



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

APPEAL NO. E064 OF 2021

KIRAGU & MWANGI LIMITED.....APPLICANT

VERSUS

CHARLENE EVA WANGARI.....RESPONDENT

RULING

1. Before this Honourable Court for determination are two Applications dated 18th June 2021 and 30th June 2021 by the Applicant. The Applicant's Notice of Motion Application dated 18th June 2021 seeks for Orders that Leave be granted to it to file the intended Appeal out of time and the same be adopted as duly filed and that costs of the application be in the cause. The Application is premised on the grounds that the Applicant has lodged an Appeal against this Honourable Court's Judgment and decree of 12th April 2021. The Applicant asserts that it only became aware of the said judgment on 27th April 2021 when they were served a copy of an uncertified and unsigned Decree and that it has to date not received a copy of the said judgment, thus occasioning the late filing of the Memorandum of Appeal. The Application is supported by the affidavit sworn by the Applicant's advocate, Ms. Sally Omotto who avers that neither the Applicant nor its Advocates on record were served with a Judgment Notice and that the Applicant was therefore not aware the said Judgment would be delivered on the said date. She depones that despite their best efforts they were unable to get the full judgment of the Honourable Court to enable them draft an informed Memorandum of Appeal. She asserts that it is in the interest of justice and fairness that this Court grants the orders sought.

2. In response, the Respondent filed her Replying Affidavit dated 1st July 2021 wherein she depones that the trial court delivered judgment in her favour on 14th April 2021 and that the same moved from being delivered on 12th April 2021 due to long cause list and heavy workload on the part of the Court. She denies there being an order issued by the court, preserving status quo and/or stopping execution of the valid decree of the trial court as alleged and avers that this Court was misled to issue interim orders herein whereas the Applicant had not sought stay of execution of the decree issued by the lower court. She further avers that despite conceding having become aware of the judgment on 27th April 2021, it has not offered an explanation why it did not lodge the Memorandum of Appeal within 30 days from 14th April 2021 as required by the rules of the court. That there is no evidence before this Court showing that the Applicant has ever applied for a copy of the judgment or decree from the lower court and that no receipt for perusal of the lower court file has been exhibited. The Respondent further depones that the Applicant is not candid as it has failed to disclose to this Court that it unprocedurally filed a Notice of Appeal in the lower court on 13th May 2021 which the Respondent has contested by way of a Preliminary Objection. That ground number 3 in support of the Motion dated 18th June 2021 contradicts prayer 3 sought in the same Motion as the Applicant is seeking leave to file the appeal out of time and on the other hand averring that it has since filed an appeal against the trial court judgment. She also avers that the Court's jurisdiction to admit an appeal out of time not been properly invoked and urges the Court to refuse the said prayer. It is the Respondent's contention that the application and impugned appeal are only meant to frustrate her getting the fruits of her judgment she has waited for since 2018.

3. The Applicant filed a Supplementary Affidavit sworn on 8th September 2021 by its Managing Director, James Kiragu who depones that the Applicant found it suspicious that: Judgment date in the trial court was obtained *ex parte* only two days after the date it was scheduled to be delivered and with no notice to the Applicant; the Court proceeded to deliver the said Judgment in the absence of the Applicant without satisfying itself that there was proof of service of a Judgment Notice upon the Applicant or their Advocates on record; and that the Judiciary's E-filing portal indicates that Judgment was delivered on 12th April 2021 whereas the unsigned and uncertified decree served upon the Applicant indicated that the Judgment was delivered on 14th April 2021. He further avers that the issue of notice or lack thereof of the Judgment date is fundamental as the Applicant was disenfranchised and asserts there is sufficient evidence as admitted throughout the said Replying Affidavit that the Applicant sought stay of execution at the lower court. He annexes a copy of a letter written to the Deputy Registrar by the Applicant's advocates requesting for a copy of the Judgment and a copy of the receipt of payment for perusal of the Court file which he depones only had the final award and had no judgment. He depones that the Applicant has demonstrated to this Court that it deserves the exercise of the Court's discretion in its favour.

4. In regard to the Applicant's Notice of Motion Application dated 30th June 2021, the Applicant is seeking for the Court's orders issued on 18th June 2021 to be varied to the extent that the Applicant be granted leave to make deposits of the decretal sum in Court by reasonable monthly instalments of Ksh. 200,000/- until payment in full. It also seeks for costs of the application to be in the cause. The Application is

based on the grounds that the Court vide orders dated 18th June 2021 granted stay of execution pending *inter-partes* hearing of the Application on condition that the Applicant deposits the full decretal amount in court within 14 days. The Applicant asserts that it is unable to raise the decretal sum as it lacks the capital reserve that would allow it deposit the full decretal sum in court in compliance with the said orders and that the same is partly attributed to the fact that its business is still recovering from the adverse economic effects of the COVID-19 Pandemic. The Applicant asserts that it has every intention of complying with this Court's orders and prays that this Honourable Court exercises its discretion and grants the orders sought. In response, the Respondent filed her Replying Affidavit dated 10th September 2021 averring that it is not open for the Applicant to seek an order for stay of execution in two (2) separate applications based on the same set of facts. She relies on the facts pleaded in her earlier Replying Affidavit to oppose the orders sought and avers that the Applicant is not taking court orders seriously and Covid-19 Pandemic cannot be an excuse without evidence before court to prove the same.

5. The Applicant submits that Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 provides for stay of execution pending appeal and the conditions an Applicant should satisfy for a grant of an order for the same i.e. that: substantial loss may result to the Applicant unless the order is made; the Application has been made without unreasonable delay; and such security as the Court Orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given. The Applicant submits that Order 42 Rule (6) further states that the High Court shall nevertheless have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with. The Applicant relies on the Court of Appeal's pronouncements in **Butt v Rent Restriction Tribunal [1979] eKLR** that the power to grant or refuse an Application for a Stay of Execution is discretionary. That the Applicant's case is that the decretal award it ought to pay to the Respondent is the sum of Kshs. 975,745/- and it has reasonable fear of the Respondent's inability to refund the decretal award if the Appeal succeeds as the Respondent is a person of unknown means and there is a high risk it will suffer substantial loss and the Appeal will be rendered nugatory. The Applicant submits that the Respondent on her part did not demonstrate her financial capability to cushion the Applicant from substantial loss should the Appeal succeed. The Applicant relies on the case of **Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR** where Warsame J. (as he then was) observed that in stay of execution pending appeal, the Court is empowered to carry out a balancing exercise to ensure that the execution of one party's right should not defeat or derogate the right of the other. The Applicant calls upon this Court to thus balance the right of the Respondent to enjoy the fruits of her judgment with the Applicant's rights to breathe life into its Appeal and not render it an academic process. The Applicant further submits that it has demonstrated it promptly filed an Application seeking stay of execution at the Magistrate's court and promptly moved this Honourable Court when its efforts at the lower court were rendered futile. With regard to security for costs, it cites the case of **Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another [2018] eKLR** where the Court was of the view that it is sufficient for the applicant to state he is ready to provide security or to propose the kind of security which satisfied this ground for stay. It is the Applicant's further submission that Order 21 Rule 12 of the Civil Procedure Rules, 2010 grants this Court the power to allow a Judgment Debtor to pay a decretal award by instalments. That since the Court gave interim orders for the payment of the decretal sum into the Court as a way of protecting the interests of the Respondent, the court allowing the Applicant's Application dated 30th June 2021 will not prejudice the Respondent whose interests will be sufficiently protected. That it has demonstrated its willingness to deposit the decretal award in Court having even deposited the first instalment of Kshs. 200,000/- on 29th June 2021 and that it merely seeks to do so by way of reasonable monthly instalments of Kshs. 200,000/- until payment in full. On the issue of enlarging time of filing the Memorandum of Appeal, the Applicant submits that Section 75G of the Civil Procedure Act provides that an appeal from a subordinate court to the High Court may be admitted out of time if the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time. The Applicant submits that Section 95 further provides that the court may in its discretion enlarge any period of any act prescribed/allowed by the Act, even though the period originally fixed or granted may have expired. It relies on the case of **Paul Musili Wambua v Attorney General & 2 Others [2015] eKLR** where the Court of Appeal held that "*the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted...*" The Applicant submits that it has sufficiently proven to this Honourable Court that it has met all the requisite conditions that warrant the granting of an order of Stay of Execution pending the hearing and determination of the suit. It is on this basis that the Applicant urges this Honourable Court to allow the instant Applications as prayed.

6. The Respondent submits that Prayer 3 of the Notice of Motion dated 18th June 2021 is defective because the Claimant/Respondent herein is not seeking an appeal against the judgment delivered by the trial court as cited by the Applicant and that the prayer should be rejected on that ground alone. The Respondent submits that in the same prayer it is not clear which intended appeal the Applicant is referring to considering it already describes itself as an Applicant and pleads of having lodged an Appeal. She submits that it is trite that parties are bound by their pleadings. The Respondent further submits that this Court has discretionary powers to allow an appeal to be filed out of time but not for a party to file an appeal out of time and seek the court's discretion to have the same validated by an order of the court, which the Supreme Court found is unprocedural in **County Executive of Kisumu v County Government of Kisumu & 8 Others [2017] eKLR**. She urges the Court to be guided by the holding of the Supreme Court in the aforesaid authority and strike out the Memorandum of Appeal filed herein for being an illegality. She submits that the court can only grant leave to file an appeal out of time where there is a good and sufficient cause as considered by the Court in **Evans Kiptoo v Reinhard Omwoyo Omwoyo [2021] eKLR**. That the Application dated 18th June 2021 does not satisfy all the elements required for the court to exercise its discretion in allowing an appeal to be filed out of time as the Applicant has failed to offer any good and reasonable explanation for the delay in filing the appeal, and further demonstrate that the appeal is arguable. The Respondent submits that the Applicant should have disclosed the reason for the delay as being occasioned by approaching the wrong forum to lodge the appeal and filing a Notice of Appeal as opposed to a Memorandum of Appeal. On the issue of stay of execution, it is submitted by the Respondent that the Applicant has invoked Order 42 Rule 6(1) of the Civil Procedure Rules dealing with stay in case of appeal but a perusal of the Motion shows there is no prayer before court that is seeking for stay pending the hearing and determination of the appeal or the intended appeal. The Respondent submits that interim orders granted by Nduma Nderi J. and Maureen Onyango J. are for stay pending *inter partes* hearing and determination of the applications. She submits that Courts cannot fashion prayers for the parties and that she is guided by the holding in the case of **Anthony Francis Wareham t/a AF Wareham & 2 Others v Kenya Post Office Savings Bank [2004] eKLR** that a court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings. The Respondent urges this Court to disregard the submissions made in respect of stay pending appeal and/or suit. Without prejudice to the foregoing, the Respondent submits that the Applicant has nevertheless failed to submit and persuade the Court by demonstrating that substantial loss will result to the company unless the order of stay is made, as required under Order 42. She relies on the case of **Njagi Peter v Joseph Musyimi Musyoka [2020] eKLR** where the Court dismissed the prayer for stay of execution pending appeal but allowed the Applicant to lodge an appeal out of time.

7. The Respondent submits that Prayer 3 of the Notice of Motion dated 30th June 2021 has no legal anchor in law and that the invoked Order

21 Rule 12 of the Civil Procedure Rules does not apply to proceedings filed before the Employment and Labour Relations Court. Further, the provisions of the said Order are at the discretion of the trial court and not the Appellate court. She cites the case of **Abdisalan Abdi Ali Ismail v Guhart Abdi Ali & 2 Others [2019] eKLR** where the court stated that the power to order payment by instalments of the decretal amount is purely a matter of discretion of the trial Court except that sufficient cause must be shown and the indulgence to pay by instalments may be on such terms that the Court thinks fit. The Respondent further submits that the Applicant has not provided any evidence of its alleged deposit of the first instalment on 29th July 2021 and which also means that the orders of Maureen Onyango J. were not complied with within the ordered 14 days.

8. The applications by the Applicant can be divided into two aspects – an application for leave to file appeal out of time and an application for payment of the sums ordered as security in instalments. The Respondent is of course opposed to the grant of the two applications. The factors to consider in an application such as the one seeking leave or extension of time to lodge an appeal is as follows:-

- i. That substantial loss may result to the Applicant unless the order is made;
- ii. the Application has been made without unreasonable delay; and
- iii. such security as the Court Orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.

9. The Applicant herein has failed to satisfy these key requirements. The Applicant did not make the applications without substantial delay which delay has not been properly explained. If the Applicant became aware of the judgment on 27th April 2021, why did it take so long to move Court? In any event, it has not indicated why it failed to ascertain the delivery of judgment on 12th April 2021 since it seems to have been aware of the date of delivery. The Applicant's second application, the one dated 30th June 2021 is an admission that the Applicant is unable to meet the requirement of giving such security as the Court Orders for the due performance of such decree or order as may ultimately be binding on the Applicant. The orders of the Court granted previously giving the Applicant conditional stay have been ignored and not complied with thus disentitling the Applicant of the discretion of this Court. The 2 applications before me are wholly devoid of merit and are accordingly dismissed to the Respondent herein.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 202

NZIOKI WA MAKAU

JUDGE