REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

APPEAL NO. E017 OF 2021

THE BOARD OF GOVERNORS KENYA BAPTIST THEOLOGICAL COLLEGE......APPLICANT

VERSUS

EVANS MWANA KATANA DZUYA..RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated 25th February 2020. The said motion seeks the following orders:

    1. *Spent*.

    2. THAT this Honourable court be pleased to give leave to the Applicant for an extension of time within which the applicant to file a record of appeal out of time.

    3. *Spent*.

    4. THAT costs of this application be in the cause.

2. The Application is based on the grounds that the Applicant intends to appeal against part of the Judgment delivered on 8th December 2020 in ELRC Cause No. 1 of 2019 in the Senior Principal Magistrate's Court at Limuru. The Applicant asserts its former Advocates M/s Kirwa Koskei & Co. Advocates did not notify it of the said judgment until 1st February 2021 when the said Advocates belatedly wrote a letter informing it of the said Judgment. The Appellant asserts that its former Advocates further indicated in the correspondence that they were never notified of the Judgment date due to the Covid-19 Pandemic and the said Judgment was delivered in the absence of both parties.

3. The Applicant asserts that it is in the best interest of justice that it be given a chance to appeal out of time and contest part of the Judgment it is aggrieved with being the sum of Kshs. 483,000/- awarded to the Respondent as compensatory damages for unfair termination. The Applicant asserts that the intended appeal has high chances of success and the Applicant will suffer irreparable loss and damage if the appeal is not heard and determined. The Application is supported by an Affidavit sworn by Joseph Kamau Kabui who avers that as the Principal of the Applicant, he used to follow up on the said Claim and that their former Advocates at all times assured him that Judgment had not been delivered and that he was therefore surprised to learn that Judgment had been delivered on 8th December 2020 and a decree subsequently issued on 27th January 2021. He deponed further that the Applicant subsequently instructed the said former Advocates to appeal out of time against the part of the Judgment but the said Advocates failed to execute those instructions and that the Applicant engaged the current Advocates on 24th February 2021 after the Applicant's motor vehicle registration number KAX 071N was physically carried away by Daystar Auctioneers on the said date. He avers that the Applicant's failure to appeal on time was occasioned by the mistake of their former Advocates, Kirwa Koskei & Co. Advocates and that such mistake of an advocate cannot be visited upon an innocent litigant. He is apprehensive that unless the orders sought are granted, the Respondent is likely to sell the Applicant's motor vehicle registration no. KAX 07IN and the other proclaimed goods and thus render this application and intended appeal nugatory. He avers that the Applicant is not guilty of inordinate delay in filing this application and it is imperative that this Court grants an extension of time to file the record and further, that the Respondent will not be prejudiced in any manner in the event this Application is allowed.

4. The Respondent filed Grounds of Opposition dated 10th March 2021 opposing the Applicant's application and seeking that the same to be dismissed with costs. He asserts that M/s Eric N. Amati Advocates have purportedly come on record for the Applicant bereft of consent from Messrs Kirwa Koskei & Co. Advocates or with leave of court. The Respondent asserts that the said action is contrary to Order 9 Rule 9 of the Civil Procedure Rules, 2010 and that the court in **Stephen Mwangi Kimote *v* Murata Sacco Society [2018] eKLR** espoused that the provisions thereof are mandatory and cannot be termed as mere technicality. He also asserts that the Applicant is guilty of laches as it was notified through its former advocates, of the Judgment and decree of the trial court vide a notice of entry of judgment dated 28th January 2021. That the Applicant was yet again notified of the said judgment and decree when Daystar Auctioneers went to the Applicant's physical

premises and proclaimed assorted movable property for attachment. That the Applicant only filed the instant Motion in afterthought after the Auctioneers carted away its motor vehicle. The Respondent further asserts that there has been no affidavit sworn by the Counsel instructed by Kirwa Koskei & Co Advocates to support the Applicant's claim of lackadaisicalness on the Applicant's Counsel's part. The Respondent further asserts that the Applicant's recourse, if any, lays in a professional negligence claim against Kirwa Koskei & Co. Advocates because the Applicant mainly blames its inability to file its appeal on time on the said advocates. The Respondent cites the case of **Gerald Mwithia *v* Meru College of Technology (Sued through The Chairman Board of Governors) & Another [2018] eKLR** held that it behoves the litigant to always follow up his case and check its progress and cannot come to Court and say that he was let down by his Advocate when a decision adverse to him is made by the Court. The Respondent cited the case of **Charles Omwata Omwoyo *v* African Highlands & Produce Co. Ltd [2002] eKLR**, the Court held that time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour. The Respondent asserts that the intended appeal purports to challenge the trial court's award of compensation for unfair termination under Sections 49 & 50 of the Employment Act, 2007 notwithstanding that the said award is discretionary. Further, that the Applicant has not demonstrated why this Honourable Court ought to interfere with the trial court's discretion as it has failed to state:

i. How the trial court misdirected itself on law;

ii. How the trial court misapprehended the facts of the case;

iii. What irrelevant considerations the trial court took into account; and

iv. What relevant considerations the trial.

5. In his Affidavit Verifying Grounds of Opposition, the Respondent depones that the Applicant has failed to demonstrate why he should not forthwith enjoy the fruits of judgment pending hearing and determination of the appeal. He further avers that the Applicant does not deserve this Court's lenient exercise of discretion to allow the instant motion as the Motion was not filed timeously and the Applicant has not demonstrated the substantial loss is stands to suffer should the motion be dismissed.

6. The Motion was disposed of by way of Written Submissions. The Applicant's submissions were to the effect that the principle that a litigant should always check on the progress of their case does not apply to a vigilant litigant who follows up on his case but is by one way or another misled by either a mistake or omission of his advocates. The Applicant submitted that it has demonstrated it was belatedly informed of the judgment of the Court despite several inquiries to its former advocates on the outcome of the judgment and nevertheless immediately instructed the former advocates to stay execution and file an appeal. It submits that it cannot in the circumstances be termed as a negligent litigant but rather an innocent litigant who should not be punished for the mistake or omission of its former advocates. That it is a vigilant litigant as it further moved with speed to file the Application herein and demonstrating it is desirous of appealing its case. The Applicant relies on the case of **Josephat Mulongo Wekesa *v* The Clerk County Council of Lugari [2016] eKLR, Kakamega High Court Misc. Civil Application No. 32 of 2013** where Justice C. Kariuki found the applicant's reasons to be genuine and in allowing him to file his appeal, held that:

> "*The issue raised by the applicant in support of his application is that he was not notified of the ruling.....*
>
> *It was incumbent upon the respondents counsel to inform the applicant on the outcome of the court's ruling. This is good practice…… Although the applicant was not vigilant in pursuing his case, he has an interest in appealing. I say so because of the effort he puts after realizing his mistake. He quickly filed the present application seeking the court's leave to appeal.*
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> *I find therefore the applicant is desirous of appealing his case and for the interests of justice it would be unfair to shut him out at this stage. It is upon him now to exercise due diligence to see to it that at least he files the appeal as ordered by the court."*

7. The Applicant submitted that the Respondent's assertion on the firm of Eric N. Amati & Co. Advocates not being properly on record is misplaced, misguided, wrongly interpreted and a clear misapplication of Order 9 Rule 9 of the Civil Procedure Rules which provides that:

> "*When there is a change of Advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-*
>
> *(a) upon an application with notice to all parties; or*
>
> *(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be."*

It further submits that leave or consent is sought only when a party intends to file any pleadings in the same Cause where judgment has been delivered. The Applicant submitted that therefore in this case, leave or consent was to be sought in Limuru SPMC ELRC Cause No. 1 of 2019 had its former Advocates intended to file any pleadings within the meaning of Order 9 Rule 9 of the Civil Procedure Rules, 2010. That no judgment has been delivered nor is there any previous advocate from whom consent was to be sought in Nairobi ELRC Appeal Cause No. E017 of 2021, which is the matter before the Honourable Court. The Applicant submits that the appeal is different proceedings altogether and a party is at liberty to appoint a different advocate and that there is hence no need to seek leave in terms of Order 9 Rule 9. On this score it relies on the case of **Charles Njagi lreri *v* Njeru Simon Gathuri & Another [2019] eKLR, Embu High Court Civil Appeal No. 122 of 2012** where Justice F. Muchemi in finding that the appellant's appointed advocate was properly on record and was not required to obtain any order before coming on record, observed that:

> "*….I have perused Order 9 Rule 9 and understand it to refer to a case where judgment has already been passed. The term "after*

judgment has been passed" refers to the original suit either in the High Court or in the magistrate's court....

The interpretation I give to Order 9 Rule 9 is that it refers to a suit where judgment has been delivered and where other proceedings follow. These may be interlocutory applications in execution of the decree or on other issues arising after judgment. The provision was designed to protect advocates from unscrupulous clients who may decide to avoid payment of fees after the case has been determined by bringing in new counsels to represent them in interlocutory applications within the same suit.

The matter before me is an appeal arising from a suit determined in the magistrate's court. In my considered view, an appeal is a different proceeding altogether and a party is at liberty to change an advocate. Such an advocate will be required to file a notice of appointment in the appeal."

The Applicant submited that the intended appeal has high chances of success as the learned trial magistrate wholesomely awarded the Respondent compensatory damages for unfair termination without taking into consideration his concession in his evidence of having misappropriated funds. The Applicant submitted that the Respondent was thus not deserving of such a colossal amount as compensatory damages and that this together with other grey areas are pegged on the intended appeal as demonstrated in the draft memorandum of appeal annexed to the supporting affidavit. It further submits that the rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be as held in **Martha Wangari Karua *v* IEBC *&* 3 Others [2018] eKLR, Nyeri High Court Civil Appeal No. 1 of 2017**. The Applicant submits that it deposited the entire decretal sum of Kshs. 599,785/- to the Judiciary's Kenya Commercial Bank account in compliance with Order No. 2 issued on 26th February 2021 by this Honourable Court. That this sum serves to safeguard the Respondent's interests in the event the appeal does not succeed but which situation it does not anticipate and that the Respondent stands to suffer no prejudice at all as his interests have been taken care of. It further submits that it does not think that the degree of prejudice, if any, the Respondent stands to suffer is too much compared to the prejudice the Applicant shall endure if this application is not allowed. On this end it relies on **Mary Nchekei Paul *v* Francis Mundia Ruga [2019] eKLR, Court of Appeal at Nyeri, Civil Application No. 99 of 2018**. The Applicant submitted that it has not only demonstrated the set principles but has also placed before this Honourable Court undisputed material evidence and valid reasons for the grant of the orders sought and it prays that the Applicant's application dated 25th February 2021 be therefore allowed.

8. When the matter was mentioned in court on 21st April 2021, the Respondent's Advocate stated that they find their Grounds and Affidavit sufficient enough as a response to the submissions by the Applicant. In the matter before me, the Applicant is desirous of appealing a decision made by the Subordinate Court and in this instant Application has deposited the entire decretal sum in the Judiciary Account. On his part, the Respondent asserts the Applicant has been guilty of laches as demonstrated by its failure to move the Court upon learning of the entry of judgment in January 2021. The Respondent asserts that the matter of compensation which forms part of the grounds for the intended appeal is a discretion the learned Magistrate exercised and which discretion the Court on appeal would not question.

9. On the issue of representation, it is clear that the intended appeal and this motion are not what is contemplated in Order 9 Rule 9. As held by Muchemi J. in the case of **Charles Njagi lreri *v* Njeru Simon Gathuri *&* Another** (*supra*) the reference in that Rule is to the matter in the lower Court and not on appeal. Now turning to the motion seeking extension of time, it is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which a court takes into account in deciding whether to grant an extension of time are: firstly the length of the delay, secondly, the reason for the delay; thirdly 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. In analysing the matter before me in terms of the first two considerations, the delay from date of judgment to the time the Applicant moved Court has been explained away as being the lackadaisical approach the Applicant's former advocates handled the matter. It is clear the Applicant was keen and diligent but was repeatedly let down by its former advocates. The Applicant has eliminated the prejudice the Respondent is to suffer as the Judgment sum is securely in the custody of the Court and upon the Intended Appeal being disposed of, the same will be released to the successful party in the Appeal. The upshot of the foregoing is that the Court finds merit in the motion before it and grants the Applicant extension of time within which the applicant to file a record of appeal out of time. The appeal record must be filed within 60 days of today and the costs of the motion are to abide the outcome of the Appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JUNE 2021

Nzioki wa Makau

JUDGE