



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO.E169 OF 2021**

**ROTO MOULDERS LIMITED.....APPLICANT**

**VERSUS**

**JOSPHAT ONTOMWA MOGOBA.....RESPONDENT**

**RULING**

The applicant filed application dated 21st September, 2021 seeking for an order of stay of execution of the decree dated 25<sup>th</sup> June, 2021 and to be granted leave to file appeal out of time for the reasons that following judgement by the lower court on 25<sup>th</sup> June, 2021 where the respondent herein was awarded compensation and costs, the applicant is aggrieved and wishes to file an appeal against the judgment.

The applicant filed application dated 19<sup>th</sup> July, 2021 before the trial court and seeking stay of execution but the file went missing and the same court not proceed for hearing.

The application is supported by the Supporting Affidavit of Mary Kagumu a representative of the respondent and who avers that hen judgement was delivered, their advocate Ms Atim was taken ill and could not file the appeal in time and thus seek leave to file the appeal out of time. the respondent applied for typed proceedings and the judgement and which were not supplied in good time. there is a good appeal and if time is not extended it shall be rendered nugatory.

In reply, respondent filed his Replying Affidavit and avers that his advocate indulged the applicant's advocate on numerous occasions but who instead tried to portray him as insensitive due to her illness which is not correct.

Judgement was delivered on 5<sup>th</sup> June, 2021 a period of over 3 months since and no logical reason is given as to why the appeal was not filed in time. there was no application made orally or otherwise seeking stay of execution leading to the **respondent commencing execution proceedings and the costs due should be paid by the applicant.**

Both parties attended and made oral submissions.

The respondent is not opposed to the applicant being granted the prayers sought save, since there was no stay of execution, he instructed auctioneers to commences execution and the attendant costs should be paid.

The applicant submitted that the appeal was not filed in good time due to illness of counsel and was not able to get the court decree signed by the Deputy Registrar in good time so as to make the deposit as directed by the court. such is excusable and the applicant should not be made to pay for the auctioneer as such would be punitive.

Rule 8 of the Employment and Labour Relations Court (Procedure) Rules, 2016 regulate the filing of appeal before the court and which requires a party to file the appeal within 30 days from the date of impugned judgement or as specified under the written law.

These procedures are similar to the requirements under Section 79G of the Civil Procedure Act which requires an appeal before the High Court to be lodged within 30 days.

Section **75G of the Civil Procedure Act** provides that:

***79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.***

***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.***

Judgement of the lower court was delivered on 25<sup>th</sup> June, 2021. The applicant's counsel submitted that she filed application seeking stay in the lower court, she was then taken ill and when a hearing date was allocated the file went missing. There is application seeking for typed proceedings and judgement in order to prepare the Record of Appeal.

Effectively the 30 days period contemplated under Rule 8 lapsed before the appeal court be filed.

The court finds good cause to extend time to file appeal.

However, there was no stay of execution of the lower court judgement. This was until interim orders herein issue don 23<sup>rd</sup> September, 2021 and the applicant was directed to deposit the decretal sum in court. there is no compliance.

The excuse that counsel was ill and the Deputy Registry did not assess the decretal sum for payment and deposit in court is not correct as the Decree attached is dated 25<sup>th</sup> June, 2021 a date way before the instant application was filed.

Without an order staying the execution of the lower court judgement and decree thereof, nothing stopped the respondent herein from proceeding with execution proceedings. Such is proper, valid and justified. The attendant costs must be met by the judgement debtor, the applicant.

**For the above reasons, leave to appeal out of time is allowed and the applicant given 14 days to file and serve the appeal. the conditional stay allowed on 23<sup>rd</sup> September, 2021 shall be complied with within the same time failure to which the order shall lapse.**

**The applicant shall pay auctioneers costs together with costs of this application to the respondent.**

**DELIVERED AT NAIROBI IN OPEN COURT THIS 18TH DAY OF NOVEMBER, 2021.**

**M. MBARU**

**JUDGE**