



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**MISC APPLICATION NO. E011 OF 2021**

**JUNE JEBET.....CLAIMANT/RESPONDENT**

**-VERSUS-**

**DIRECTOR GENERAL KENYA SCHOOL OF**

**GOVERNMENT & DIRECTOR BARINGO CAMPUS.....RESPONDENT/ APPLICANT**

**RULING**

1. This ruling is in respect of the Respondent/applicant's application dated 27<sup>th</sup> April, 2021 filed under certificate of urgency on 20<sup>th</sup> April, 2021 by the Honourable Attorney General pursuant to Section 79G and 95 of the Civil Procedure Act, Article 50 of the Constitution and all other enabling provisions, seeking the following orders;

- 1) This application be certified as extremely urgent and be heard ex-parte.**
- 2) This Honourable Court do enlarge time within which the Applicant herein is to file and serve an appeal out of time to the judgment delivered on 7<sup>th</sup> February, 2020 by Hon. Limo has lapsed.**
- 3) It is necessary that the said time be enlarged for the Applicants to file an appeal out of time.**
- 4) This Honourable Court do make such further Orders and/or directions as it may deem necessary in the circumstances.**
- 5) The cost of this Application be in the cause.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 27<sup>th</sup> April, 2021 by **Victor Ondieki**, the advocate ceased of this matter, and based on the following grounds: -

(a) That, judgment in the trial Court was delivered by Hon. Limo on the 15<sup>th</sup> May, 2020 in favour of the Claimant as against the Respondent for Kshs. 594,565.40. Subsequently, on receiving the judgment on 18<sup>th</sup> May, 2020 the Respondent forwarded to the client on the 19<sup>th</sup> May, 2020 for further directions.

(b) That during that period the Respondent's offices were closed due to Covid- 19 directions and the Attorney General could not take any further action without the advice of the Respondent.

(c) That the Respondent recently instructed the Attorney General to lodge an Appeal against the decision of the trial Court having been dissatisfied with the entire decision. Further that, time within which Appeal can be lodge has expired and therefore asks this Court to enlarge time within which the said Appeal can be lodged.

(d) That execution proceedings have already commence and that unless the same are stayed, the intended Appeal will be rendered nugatory.

(e) That the Appeal is arguable and that no prejudice will be occasioned upon the Claimant/ Respondent if this application is allowed.

(f) That this application had been filed initially through the e-filing platform on the 28<sup>th</sup> July, 2020 and assigned case number Civil Miscellaneous Number 109 of 2020 however the same was not placed before the Court for consideration and Executive officer on realizing the anomaly on 9<sup>th</sup> February, 2021 requested the Attorney General to lodge the said application afresh which was filed on the 9<sup>th</sup> February, 2021 and immediately served upon the Respondent.

(g) It is stated that the matter was placed before Justice Matheka who certified the application urgent and slated it for hearing on the 9<sup>th</sup> March, 2021 however the court was not sitting and the matter slated for mentions severally till 22<sup>nd</sup> April, 2021 when it was noted that the matter had been filed in High Court instead of this Court, having emanated from a labour dispute.

(h) That the Applicant immediately amended its application and rightfully placed before this Court for determination, therefore the delay in filling this application is excusable as the same was not deliberate.

3. In opposing the application, the Respondent, **June Jebet**, swore a replying affidavit dated 17<sup>th</sup> May, 2021 and filed in this Court on 18<sup>th</sup> May, 2021 on the following grounds;

a) That the application is bad in law, made in bad faith, lacks merit, inept and an afterthought which amounts to an abuse of Court process.

b) That application herein offends the provisions of Rule 9 of the Oaths and statutory declaration rules since the annexures have not been marked and commissioned. Also that the entire application offends the principle of *lis pendens* and *sub-judice* on account of her pending Judicial Review Application number 1. Of 2021 pending before this Court.

c) She stated that the Judgment subject of this Application was delivered on 7<sup>th</sup> February, 2020 and therefore time to appeal closed on 7<sup>th</sup> March, 2020 before the onset of Covid-19. Subsequently that the decree and certificate of cost was issued on 11<sup>th</sup> March, 2020.

d) That the Courts were closed till 1<sup>st</sup> April, 2020 when the presiding judge gave directions on how matters were to be handled and the Senior Litigation Counsel in the Office of the Attorney General, Ms. Cheruiyot communicated in the Rift valley law society forum on the emails to be used during the said period.

e) That the Court's operations run smoothly and that she was able to obtain certificate of costs which was served upon the Attorney General and execution documents served on the 18<sup>th</sup> May, 2020, which were never acted upon for 2 months

f) That on 23<sup>rd</sup> July, 2020 they send a reminder asking for the decree to be settled in response the Attorney general indicated that they had filed an application seeking to appeal out of time but never served he application to the Respondent.

g) That after 5 months of silence from the Attorney General, the Respondent sought to compel the Applicant to pay her by filing Judicial Review which leave was allowed and substantive motion pending for submissions.

h) That the application herein was only filed when the Judicial review Orders became eminent as such are not filed in good faith but as a decoy to delay the claimant from enjoying her fruits of judgment.

4. The parties herein disposed of the application by way of written submissions with the applicant filing on 17<sup>th</sup> May, 2021 and the Respondent on 18<sup>th</sup> May, 2021.

#### **Applicant submissions**

5. The applicant's Advocate submitted that the delay in filling the appeal has been explained and that they are desirous of lodging the Appeal and that unless time is enlarged within which the appeal can be lodge they will suffer prejudice as they are dissatisfied with the judgment of the Trial Court.

6. He argued that enlargement of time is a matter of Court's discretion and urged this Court to be persuaded by the court's decision in **Paul Musili Wambua –v- Attorney General & 2 others [2015] eklr** and allow the Application.

7. It was submitted that the applicant had approached court timeously on the 28<sup>th</sup> July, 2020 and that since the application was file in the wrong forum the same was regularized immediately it was noted.

#### **Respondent's submissions.**

8. The Respondent submitted from the onset that Rule 9 of the Oaths and statutory declaration Rules makes it mandatory for the annexures to be marked with serial letters for identification and the same ought to be commissioned. He reinforced this argument by citing the case of **Kenya National Union of Nurses –v- Kiambu County Public service & 5 Others [2019] eklr** where the Court held that;

**“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.**

**The law peremptorily uses ‘shall’ to denote that there is no discretion in the choice of affixing the seal and serializing the exhibits forming part of the affidavit. Without the said seal by the Commissioner there is no proper affidavit before the court. I expunge the offending affidavit. Having expunged the affidavit by the Claimant/Respondent, there is in essence no defence to the motion. The application dated 11th June 2019 by the 5th Respondent/Applicant is therefore granted as prayed with costs to the 5th Respondent.”**

9. Accordingly, Counsel submitted that the supporting affidavit is defective on those lines and ought to be expunged from record and the entire motion dismissed.

10. It was further submitted that since there is a Judicial review application seeking for the writ of mandamus to compel the Applicant to pay the decretal sum, which Judicial Review is at submissions stage, this Application offends the principle of *lis pendens* as was held in **Grace Chemutai Koech –v- Franices Kiplangat Chebiror & 2 others [2018] eKLR**.

11. He also argued that the application herein offends provisions of section 6 of the Civil Procedure Act, as the Judicial review sought for stay of proceedings in ELRC Cause number 109 of 2018 which if this application is allowed will bring chaos in the proceedings subject of this suit. He further argued that the moment the Judicial review application was filed the Applicant herein lost the right to Appeal. He submitted that if the application herein is allowed and the application for writ of mandamus is allowed then the entire proceedings will be thrown in an arena of confusion.

12. On whether the delay in filing this application is justified, it was submitted that the delay is inordinate as the judgment in the trial court was delivered in February, 2020 and the Applicant’s application herein filed on 9<sup>th</sup> February, 2021, and that the only explanation for the delay was the allegation that the Courts were closed due to Covid-19 Pandemic when it’s clear that the court adopted an online system of filling urgent matters which was duly communicated to the Applicants’ advocates herein.

13. He therefore argued that the delay is not excusable and the application ought to be disallowed.

14. I have examined the averments of the parties. Since the applicants have an expectation that they ought to exhaust their way up in an appeal process, and given circumstances under which they failed to file their appeal the same being due to COVID related issues which necessitated closure of courts at some period, I allow the application.

15. I allow stay orders pending filing and hearing of appeal.

16. The appeal should be filed within 14 days.

17. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 27TH DAY OF JULY, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Sabaya for claimant – present

Ondieki for applicant – present

Court assistants – Wanyoike and Fred