



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

MISC APPLICATION NO. E008 OF 2021

TRANSAFRIC TIMBER LTD.....APPLICANT

VERSUS

LEDICIA MORAA MOKAYA.....RESPONDENT

RULING

1. This ruling is in respect of the applicant's application dated 20th April, 2021 filed under certificate of urgency on 21st April, 2021 via the firm of E.M Juma and Ombui advocates pursuant to Order 42 Rule 6(1), Order 22 Rule 22 and 25, Order 51 Rule 1, Order 50 Rule 6 of the Civil procedure Rules, 2010 and Sections 3A, 79G & 95 of the Civil Procedure Act, seeking the following orders;

- 1) **THAT this application be certified urgent and service be dispensed with in the first instance.**
- 2) **That this Honourable Court be pleased to order temporary stay of execution of the judgment and the resultant decree issued on 19th March, 2021 in Nakuru CMCC No. 711 of 2017 pending the hearing of this application inter partes.**
- 3) **That this Honourable Court do grant the applicant herein leave to lodge an appeal against the judgment and resultant decree out of time.**
- 4) **That this Honourable Court be pleased to Order stay of execution of the Judgment and resultant decree issued on 19th March, 2021 in Nakuru CMCC No. 711 of 2017 pending the hearing and determination of the intended Appeal herein.**
- 5) **That the cost of this Application be provided for.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 20th April, 2021 by **Rina Walema**, the legal officer of APA insurance Company Limited, the insurers of the Applicant herein and based on the following grounds: -

- (a) That, the delay in lodging the Appeal is purely in advertent as the legal officer in conduct of the matter had a misfortune and was away from the office for 3 weeks and by the time they tried lodging the Appeal, time had lapsed for a day.
- (b) That the delay in lodging the appeal is not inordinate.
- (c) That the intended appeal annexed herein has high chances of success and is not frivolous.
- (d) That the trial magistrate did not have jurisdiction to hear and determine the trial case as it was a Work Injury and Benefits Act matter.
- (e) That the Respondent has by a notice of Entry of Judgment of 26th March, 2021 threatened to execute the decree within 21 days.
- (f) That unless he application herein is heard and the prayers granted the intended Appeal will be rendered nugatory and the applicant shall suffer prejudice.
- (g) That the Applicant is ready and willing to offer security inform of a bank guarantee or deposit the decretal sum in a fixed account in names of both counsels on record.

3. In opposing the application, the Respondent, **Ledicia Moraa Mokaya**, swore a replying affidavit dated 3rd May, 2021 and filed in this

Court on even date 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 she instituted suit number 711 of 2017 at Nakuru chief magistrates Court seeking compensation from an industrial accident which case was heard and judgment delivered in her favour.
- c) That the Notice of entry of judgment was served upon the Applicant's Advocates seeking to satisfy the decree but they failed to pay the decretal sum.
- d) That the applicant had ample time to file this application if it needed to and thus contends that the application herein is a ploy used by the applicant to delay and deny her the fruits of her judgment.
- e) That the Memorandum of appeal as annexed herein lacks merit and has no chances of success.
- f) That without prejudice to the foregoing, if the court is inclined to allow the application, the entire decretal sum together with costs and interest therein be deposited in an interest earning account in the joint names of the advocates on record for the parties.

4. The parties herein disposed of the application by way of written submissions with the applicant filing on 3rd June, 2021 and the Respondent on 2nd June, 2021.

Applicant submissions

5. The applicant's Advocate submitted that Order 42 Rule 6 of the Civil Procedure Rules provides for conditions that the Court ought to be satisfied before an order of stay is granted. He argued that the Respondent has served the Applicant with a Notice of Entry of Judgment with Condition that the decretal sum be paid within 21 days, failure to which execution proceedings shall commence. It is contended that the Intended Appeal has high chances of success in that the trial Court lacked jurisdiction to entertain the industrial matter but still went ahead to hear and deliver judgment. He thus argued that the Applicant is likely to suffer prejudice if stay is not granted.

6. It was submitted that judgment in the trial court was delivered on 19th March, 2021, while the Applicant lodged this Appeal on 21st April, 2021 only a day late which has been explained by the applicant as such the time of lodging this Appeal is not inordinate. He cited the case of **Victory Construction –v- BM (Aminor suing through next friend one PMM) [2019] Eklr** and urged this Court to grant the stay Orders sought.

7. With regard to security, it was submitted that the applicant is willing to furnish the court with a bank guarantee as security for due performance of the decree.

Respondent's submissions.

8. The Respondent on the other hand submitted that the applicant has not furnished this Court with sufficient cause for the delay in filling the Appeal within time as provided for under section 79G of the civil procedure Act. He cited the case of **Kenya Hotels and allied workers Union –v- Mada Holidays Limited [2021] eklr** where the Court while quoting the case of **Shah –v- Mbogo** held that;-

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

9. It was submitted that since enlargement of time is not as of right the party seeking the same has to give specific cause for the delay and cited the case of **Dilpack Kenya Limited –v- William Muthama Kitonyi [2018] eklr**.

10. The Respondent submitted that the intended Appeal as filed lacks merit as the Trial Court's decision was sound and made within that Court's Jurisdiction.

11. On the stay Orders sought, it was submitted that the Applicant has not demonstrated any loss that it will suffer if the stay of execution is denied therefore urged this Court to disallow the stay orders.

12. The Respondent concluded by submitting that the application herein be disallowed in its entirety however if the Court is inclined to allow it, then the entire decretal sum together with costs and interests therein be deposited in an interest earning account in the joint names of both advocates on record.

13. I have examined the averments and submissions of the parties herein. The applicants seek leave to file an appeal out of time and also stay orders.

14. I have considered the application and it is apparent that the application was filed without any delay and reasons for the delay are plausible.

15. I will allow the applicants to file the appeal out of time and in any case within 14 days.

16. I will also allow stay on condition that the applicant deposits the entire decretal sum in court within 14 days.

17. In default execution may proceed.

Ruling delivered virtually this 22ND day of **JULY, 2021**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Saringi for respondents – present

Chelagat for applicant – present

Court Assistants – Fred and Wanyoike