



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**MISCELLANEOUS APPLICATION NO. 20 OF 2019**

**BERNARD ASUMA ISOE.....APPLICANT**

**VERSUS**

**TOMBE TEA FACTORY COMPANY LIMITED..... RESPONDENT**

**RULING**

1. The applicant by a Notice of Motion Application dated 28/10/2016 prays for the following reliefs:

**(a) That this Honourable Court be pleased to grant leave and extent time to the Applicant to file his Appeal out of time in respect of Nyamira CMCC No. 164 of 2013.**

**(b) That the draft Memorandum of Appeal annexed hereto be deemed as duly filed upon payment of Court fees.**

**(c) Costs of the application be in the Cause.**

2. The application is premised on grounds set out on the face of the Notice of Motion marked (e) to (L) and deposition in the supporting affidavit of the applicant sworn to on 26/6/2019.

3. The nub of the grounds is that Nyamira CMCC No. 164 of 2013 was heard and determined by the Magistrate's Court and a Judgment delivered on 20/2/2019.

4. Aggrieved by the decision Applicant lodged an Appeal to the High Court before Nyamira High Court Civil Appeal No. 5 of 2019.

5. Upon perusal of the record, the learned Judge of the High Court did not admit the appeal and noted that the appeal reside in the Employment and Labour Relations Court.

6. The time of filing an appeal had lapsed at the time the applicant lodged an Appeal and was pursuing the same at the Nyamira High Court.

7. The delay was therefore not intentional. The Applicant intend to file an appeal in Employment and Labour Relations Court.

8. The appeal has triable issues both in law and fact.

9. That no prejudice will be occasioned the respondent that cannot be remedied by way of costs.

10. That it is in the interest of justice and fair play that the application be allowed.

11. The Memorandum of Appeal filed at the High Court on 6/3/2019 is annexed. This was about 16 days from the date of judgment.

12. The applicant has also attached a communication of the decision of Hon.

E. Maina J. by the Deputy Registrar Nyamira, High Court, informing the applicant by a letter dated 17/6/2019, that this matter ought to be filed at Employment and Labour Relations Court and not the High Court which had no jurisdiction to hear and determine the matter.

13. The applicant has since filed a draft memorandum of Appeal at the

Employment and Labour Relations Court, Kisumu on 3/7/2019 attached to the application.

14. The respondent opposes the application by a replying affidavit sworn to on 9/9/2019.

15. The respondent deposes that the suit in CMCC No. 164 of 2013 was instituted by the respondent on 4/10/2013 in the Principal Magistrate's Court at Nyamira seeking to have a sum of Kshs. 757,376,45 being an amount mistakenly paid as terminal benefits to a former employee, the applicant in excess of the payable amount.

16. The suit was decided in favour of the respondent ordering the applicant to reconstitute the excess payment to the respondent.

17. That by fact of previous proceedings at the Magistrate's Court and the High Court at Nyamira, the applicant was well aware this was an employment matter and cannot plead ignorance of the law to justify filing of the application in the wrong Court.

18. That the applicant is guilty of inordinate delay which has not been explained.

19. That intended appeal lacks merit and is an afterthought calculated to circumvent the judgment of the lower Court.

20. That the application be dismissed with costs.

21. The parties filed written submissions on 12/11/2019 and 15/1/2020 respectively.

#### **Determination**

22. Section 79 G of the Civil Procedure Act, provides: -

**“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 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 out of time.**

23. From the facts of this case it is, common cause the applicant filed a notice of Appeal timeously, and only after 16 days albeit to the wrong Court, at the High Court Nyamira instead of Employment and Labour Relations Court Kisumu.

24. It is now trite following the guidance by the Court of Appeal in **Daniel N. Mugendi –vs- Kenyatta University and 3 Others [2013] eKLR** in which the Court of Appeal weighed on the issue whether a matter that has been filed in the wrong Court should be struck out for want of jurisdiction or should simply be transferred to the correct Court. The Court said:-

**“The position that the industrial Court can and should entertain the claim as laid by the appellant is in line with the decision of Majanja J. in Petition No. 170 of 2012 - United States International University (USIU) –vs- The Attorney General & Others where the judge dealt with the issue .**

**“The central issue to be determined is whether the High Court should continue to determine Labour and Employment matters in the light of the establishment of the Industrial Court.’**

25. The learned Judge citing Article 162(2) of the Constitution and Section

12 f the Employment & Labour Relations Court Act, 2011 directed that the two causes that gave rise to the petition before him be transferred to the Industrial Court for hearing and determination.

13 Court of Appeal in the Mugendi case stated: -

**“Believing as we do that the approach taken by Majanja J, is the correct one, and in endeavoring to meet the ends of justice untrammelled by procedural technicalities, we set aside the Order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider claims of breach of fundamental rights as pertains to industrial and labour relations matters.....and in order to do justice in the event where the High Court, the industrial Court or the Environment and Land Court comes across a matter that ought to be litigated in any of the other Courts, it should be prudent to have the matter transferred to that Court for hearing and determination.**

26. The High Court at Nyamira ought to have followed this trodden route and save the parties and this Court valuable time taken to unnecessarily litigate and determine this well settled matter.

27. Accordingly, the Court finds that this appeal was filed timeously at Nyamira High Court and it is now properly before the Employment and Labour Court at Kisumu where it should be heard and determined on the merits.

28. Accordingly, the application has merit and is allowed with costs in the CAUSE.

**DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

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. Ochoki for Applicant

Mr. Ochieng for respondent

Chrispo: Court clerk