



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**MISCELLANEOUS APPLICATION NO 11 OF 2020**

**BLUE CAT PORT SERVICES LTD.....APPLICANT**

**VS**

**GEORGE OTEKO ORIMBO.....1<sup>ST</sup> RESPONDENT**

**K.K SECURITY GROUP OF COMPANIES LIMITED.....2<sup>ND</sup> RESPONDENT**

**GRAIN HANDLERS LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant's application dated 2<sup>nd</sup> September 2020 is for leave to file an appeal out of time. The intended appeal is against the judgment of **Hon G.Kiagi, SRM** delivered on 28<sup>th</sup> May 2020 in **Mombasa SRMCC No 649 of 2012: George Oteko Orimbo v K.K Security Group of Companies Limited & others**.

2. The application is supported by an affidavit sworn by John Muchibi Chitechi and is based on the following grounds:

- a. That on 22<sup>nd</sup> July 2013, the 1<sup>st</sup> Respondent filed **Mombasa SRMCC No 649 of 2012** against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, seeking damages in respect of injuries sustained in the course of work as an employee of the 2<sup>nd</sup> Respondent;
- b. That on 13<sup>th</sup> June 2014, the Applicant was served with a Third Party Notice by the 3<sup>rd</sup> Respondent who claimed indemnity and/or contribution on the part of the Applicant on the ground that the 1<sup>st</sup> Respondent had sustained injury when a loading belt, allegedly operated by the Applicant and/or its employee, snapped and injured the 1<sup>st</sup> Respondent;
- c. That the suit was subsequently heard before the trial court up to 18<sup>th</sup> February 2020, when the court reserved judgment for 28<sup>th</sup> May 2020;
- d. That on 28<sup>th</sup> May 2020, the Applicant's Advocates sent an email to the 3<sup>rd</sup> Respondent's Advocates, asking for assistance in obtaining a copy of the judgment but the Applicant was unable to obtain the judgment until 4<sup>th</sup> June 2020, when it was sent via email;
- e. That due to the COVID-19 Pandemic, the Applicant scaled down its operations and the required Applicant's officer was not available to provide the Applicant's Advocates with the necessary instructions to file an appeal within the required time;
- f. That the 1<sup>st</sup> Respondent is in the process of executing the judgment and has instructed an auctioneer who has attached the Applicant's goods, for sale by public auction;
- g. That the delay on the part of the Applicant in filing an appeal was not deliberate but was occasioned by complications brought about by the COVID-19 Pandemic;
- h. That the intended appeal by the Applicant is not frivolous and raises triable issues on the question of apportionment of liability and the propriety of the entire judgment, which is manifestly contrary to the provisions of the Work Injury Benefits Act, 2007 and the trial court did not have the necessary jurisdiction to hear and/or determine the suit;

i. That the delay on the part of the Applicant is not inordinate and is excusable, particularly considering that court operations were scaled down pursuant to directions by the Chief Justice issued on 15<sup>th</sup> March 2020, scaling down court operations across the Country;

j. That no prejudice will be occasioned to the Respondents if the application is granted and it is in the interest of justice that the Applicant be granted an opportunity to ventilate its appeal on merit rather than being locked out of the seat of justice on account of the slight and excusable delay.

3. The 1<sup>st</sup> Respondent's response is by way of a replying affidavit sworn by his Counsel, Kioko Maundu on 28<sup>th</sup> September 2020.

4. Counsel depones that judgment in the trial suit was delivered on 28<sup>th</sup> May 2020, in the presence of Miss Naliaka holding brief for Mr. Mutubia, for the Applicant.

5. Counsel further depones that he wrote to the trial court requesting for a copy of the judgment, which was sent by email on 4<sup>th</sup> June 2020.

6. In the meantime, on 3<sup>rd</sup> June 2020, Counsel for the 1<sup>st</sup> Respondent drew a judgment notice which was delivered to the Applicant's Advocates and received on 4<sup>th</sup> June 2020.

7. Counsel points out that in drawing the judgment notice, apportionment of the final decretal sum had been omitted; the notice was therefore re-drawn and served again on the Applicant's Advocates, on 10<sup>th</sup> June 2020.

8. Upon being served with the judgment notice, all the judgment debtors settled their portion of the decretal sum, save for the Applicant; execution proceedings were therefore commenced against the Applicant.

9. Counsel for the 1<sup>st</sup> Respondent accuses the Applicant of indolence, resulting in inordinate delay.

10. The Applicant's application is brought under Section 79G and 95 of the Civil Procedure Act which provide as follows:

**79G. 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 he had a good and sufficient cause for not filing the appeal in time.**

**95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.**

11. The Court was referred to the decision in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* [1999] 2 EA 231, where the Court of Appeal set the factors to be considered in an application for leave to file an appeal out of time by stating:

**“It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”**

12. *Leo Sila Mutiso* has stood the test of time and remains good law. In the more recent decision in *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR the Court of Appeal stated thus:

**“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”**

13. In the instant application, Counsel for the 1<sup>st</sup> Respondent states and the Appellant does not deny that judgment in the trial suit was delivered on 28<sup>th</sup> May 2020, in the presence of Miss Naliaka holding brief for Mr. Mutubia for the Applicant.

14. Further, a judgment notice was served on the Applicant's Advocates on 4<sup>th</sup> June 2020. The judgment notice was later amended and served again on 10<sup>th</sup> June 2010.

15. To put it simply, the Applicant's Advocates were aware of the judgment against the Applicant as early as 28<sup>th</sup> May 2020. However, no action was taken until the Applicant was jolted by execution on 27<sup>th</sup> August 2020.

16. The Applicant attributes the delay in filing its appeal to complications occasioned by the COVID-19 Pandemic.

17. In the affidavit sworn in support of the application by John Muchibi Chitechi, who describes himself as the Applicant's Supervisor, it is deponed that the Applicant was not available to issue instructions to its Advocates to lodge an appeal within time, due to the COVID-19 Pandemic.

18. The Court is aware that the COVID-19 Pandemic has caused significant disruption of physical operations for enterprises. With regard to court operations however, the Kenyan Judiciary, very early on the onset of the Pandemic rolled out online platforms as a safe mode of keeping the wheels of justice turning.

19. These online platforms were available to the Applicant who chose not to utilise them. In our circumstances, the COVID-19 Pandemic cannot be used as a general excuse for apathy or indolence of litigants. In this case, I find and hold that the Applicant acted irresponsibly and the Court is disinclined to exercise discretion in the Applicant's favour.

20. On the issue of prejudice to be suffered by the 1<sup>st</sup> Respondent if the application is granted I have this to say; by the time the Applicant was moving the Court, the 1<sup>st</sup> Respondent had reaped the fruits of his judgment as against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. It would, in my view, be greatly prejudicial to the 1<sup>st</sup> Respondent were he to be dragged back to court. The horses have bolted and this case must now be let to rest.

21. In light of the foregoing conclusions, I do not need to go into the merits of the intended appeal.

22. That said, the Applicant's application for leave to file an appeal out of time is declined with costs to the 1<sup>st</sup> Respondent.

23. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF FEBRUARY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mutubia for the Applicant

Mr. Maundu for the 1<sup>st</sup> Respondent

No appearance for the 2<sup>nd</sup> Respondent

No appearance for the 3<sup>rd</sup> Respondent