugned decision. Yet, this was apparently the time the Applicants had just learned of the apparent anomaly in the judgment through social media and were understandably grappling with how to access the court file in order to retrieve the decision and confirm whether what they had seen on social media was in fact the correct version of the judgment. One can therefore reasonably understand why the Applicants ran out of time in filing the proposed appeal.

18. I have studied the trial court's judgment. The award of Ksh. 300,000/= to the Respondent as general damages appears at pages 14 and 15 of the decision. It is not reiterated in the conclusion of the decision. Therefore, if one were to read the conclusion alone without making reference to other parts of the decision, one would very easily miss to notice that the court had in fact awarded the Respondent general damages for violations visited upon him. I suspect this is the trap that the trial court fell into when reading the decision online.

19. Be that as it may, the consequence of the foregoing is that the Applicants' right of appeal was thereby tampered with for no fault of their own. Should the court perpetuate this undesirable state of affairs by refusing to permit them to appeal out of time?

20. The Respondent thinks that the Applicants are undeserving of the orders sought. He argues that the application has been argued too late after it was filed. Yet, the Respondent only filed his opposition to the motion about four days before the date for hearing of the application. Metaphorically, I think that everyone who comes to equity must not only do so with clean hands but also be prepared to do equity. I do not think that it is proper for the Respondent to plead inordinate delay in prosecuting the application as a ground for challenging the motion when he is quite guilty of opposing it late.

21. As for the question of the orders permitting the filing of an appeal interfering with the appeal before the PSC, I should perhaps only mention that the two forums are quite distinct: one is judicial and the other quasi judicial. I do not see how the concurrent pendency of proceedings before the two should compromise proceedings before either of them. At the very worst, proceedings in one of the forums can be stayed to await the conclusion of proceeding in the other forum. In any event, the Respondent had filed concurrent appeals before the two forums. I do not understand why he did not think that it was a problem then but thinks that it has become a possible problem now.

22. I have considered a couple of judicial pronouncements on the conditions to consider before granting an application for leave to appeal. In *Kinyunjuri Muguta v Wotuku Muguta [2018] eKLR* the court observed as follows: -

“...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

23. With regard to the current application, I note that it was filed on 23rd June 2021 approximately one month after the Applicants allegedly

encountered a different version of the trial court's judgment on social media. I do not think that much time was lost before the Applicants approached the court for redress. As for the time the application has taken to be heard, it is common knowledge that this station did not have a resident Employment and Labour Relations judge until the last quarter of 2021. That the application has been finally heard in the quarter next following cannot be considered as inconsiderable delay in prosecuting the matter.

24. As for the reasons justifying the grant of the orders, I think that we do not need to belabor the circumstances leading to the delay in presenting the appeal. They are self evident and did not arise out of the default of the Applicants. It will be evidently unjust for this court to close its eyes to them. They are sufficiently compelling to warrant the allowing of the motion.

25. As to the strength of the intended appeal, I will refrain from discussing this save to say that the Applicants have attached a draft Memorandum of Appeal which challenges the trial court's findings both on statutory and constitutional grounds. It is only right that the Applicants be permitted to ventilate these grounds if at all.

26. I note that the Respondent is entitled to enjoy the fruits of his judgment. And I know only too well that an appeal against the judgment does delay the enjoyment of such right.

27. From the record, there is evidence that the Respondent has failed to pay the judgment sum to the Respondent despite having notice of the judgment since May 2021. The Respondent has expressed his frustration in trying to have the judgment sum paid to him without success. This court takes judicial notice of the immense challenges that private citizens face trying to get State institutions to settle court decrees. I do not think that such conduct on the part of State agencies is just.

28. To strike a balance I make the following orders: -

a. That the Applicants are granted conditional leave to file an appeal against the judgment in Lamu Chief Magistrate's ELRC case number 1 of 2019 within 30 days of this order.

b. That the filing of the appeal in clause 28 (a) above is conditional upon the Applicants depositing the entire decretal sum together with costs into the court's escrow account within 29 days of this order.

c. That from the date of this order until compliance with clause 28(b) above, the Applicants shall enjoy stay of execution of the decree in the aforesaid case which order shall automatically be extended until the proposed appeal is heard and determined if clause 28(b) above is adhered to. However, should the Applicants fail to comply with the said clause the orders of stay of execution hereby granted will be deemed as automatically vacated.

d. That further in the event of noncompliance with clause 28(b) above, it shall be deemed that the right of appeal granted under 28(a) above has lapsed and any appeal filed shall be deemed as having been filed in violation of these directions and therefore incompetent.

e. That the costs of this application are granted to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 28TH DAY OF APRIL, 2022

B. O. M. MANANI

JUDGE

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

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 April 2020, this Ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE