



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 763 OF 2016

KENYA HOTELS & ALLIED

WORKERS UNION.....CLAIMANTS

VERSUS

MADA HOLIDAYS LIMITED.....RESPONDENT

RULING

Background

1. The application before the Court is the Respondent's/Applicant's Notice of Motion dated 29.6.2020 seeking the following orders:

- a) That Leave be granted to the applicant to file an Appeal out of time and lodge a Notice of Appeal out of time against the judgment delivered in this matter on 6.3.2020.
- b) That the Notice of Appeal herein be deemed as filed upon payment of the prerequisite fees.
- c) That stay of execution be granted pending hearing and determination of the intended appeal.
- d) The costs of the application.

2. The Application is premised on the grounds set out on the body of the motion and is Supported by the Affidavits sworn by the defence counsel Mr. Antony Kingara Gichuki on 29.6.2020 and 30.7.2020. In summary, the Respondent's case is that it was aggrieved by the judgment of the Court delivered on 6.3.2020 and instructed its counsel to lodge an appeal; that due to the Covid-19 pandemic, its counsel was not able to file the Notice of Appeal within the required 14 days because on 15.3.2020, the Chief Justice announced a scale down of court activities; that even before the said scale down, counsel had already closed down his chambers due to the Covid-19 situation; that the time within which to file a Notice of Appeal has lapsed but it still is interested in lodging the appeal against the said judgment; that it has annexed the notice of Appeal and the letter requesting for the typed proceedings to the application herein; that the claimant has by its letter dated 8.7.2020 threatened to execute the judgment totaling to kshs.3,092,243.12; that if a stay order is not granted, the appeal will be rendered nugatory since the claimant's has not produced any evidence to prove its ability to refund the decretal sum should the intended appeal succeed; that the application has been made without unreasonable delay; and it is willing to provide security for the claimant's decree. Therefore, it prayed for the application to be allowed as prayed.

3. The claimant opposed the application through a Replying Affidavit sworn by its General Secretary Mr. Wycliffe Sava Mundu on 10.7.2020. In brief, the claimant contended that the entire operations of the court were not stopped by the Press Statement made by the Chief Justice on 15.3.2020; that the Court Registry remained open allowing filing of urgent pleadings including Notices with statutory time lines; that it was unreasonable for the applicant's counsel to close his offices even before the press Statement by the Chief Justice and noted that the indication that people who are over 58 year old were as high risk was made, by the President on 6.4.2020; that the reason for failure to file a Notice of Appeal was negligence; and that the failure to address the Court immediately after the Court commenced full operations on 15.6.2020 was not explained.

4. He further contended that the application is premature and has not met the threshold for granting stay pending appeal as set out under Order 42 Rule 6 and Order 50 Rule 6 of the Civil Procedure Rules; that the Respondent has not shown that the intended appeal is arguable and it will be rendered nugatory if the stay order is not granted; that granting the stay order would amount to entertaining violation of the right to fair labour practices; that in the event the court decides to grant stay, then the applicant should be ordered to pay the grievants 50% of the decretal sum and deposit the remaining 50% in Court or into an interest earning account; and that finally the Court be pleased to invoke Order 50 Rule 6 of the Civil Procedure Rules against the Respondent.

Submissions

5. The application was canvassed by written submissions. The Applicant submitted that it ought to be granted leave to file an appeal out of time since it has demonstrated that it is not indolent but the delay was occasioned by unforeseen circumstances. It reiterated that the delay was caused by the announcement by the Honourable Chief Justice on 15.3.2020 towards the scaling down of court services owing to the covid-19 situation, and also by the closure of its counsel's chambers due to the high risk individual in line with the directives by the Ministry of Health.

6. It submitted that the 14 days within which to file a Notice of Appeal was to lapse on 20.3.2020 but the court Registries were closed from the general public from 16.3.2020 except for applications under Certificate of Urgency and thereby it was barred from filing a Notice of Appeal on time. It further submitted that upon the upscaling of the court activities on 15.6.2020, it brought the instant application on 26.6.2020 under certificate of urgency. In view of the foregoing matters, it submitted that there was no delay on its part and that the application is not brought in bad faith.

7. For emphasis, it relied on **Thuita Mwangi V Kenya Airways [2003] eKLR**, where the court set out the points to consider in deciding whether or not to grant extension of time to appeal. It further relied on **Edwin K. Too v Paul K. Sitienei [2020] eKLR** and **Judith Walekwa v Ronald Olunga & 2 others [2020] eKLR** where the court found that the delay in making application for stay was not unreasonable since it was caused by the scaling down of court operation due to the Covid -19 pandemic

8. As regards the prayer for stay of execution, the Applicant relied on the decision in **Butt v Rent Restriction Tribunal [1979] eKLR** where the court of Appeal held that the power of the court to grant stay of execution is discretionary and the discretion should be exercised in such a way as not to prevent an appeal; that the general principle is that if there is no overwhelming hindrance, a stay must be granted so that an appeal is not rendered nugatory should the court reverse the judge's decision; and that in exercising the discretion whether to grant or refuse an application for stay, the court will consider the special circumstances of a case and its unique requirements.

9. The Respondent contended that if stay is declined and the appeal succeeds, it will suffer substantial loss because the assets of the claimants are unknown and as such recovery of the kshs.3, 091,843. 12 will be difficult and the appeal will be rendered nugatory. For emphasis, it relied on **RWW v EKW [2019] eKLR** where the court held that the purposes of stay pending appeal is to safeguard the rights of the appellant who is exercising his right of appeal, and to ensure that the appeal, if successful, is not rendered nugatory.

10. The Respondent further submitted that the intended appeal has merits and has high chances of success and urged the court to protect it by granting the stay order sought.

11. Finally, the Respondent submitted that it is willing to provide adequate security as may be ordered to secure the claimant's decree. For emphasis, it relied on **Kenya Commercial Bank Ltd v Sun city Properties Ltd & 5 others [2012] eKLR** and **Gianfranco Manethi & another v Africa Merchant Assurance Company Ltd [2019] eKLR** where the court held that while granting stay of execution pending appeal, the competing interests of the parties must be balanced.

12. On the other hand, the Claimant submitted that the respondent's application lacks merits because the reasons advanced for the extension of time are not sufficient as they do not show that it was prevented from filing the Notice of Appeal by the scaling down of the court operations or due to Covid-19. According to the claimant, the reason for the failure to file the Notice of Appeal was negligence because counsel closed down his office on 13.3.2020 despite having been received instructions from his client to appeal, even the courts operations were scaled down.

13. For emphasis, the Claimant relied on **Abdul Azziz Ngoma v Mungai Muthayo [1976] KLR 61** where the court held that the application for extension of time must demonstrate existence of sufficient reason before other factors such as absence of prejudice and prospects of success of the appeal can be considered. The applicant further relied on **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR** where the Supreme Court of Kenya held that in an application for extension of time, the whole period of delay should be explained satisfactorily to the court, and went further to set out the principles governing application for extension of time.

14. The applicant maintained that the delay in filing the Notice of Appeal has not been explained satisfactorily including the period of 14 days after the scaling down of court operations was lifted on 15.6.2020. It further distinguished this case from **Edwin K. Too v Paul K. Sitienei [2020] eKLR** and **Judith Walekwa v Ronald Olunga & 2 others [2020] eKLR** noting that the issues were not the same and reiterating the principle that each case should be considered on its own special circumstances.

15. As regards the order of stay of execution of the impugned judgment, the claimant contended that granting the same is not merited since the applicant has not met the threshold for granting stay under Order 42 Rule 6 the Civil Procedure Rules. In its view, the applicant has not proved that the intended appeal is arguable and that it will be rendered nugatory. For emphasis, it relied on **Patriotic Guards Ltd v James Kipchirchir Sambu [2017] eKLR** where the court held that without prove that the appeal was arguable, there was no need to consider whether or not the appeal would be rendered nugatory.

16. It contended that granting the orders sought will seriously prejudice the grievants who are jobless and living in depleted standards due to unfair termination of their employment by the applicant and also due to effects of Covid -19 would delay justice. Finally, it contended that the application lacks merits, was brought with undue delay and ought to be dismissed with costs.

Analysis and determination

17. Having considered the material presented to the court, the issues for determination are:-

(a) Whether the court should extend the time within which to lodge a Notice of Appeal against this Court's Judgment delivered on 6.3.2020.

(b) Whether the court should grant stay of execution of the said Judgment pending hearing and determination of the intended appeal.

Leave for extension of time to file appeal

18. Rule 75 of the Court of Appeal Rules provides that any party desiring to appeal against a decision of this court shall file a Notice of Appeal with the Registrar of this court within 14 days of the impugned decision. In this case it is common ground that the impugned judgment was delivered on 6.3.2020 in the presence of the counsel for two the parties. Accordingly, the time within which to lodge a Notice of Appeal was to lapse on 20.3.2020.

19. The applicant's counsel deposed in the Supporting Affidavit herein that the applicant was dissatisfied with the "entire judgment and duly instructed his firm to lodge appeal". However, he did not file any Notice of Appeal, or even request for the typed proceedings and certified copy of the Judgment within the required time. Instead, he closed his chambers on 13.3.2020 owing to the increasing cases of Covid-19 since the office had a number of high risk senior citizens. Further, the counsel contended that the on 15.3.2020, the Honourable Chief Justice announced a scale down of court activities which barred members of public free access to the court registries except for urgent matters.

20. Having considered the material presented to the court, I must agree with the claimant that the applicant did not act diligently. It has not been shown that it made attempt to lodge a Notice of Appeal before the lapse of the required 14 days but was prevented from doing so by closure of the court registry or the Covid-19 situation. The court notes with surprise that, even with the full instructions to lodge an appeal, nothing was done until 25.6.2020 when the counsel wrote to the Deputy Registrar of the court requesting for certified copies of the Judgment and typed proceedings followed by the filing of the instant application on 2.7.2020.

21. The explanation given by the applicant for the delay in filing the Notice of Appeal and this application for leave is not sufficient reason for this court to exercise discretion to grant the leave sought. To begin with the scaling down court of operations did not constitute a complete closure of the Court operations. The court registries remained open to receive legal documents for both new and continuing cases. A Notice of Appeal which must be filed within strict timelines could not have been rejected on presentation. Secondly, even if it was not possible to beat the 14 days' deadline, a delay to apply for the leave from 20.3.2020 to 2.7.2020, being more than 100 days without any justification, was obviously unreasonable. In addition allowing the application will prejudice the claimant by delaying enjoyment of its judgement.

22. In view of the foregoing observations, I find no merit in the application for leave and accordingly reject it since no sufficient cause has been demonstrated to justify the failure to file a Notice of Appeal within 14 days of the impugned judgment. As observed above, the default was deliberate or due to negligence. I gather support from **Shah v Mbogo and Another [1967] EA 116** where the Court of Appeal of East Africa held that:

"... discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

23. I further gather more support from **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR** where the Supreme Court of Kenya held that:

"... this Court has settled the principles that are to guide in the exercise of its discretion to extent time in the Nicholas Salat case ... The Court delineated the following as:

"the under-lying principles that a Court should consider in exercise of 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 for 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 the time, is a consideration to be made on case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether 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."

24. The decision in **Edwin K. Too v Paul K. Sitienei [2020] eKLR** and **Judith Walekwa v Ronald Olunga & 2 others [2020] eKLR** are distinguishable from the instant case because in the first one the application was not opposed, while in the second case the application for leave was filed within a period of less than a month after the lapse of the 14 days allowed for filing of the notice of Appeal. Again the two precedents cited by the applicant confirm that Court registries were still receiving documents and the Judges were indeed working during the period of the said scale down due to covid-19 situation.

Stay of execution of the judgment.

25. In view of the foregoing refusal to grant the leave to appeal out of time, I see no basis for staying the judgment delivered on 6.3.2020. In any case, I see no possibility of execution of the decree in the near future since the costs awarded to the claimant have not yet been determined by the Taxing Officer of the court.

Conclusion and disposition

26. I have found that the failure to file Notice of Appeal within the prescribed period was deliberate or due to negligence. I have also found that the delay in making the instant application for leave was unreasonable and without any sufficient reason and declined to grant the same. Finally, I have found no basis granting stay of the judgment delivered on 6.3.2020 after declining to grant the leave to appeal out of time. Consequently I dismiss the Notice of Motion dated 29.6.2020 with costs.

Dated, Signed and Delivered at Nairobi this 5th day of February, 2021

ONESMUS N. MAKAU

JUDGE

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 judgment 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.

ONESMUS N. MAKAU

JUDGE