



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. E010 OF 2021**

*(Before Hon. Justice Mathews Nderi Nduma)*

**CADDEL CONSTRUCTION COMPANY LIMITED.....APPLICANT**

**VERSUS**

**ELIAS MAINA KARIUKI.....RESPONDENT**

**RULING**

1. The notice of motion dated 25<sup>th</sup> November 2021 seeks for an order in the following terms:-

(i) Spent.

(ii) That leave be granted to the Applicant herein to appeal out of item.

(iii) Spent.

(iv) That this Hon. Court be pleased to grant stay of execution of the decree and judgment in **C.M. ELRC No. 1225 of 2019, Elias Miana v Caddell Construction Company Limited**, pending the hearing and determination of the appeal.

(v) That the draft memorandum of appeal attached herein be deemed to have been duly filed upon prayer 3 above being granted.

(vi) That costs of this application be provided for.

2. The application is premised upon grounds set out on the face of the notice of motion and in the supporting affidavit of John Gachingili, the Human Resource and Administrative Manager of the Applicant the gravamen of which is that judgment sought to be appealed against was delivered on 16<sup>th</sup> October 2020.

3. The memorandum of appeal that ought to have been filed within 30 days of delivery of judgment was not filed and this was not due to any mistake by the Applicant rather it was occasioned by failure by the court in remitting a copy of the judgment and proceedings relating thereto.

4. The situation was made worse by the passing on of the Applicant's Advocate Mr. Nzamba Kitonga SC immediately after the delivery of judgment on 24<sup>th</sup> October 2020 and his office remained closed for more than three weeks.

5. That the Respondent has obtained warrants of attachment and proceeded to proclaim the Applicant's goods.

6. That the Applicant stand to suffer irreparable loss unless the orders sought are granted.

7. That the 30 days period within which the appeal was supposed to be lodged has since lapsed. That the application be granted.

8. That the draft memorandum of appeal dated 22<sup>nd</sup> January 2021 and not yet filed is attached to the supporting affidavit.

9. The appellant intends to appeal against the decision of the Learned Magistrate that dismissed the Appellant's case for lack of prove.

10. The Respondent filed a notice of preliminary objection to the application as follows: -

- a. That the application is in breach of the proviso of Section 79G of the Civil Procedure Act that “when a party wishes to obtain leave to file an appeal out of time such a party **must file** the appeal then must seek leave to admit that appeal out of time.”
- b. That the Court’s appellate jurisdiction has not been invoked in the absence of a duly filed memorandum of appeal.
- c. That an appeal cannot be instituted through a miscellaneous application as filed before this court.

11. The Respondent further filed a replying affidavit dated 2<sup>nd</sup> February 2012 in which the issues raised in the notice of preliminary objection have been restated and emphasized in addition to responding to matters of fact set out in the application.

12. In particular, the respondent states that there is no evidence that the applicant applied for and paid for supply of certified copies of judgement and proceedings, there being no deposition to that effect in the application. That no receipt for such payment has been exhibited before court.

13. That in the absence of the lower court’s judgement which is not attached to the application, this court can only speculate and cannot be in a position to evaluate the merits and demerits of the application.

14. That the court cannot grant stay of execution in terms of the orders sought in prayer 3 and 4 of the notice of motion.

15. That there is material non-disclosure by the Applicant in that the judgment of the court was delivered in the presence of both parties and that the Applicant was granted a stay of execution of 30 days from 16<sup>th</sup> October 2020.

16. That there is no evidence from their application that letters marked JG1 dated 13<sup>th</sup> November 2020 and 22<sup>nd</sup> October 2020 were emailed to the Judiciary or to the Executive Officer or that the same were uploaded into the e-filing system.

17. That there is no email delivery report attached that purports that the letters were delivered to the Executive Officer.

18. That the Applicant has to date not paid for the judgment and typed proceedings.

19. That the application is defective, lacks merit and it be dismissed with costs.

#### **Determination**

20. It is apparent from the filed application and attachments there thereto that no notice of appeal and/or memorandum of appeal has been filed before this court prior to the filing of this miscellaneous application.

21. It is also manifestly clear that no documentary evidence has been adduced by the applicant to prove payment for a certified copy of the judgment of the Court and typed proceedings since no receipts have been appended to the application.

22. As a matter of fact, there is no appeal file, before this court hence the miscellaneous application brought by the Applicant in the absence of an Appeal file duly opened before this court.

23. The Court of Appeal in the case of **Charles Karanja Kiiru v Charles Githinji Muigwa (2017) eKLR** stated thus: -

*“Having expressed ourselves as herein above, the other issue that falls for consideration is whether the appeal filed out of time on 24<sup>th</sup> October 2014 could be deemed as being properly on record.*

*There is a plethora of authorities from the High Court which interpret the proviso to Section 79G of the Civil Procedure Act to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule J. in the **Gerald M’limbine v Joseph Kangangi (2009) eKLR** stated that: -*

*“My understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time.*

*The provision does not mean that an intending appellant first seeks for the court’s permission to admit a non-existent appeal out of the stipulated period. To do so would actually be an abuse of the court’s process under Section 79B”*

24. The court shall not belabour this point, it being clear that the Applicant has approached court without first filing the intended appeal out of time.

25. The Applicant has invoked the provisions of Article 159 of the Constitution that:-

***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-***

*(d) justice shall be administered without undue regard to procedural technicalities.*

to urge the court to overlook the failure by the Applicant to file the intended appeal before seeking to have it admitted out of time.

26. Firstly, Article 159(2)(d) is not a panacea and or a carta blanche to parities to disregard rules of court couched in mandatory terms. Rules of court create good order and certainty in litigation and indeed are the handmaidens of courts in administration of justice in a fair and even handed manner.

27. Furthermore, the decision of the Court of Appeal in **Charles Karanja Kiiru (supra)** is bidding on this court. The Court of Appeal concluded:-

*“It seems to me therefore, it is not open to the court to exercise its discretion under the proviso to Section 79G of the Civil Procedure Act, except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time”. Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a Judge has established under Section 79B, that there is “sufficient” ground for interfering with the decree; part of a decree or order appealed against.*

*To allow the Applicant’s motion would be to defeat entirely the requirements of Section 79B of the Civil Procedure Act. And indeed Section 79G itself upon which the applicant relies for the requirement for a certificate of delay in the preparation and delivery of a copy of a decree or order. The Applicant’s motion is bereft of such explanation or certificate. Default by the Applicant’s former Advocate would then have been properly anchored on such certificate.”*

28. Accordingly, the present application is deficient and lacking in every respect set out by the Court of Appeal in the aforesaid Judgment.

**29. The application lacks merit and is dismissed with costs to the respondent**

**DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 24<sup>TH</sup> DAY OF MARCH, 2021**

**MATHEWS N. NDUMA**

**JUDGE**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances: -**

Mr. Gitonga for Applicant

Mr. Amutallah for Respondent

Ekale: Court Assistant