



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.301 OF 2012

ALEXANDER KASINA MUKALA.....CLAIMANT

VERSUS

KENYA POWER & LIGHTING COMPANY.....RESPONDENT

RULING

The claimant filed three (3) applications;

One dated 30th September, 2020;

One dated 3rd November, 2020; and

Another dated 5th November, 2020.

The gist of these applications is that the claimant is seeking for leave to file appeal and counter appeal out of time on the grounds that judgement herein was delivered on 9th October, 2018 and communication between him and his advocates was not possible until 6th March, 2019 to 30th September, 2020 when he filed Notice to Act in Person and has hence filed these applications.

Application dated 5th November, 2020 is seeking for orders that;

This court be pleased to grant leave for the applicant to be properly on record and file his appeal.

The application is made on the grounds that the claimant was represented by the firm of E.K. Mutua & Co. Advocates and when judgement was delivered, the advocates did not disclose to him until execution commenced and has since filed a notice to act in person and only fair that he be granted the orders sought.

The respondent filed Grounds of Opposition that;

a) There has been inordinate delay in filing the instant applications considering judgement in this matter was delivered on 9th October, 2018 in the presence of the advocate for the applicant.

b) The applicant has been aware of the said judgement having filed a Notice to Act in Person on 12th March, 2020 therefore the instant applications are belatedly filed.

c) The applications are frivolous, vexatious, incompetent, and bad in law and are an abuse of this court process.

d) It is in the interests of justice and fairness the applications be dismissed with costs.

Both parties attended court on 1st December, 2020 and agreed to address the applications by way of written submissions.

The claimant as the applicant submitted that judgement herein was delivered on 9th October, 2018 and was awarded Ksh.637, 312 in compensation together with costs and interests but was misled by his then advocates to believe that he had been awarded special damages of Ksh.1, 507,616 as prayed for. He followed up the matter with his advocates who refused to give him accurate information and on 12th March, 2020 he filed Notice to Act in Person.

Aggrieved, the claimant wishes to file an appeal.

The claimant submitted that under rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (Court Rules) an appellant is required to file a Memorandum of Appeal against decisions of this court within 30 days from the date the decision was delivered. Section 95 of the Civil Procedure Act gives the court discretion to enlarge time prescribed for doing an act, though the period originally fixed or granted may have expired as held in **First American Bank of Kenya Ltd v Gulab P Shah & others HCCC No.2255 of 2000**.

The delay in filing these applications and seeking for leave to extend time to file appeal was occasioned by the advocates representing the claimant from disclosing the contents of the judgement. Despite several communications to the advocates, there was no response. The mistake of the advocates should not be visited on the claimant as held in **Belinda Murai & 6 others v Amos Winaina [1978] KLR**.

The claimant also submitted that the intended appeal has great chances of success as the court failed to take into account that he was not a contractual employee but was employed on permanent and pensionable basis on 22nd May, 1979 and at the time of his employment was unfairly terminated, he had worked for 29 years. The failure by the court to appreciate these facts has occasioned a huge difference in the decretal sum awarded. The orders sought should be granted.

The respondent submitted that judgement herein was delivered in the claimant's favour on 9th October, 2018 and awarded ksh.637, 312 together with costs and interest.

Dissatisfied with the judgement, the respondent filed a Notice of Appeal dated 22nd October, 2018 and an application seeking stay of execution dated 23rd October, 2018 and which application was allowed on 20th February, 2019.

The respondent submitted that Rule 8(1) of the Court Rules allow a party to file a Memorandum of Appeal within 30 days and section 8(2) of the Civil Procedure Act prescribe the time for lodging an appeal. Upon delivery of judgement herein in the presence of the claimant, no appeal has been lodged for a period of over one year which is inordinate delay as held in **Mohamed Shally Sese v Fulson Company Ltd & another [2006] eKLR**. There is no good cause established as to why no appeal was filed within time as held in **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR** and the applications filed should be dismissed with costs.

Determination

The instant applications are filed by the claimant in person having opted to act in person from his Notice to Act in Person dated 12th March, 2020.

The core issue is whether the court should grant leave to the claimant to file an appeal/counter appeal out

of time.

The claimant has relied on the provisions of Rule 8(1) of the Court Rules and section 8(1) of the Civil Procedure Act.

These applications have been filed post judgement delivered on 19th October, 2018. The claimant was given an award of Ksh.637, 312. Aggrieved, the respondent filed

Notice of Appeal dated 22nd October, 2018 and application seeking stay of execution dated 23rd October, 2018. The court rendered ruling on 20th February, 2019.

On the judgement and ruling on stay of execution, the court stood *functus officio*. It had rendered itself.

Any party dissatisfied with the judgement, ruling and any orders of this court, recourse is section 17 of the Employment and Labour Relations Court Act, 2011. Appeals against the orders of this court lie at the appellate court, the Court of Appeal. There are Rules governing the filing of appeals and enlargement of time to file an appeal out of time.

17. Appeals

(1) Appeals from the Court shall lie to the Court of Appeal against any Judgement, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.

Rule 8 of the Court Rules relates to appeals lodged with the court as prescribed under the law. This rule does not regulate appeals against the judgement and orders from the court itself. To take it as such would be a serious misreading of the law.

Appeals to this court can only emanate from the subordinate courts, appeals against the decisions of the Registrar of Trade Unions under the provisions of the Labour

Relations Act, 2007, appeals against the Orders of the Director of Occupational Health and Safety under the provisions of the Work Injury Benefits Act, 2007 and related matters and not an appeal against the decision, order or judgement of this court. That is not the import of Rule 8 of the Court Rules.

The court having rendered itself on 19th October, 2018 the claimant can only lodge his intended appeal to the Court of Appeal and not back to the same court.

Equally, section 8 of the Civil Procedure Act with regard to enlargement of time should be read in the same context as Rule 8(1) of the Court Rules.

The court having rendered itself, the orders sought to extend time to file an appeal and or a counter appeal out of time is denied of this court. Such orders cannot issue through whatever craft. The court lack such mandate and jurisdiction.

Accordingly, applications filed by the claimant seeking leave to file appeal and or counter-appeal out of time are hereby dismissed. Costs to the respondent.

DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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