



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

MISCELLANEOUS NO. E130 OF 2021

COLLINS MUSONYE MUGAISI.....APPLICANT

VERSUS

CORPORATE SECURITY SERVICES LIMITED.....RESPONDENT

RULING

1. The application before me is the Applicant's Notice of Motion Application dated 26<sup>th</sup> February 2021. The application is expressed to be brought under Rule 8 of the Employment & Labour Relations Court (Procedure) Rules, Section 79 of the Civil Procedure Act and Article 59 of the Constitution of the Republic of Kenya and all enabling laws and regulations. The Applicant seeks for orders:

(1) THAT the court grants leave to the appellants to file their memorandum of appeal out of time against the Judgement delivered by Hon. Kivuti the same to be deemed properly on record.

(2) THAT costs be provided for.

2. The Application is based on the grounds that Judgment in the above matter was delivered on the 21<sup>st</sup> August 2021 and the advocates for the Applicant were under the impression that the suit had succeeded and proceeded to request for a copy of the judgment. They assert that the same was sent electronically on the 8<sup>th</sup> December 2021 by the court clerk and by this time the time to file the appeal had lapsed. It is asserted that the advocates consulted the Applicant and instructions were given for an appeal to be filed. The Applicant thus approached this Honourable Court seeking to be allowed to file the memorandum of appeal out of time. The Applicant states that the length of delay to file the appeal cannot be deemed to be so inordinate as to prejudice the respondent and that it will be in the interest of justice that the same to be allowed. The Application was further supported by the affidavit of Willis Wetaba Nanjendo sworn on 26<sup>th</sup> February 2021.

3. The Application was stated to have been served upon the Respondent but there is nothing on the Court filing portal to suggest there was any such service. Be that as it may, the Court is to consider whether it is in order for the Applicant's intended appeal to find let in this Court. The Applicant asserts that judgment was delivered by the Learned Magistrate in August 2021 and the Claimant in the suit thought he had been successful. He discovered later that he was not hence the failure to file the notice of appeal in time. In the case of **First American Bank of Kenya Ltd v Gulab P. Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application. The Court held that these are

(i). *the explanation if any for the delay;*

(ii). *the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;*

(iii). *Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.*

4. On the first limb, the explanation by the Applicant is not convincing. Whether or not the Applicant was successful on 21<sup>st</sup> August 2020, it does not excuse the Applicant from not seeking a copy of the judgment within the first few days of the decision. It does not make sense why he waited until after the lapse of 2 weeks to begin seeking a copy. he has not explained this away. In any event, the final part of the judgment was clear. The Learned Magistrate stated **The upshot is that I find the claim was not proved to the required standards the same is dismissed with costs to the Respondent.** This is not ambiguous language. As to the second question, the Court has to consider the merits of the contemplated action and determine whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice. The Court is of the firm opinion that the appeal is a frivolous one undeserving of any consideration in Court as the determination of the contract was by the hand of the employee. The Learned Magistrate in his Ruling stated and I quote: *I do not read any distress in the resignation letter I have either not found any complain (sic) highlighted thereto as to warrant any conclusion that the resignation was not voluntary the concept of constructive dismissal as I understand it is that the employer (sic) conduct must be the trigger.* Clearly stated, the Claimant resigned of his own free will as the letter of resignation does not disclose distress. The Court here would be delving into the unknown were it to admit the appeal as there is no basis for an appeal since the determination by the Learned Magistrate cannot be impeached on the grounds advanced. As such the motion by the Applicant is devoid of merit and is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER 2021

NZIOKI WA MAKAU

JUDGE