



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NO.E.188 OF 2021**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**UNIVERSITY OF NAIROBI.....CLAIMANT**

**VERSUS**

**FLORENCE K. ALUSA.....RESPONDENT**

**RULING**

1. The application is filed by the Applicant under a certificate of urgency dated 25<sup>th</sup> October, 2021. Their prayers are as follows:-

I. That the application be certified as urgent.

II. The honourable court be pleased to grant leave to the Applicant to file an appeal out of time against the whole judgment and decree issued by Hon. D. M. Kivuti (SRM) on 10.09.2021.

III. That the memorandum of appeal filed and annexed in this application be deemed to be properly filed upon grant of leave.

IV. That this court be pleased to order stay of execution of the Judgment and/or decree resulting from the decision of Hon. D. M. Kivuti (SRM) delivered on 10.09.2021 pending the hearing and final determination of the appeal.

V. That this Honourable court be pleased to make such further orders to meet the end of justice.

VI. That costs of this application be in the intended appeal.

2. The application is based on the grounds that the applicant was dissatisfied with the Judgment rendered by Hon. D. M. Kivuti (SRM) on 10<sup>th</sup> September, 2021.

3. That the time allowed to file an appeal run out and this application is filed without any undue delay.

4. The applicant states further that the intended appeal raises arguable issues with high chances of success and is apprehensive the Respondent may execute against the Applicant or their immovable properties if stay of execution is not granted and rendering the intended appeal nugatory.

5. The Applicant is ready and willing to furnish security of the full decretal sum to be deposited in a joint interest earning account.

6. The Applicant in support of his application filed a supporting affidavit sworn by his advocates DONALD KIPKORIR which basically states that they are late to file the appeal as Judgment was entered on 10<sup>th</sup> September, 2021.

7. The respondent on the other hand filed her Replying Affidavit dated 4<sup>th</sup> November, 2021.

8. She depones that she is still working for the Applicant and the decretal amount can be refunded should the appeal succeed.

9. She also states that the Applicant has not demonstrated any valid reasons why this appeal should be granted and furthermore it has not demonstrated any substantial loss it is likely to suffer if stay is not granted.

10. The Respondent also says that the Applicant has not given reasons why they took so long to file the application.

11. That this appeal has no chance of succeeding and even if the court allows the application for stay, the Applicant should be ordered to release half the decretal amount and costs to the Claimant and the other half together with security for costs of intended appeal be put in a joint interest earning account of the advocates on record to safe guard the Respondent's interest of avoiding further delay once the proposed intended appeal is finalized.

### **DETERMINATION**

12. I have considered the application, the supporting affidavit as well as the replying affidavit by the Respondent and, the grounds raised by the Applicant.

13. Section 8 of the Employment and Labour Relations Court Rules provides as follows:-

“Where no period of appeal is specified in the written law under paragraph (1) and appeal shall be filled within thirty days from the date the decision was delivered”.

14. In a supreme court case **NICHOLAS KIPTOO ARAP KORIR SALAT VS IEBC and 7 OTHERS** the Supreme Court pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court, that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court, that extension of time is a consideration on case to case basis, that delay should be explained to the satisfaction of the court, whether there will be prejudice suffered by the Respondent if the extension is not granted, whether the application is brought without undue delay and whether public interest should be a consideration.

15. The reason given by the learned counsel for the Applicant was only that they received instructions late and they proceeded to file this application only 15 days later. She pleads that 15 days is not inordinate delay and prays for enlargement of time to file the appeal.

16. Considering that each case must be decided on its merits. There is no limit to the factors the court would consider in deciding on the matter of extension of time including the period of delay, reason of delay and chances of success of the appeal and likely prejudice to be suffered by the Respondent if application is granted.

17. The Applicant reason for delay was that the learned counsel received instructions late from their client.

18. To give credit to the Applicant's counsel is that they moved in haste to file the application upon receipt of instructions from their client. That is the main reason in support of this application. Delay of 15 days is not inordinate.

19. In the case of **COURT OF APPEAL AT KISUMU CIVIL APPLICATION NO.239 OF 2005 SEVENTH ADVENTICURCH EAST AFRICA LTD, PASTOR M. NYAKESO, E.N. ADUKE VS M/S MASOSA CONSTRUCTION COMPANY Justice P. N Waki said**

“The right of appeal is a strong right. It is only rivalled by the right to enjoy the fruits of judgement and a proper balance has to be struck between the two.”

20. The Respondent is still in the employment of the Applicant and so if there is any refunds or costs incurred in any event there is a recourse under those circumstances.

The Respondent can therefore be able to bear the costs of litigation or any other consequences.

21. I am therefore inclined to allow the application as prayed.

The memorandum of appeal annexed hereto to be filed and served within seven days of this Ruling.

22. The Applicant to deposit 70% of the decretal amount in a joint interest earning account of the advocates on record within 30 days of this Ruling and the other 30% of the same be released to the Respondent within the same 30 days.

23. Costs of this application be in the intended appeal.

24. The Ruling in this cause be adopted wholly in case E.186/2021 and E.187/2021 accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2021**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**