



Bonito Hotels Limited & another v Wachiye (Miscellaneous Application E011 of 2022) [2022] KEELRC 13041 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELRC 13041 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E011 OF 2022**

JW KELI, J

OCTOBER 27, 2022

BETWEEN

BONITO HOTELS LIMITED 1ST APPLICANT

TOURIST HOTEL BUNGOMA 2ND APPLICANT

AND

MBAYA WACHIYE RESPONDENT

RULING

1. The Applicant, upon delivery of judgment against it in Bungoma Chief Magistrate Court in Employment Cause No. 9 of 2019 on the December 3, 2021, approached the court by way of Notice of Motion under Section 79G and Section 95 of *Civil Procedure Act* and all enabling laws under certificate of urgency dated August 25, 2022 seeking the following orders:-
 - a. That the Application be certified urgent and heard exparte on the first instance
 - b. That there be a stay of execution of warrant of attachment and sale issued by the Bungoma Chief Magistrate Court in Employment Cause No. 9 of 2019 on the August 12, 2022 Pending the hearing and determination of this application and the intended appeal.
 - c. That leave be granted to the Applicant to file appeal out of time and the draft memorandum of appeal herewith be deemed as duly filed.
 - d. Cost of the application be in the cause and
 - e. Any other relief that the honorable court deems fit and appropriate to grant.
2. Order (a) and b are spent.
3. The Court on the August 29, 2022 granted an interim order of stay of execution of warrants of attachment and sale issued in Bungoma Chief Magistrate Court in Employment Cause No. 9 of 2019



of August 12, 2022 on condition that the decretal sum and auctioneer's charges are deposited in court on or before 31st September 2022.

4. The Application is based the following grounds;-
 - i. That Judgment in Bungoma Chief Magistrate Court in Employment Cause No. 9 of 2019 was delivered on the December 3, 2021 in the absence of the Applicants' former advocates.
 - ii. That the Applicants' former advocates never informed the applicants of the outcome on the matter nor did they inform them of the date when the judgment was supposed to be delivered by the trial court.
 - iii. That on the August 18, 2022 the Applicant was served with Proclamation Notice from Lufree firm of auctioneers threatening to attach its tools of trade including furniture and assorted utensils.
 - iv. That the delay to file appeal within time was occasioned by the failure of Applicants' former advocates to inform the Applicants of the outcome of the case and the date that the judgment was to be delivered.
 - v. The Applicants intend to appeal against the judgment of Hon. C.S Mutai, SPM delivered on the December 3, 2021 out of time.
 - vi. The delay to file appeal within time was not deliberate as the judgment was delivered in absence of the parties.
 - vii. The mistake of the former advocates should not be visited on the her(*sic*)
 - viii. The Respondent is on verge of executing the decree emanating from the said judgment.
 - ix. It is in the interest of justice for the applicant to be allowed to file appeal out of time and the delay is not inordinate.
 - x. That no prejudice shall be occasioned on the respondent should the application be allowed as prayed.
 - xi. The intended appeal raises serious triable and weighty issues and has high chances of success.
5. The application is further supported by the affidavit of Alfred Agengo sworn on the August 25, 2022 and filed in court on even date. The deponent reiterates the grounds under the application outlined above and annexes exhibit marked 'AA1' being a copy of the proclamation notice from the auctioneers dated August 18, 2022 and exhibit 'AA2' being a copy of the memorandum of appeal.
6. The Application is opposed by the Respondent *vide* his replying affidavit sworn on the September 15, 2022 and filed in court on the September 18, 2022. The respondent in summary states that the application is without merit , an afterthought and an abuse of court process and should be dismissed in limine. That the application is meant to deny him the chance to realize fruits of his judgment after a lawful litigation process. That he is aware that both his counsel and previous counsel for the applicants were aware of the position of the suit, that the judgment date was taken by consent of both counsel on record on the October 28, 2021 which means the applicants were aware of judgment delivery date and chose not to attend court. The application is based on falsehoods and is brought in bad faith. That when the matter was slated for taxation of bill of cost dated February 4, 2022 both parties were aware of the taxation and attended court. That it beats logic that both counsel of the applicants were aware and attended taxation of bill of costs and were not aware of the judgment date or its delivery to enable them move court in time. That upon delivery of judgment on the December 3, 2021 there was



a stay of 30 days which time lapsed without them moving court hence they are not entitled to orders sought. The applicant exercised inordinate delay in filing the application and the same should not be allowed to prevent the respondent from suffering extreme prejudice. That he is advised by his counsel the application does not meet the threshold required for granting orders of stay of execution as well as setting aside Judgment and the decree of trial court and that the Applicants have approached the court with dirty hands and hence do not deserve equity. That the application will cause him injustice.

7. The Application was canvassed by way of written submissions. The applicants written submissions drawn by Nyarango & Co. Advocates are dated September 23, 2022 and filed in court on the September 26, 2022.
8. The Respondent's written submissions drawn by Ndalila and Company Advocates are dated October 3, 2022 and filed in court on the even date.

DETERMINATION

Issues for determination

9. Both parties have identified the issue for determination to be whether the application has merit . The court finds that prayer for stay having been granted and the parties being in agreement it is spent the outstanding issue for determination is prayer c being Whether the leave to appeal out of time should be granted to the applicant and the draft memorandum of appeal deemed as duly filed.

Whether the leave to appeal out of time should be granted to the Applicant and the draft memorandum of appeal deemed as duly filed.

10. The Applicant relies on the provisions of Section 79G of the Civil Procedure Act which reads:- '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.'
11. The Applicant relies on the authorities in Mohammed v Joseph Mugambi & 2 others Civil Application No. Nairobi 332 of 2004(unreported) cited with approval in the case of Stanley Kaboro Mwangi & 2 others v Kanyamwi Trading Company(2015)e KLR where the court held that the courts discretion is unfettered as there is no limit on the number of factors the court should consider as long as they are relevant among the factors being the period 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 and the importance of compliance with time limits.
12. The Applicant's further rely on the decision of the court in case of JMM V PM (2018) eKLR where the court cited Cotton L.J in Wilson V Church (No. 2) (1879)12 Ch D 454 at page 458 where he said, " I will state my opinion that when a party is appealing, exercising his undoubted right of appeal , this court ought to see that the appeal if successful is not rendered nugatory."
13. The Applicants further submit that the court of law should be hesitant at closing the door to the corridors of justice prior to the applicant being heard on his complaint. The Applicants relied on provisions of Article 48 of the Constitution on access to justice and Article 50(1) of the Constitution on right to have dispute resolved by court or other independent and impartial tribunal or body.
14. That Applicant submits that courts have allowed appeals to be lodged out of time in event no inordinate delay like in the instant application and even where there is inordinate delay depending on



the reasons for the delay and allowed parties opportunity to be heard on appeal. That the Respondent has not demonstrated what prejudice they would suffer if the applicants are granted extension of time to file appeal out of time.

15. The Respondents submits that the question whether the Applicants should be allowed to file appeal out of time is subject to applicants satisfying the court they have a good and sufficient cause for not filing appeal in time.
16. The Respondent submits that the Supreme Court of Kenya has laid down general guidelines to help determine the handling of application to enlarge time to file appeal in the decision of *Fahim Yasin Twaha -v-Timamy Issa Abdalla & 2 others* (2015)eKLR which cited with approval the case of *Rupa Savings & Credit Cooperative Society Violet Shidogo*(2022) e KLR where the court stated: ‘ [29] As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:

“... 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:

1. 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;
2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents, if extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time” [emphasis supplied].

17. The Respondent submits that the reasons of mistake of the Counsel ought to be interrogated by looking into the nature or quality of the mistake as held in decision of the Court of Appeal in *Itute Ingu v Isumael Mwakavi Mwenda* (1994)eKLR.
18. The Respondent submits that whether the mistake of counsel is bonafide has not been explained to the court and contents that it is not as no evidence the applicants sought information from counsel on their matter. To buttress this submission the Respondent relies on the decision by Odunga J in *Dilpack Kenya Limited -vs- William Muthama Kitonyi* 2018 eKLR where court held a pure and simple inaction case by counsel or refusal to act cannot amount to a mistake which ought not be visited on the client.



19. The Applicant Submit that the inherent jurisdiction is residual intrinsic authority which the court may resort to put right what would otherwise be injustice and relies on the decision of the Court of Appeal in *Stanley Kaboro Mwangi and 2 Others -vs- Kanyamwi Trading Company Limited* (2015)e KLR where the Court of Appeal held that the principles that affect the court in deciding such an application are discretionary and unfettered therefore the applicant must explain to satisfaction of the court why the discretion should be exercise in its favour.

Conclusion

20. Having considered the foregoing submissions by the parties, I find merit in the Notice of Motion application filed in court on June 16, 2022 and issue the following Orders:-
- a. There shall be a stay of execution of the Judgment and/or Decree in Bungoma CMC Employment Cause No. 9 of 2019 Mbaya Wachiye -vs- Bonito Hotels Limited & Another pending the filing, hearing and determination of the intended appeal to the Court on condition that the decretal sum of Kshs.582,769/- is deposited in this court within 14 days of this order.
 - b. Failure to comply with the deposit will lead to automatic vacation of the order Nos. 1 above.
 - c. Order of leave extending the time of filing appeal and to file appeal out of time against the Judgment of Hon. Charles Soi Mutai in Bungoma CMC Employment Cause No. 9 of 2019 Mbaya Wachiye -v- Bonito Hotels Limited delivered on December 3, 2021.
 - d. Failure to file the notice of appeal, memorandum of appeal and the record of appeal within 30 days of this Order will lead to automatic lapse of order no.3
 - e. Costs to the Respondent.
21. It is so ordered.

WRITTEN, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 27TH OCTOBER 2022.

J. W. KELI,

JUDGE.

In the presence of:-

Court Assistant – Brenda Wesonga

Applicant:- Ms Awour holding brief for Nyarango Advocate

Respondent:- Komoro

