



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO. E090 OF 2021

SEYANI BROTHERS & CO. (K) LIMITED.....CLAIMANT

VERSUS

ALBANUS MWANGI MUIA.....RESPONDENT

RULING

1. The applicant prays for orders:-

1. Spent
2. Spent
3. **THAT** the Honourable Court be pleased to grant the applicant leave to file appeal against the lower Court's judgment out of time.
4. **THAT** the attached Memorandum of Appeal be deemed as duly filed upon payment of Court fees.
5. **THAT** there is stay of execution of the decree in NAIROBI MILIMANI CMCC NO. 9114 OF 2017 pending the hearing and determination of the intended appeal against the judgment and order of the Honourable Magistrate.
6. **THAT** costs of this application be provided for.

2. The application is premised on grounds set out on the face of the Notice of Motion dated 4th May, 2021 and filed on 19th May, 2021 to wit that the judgment in the matter was delivered by a Court with no jurisdiction.

3. That the applicant has good and sufficient cause for not filing the appeal in time being that judgment was delivered on 26th February, 2021 and details were not available immediately due to prevailing Covid-19 pandemic which led to scaling down of work operations hence the delay in filing the appeal.

4. That the applicant has an arguable appeal and will be denied justice if the application is not granted. That the interim orders be confirmed to avoid execution of the decree which would render the appeal nugatory.

5. That the delay is not inordinate and the same is excusable. That the applicant is ready to provide security for the judgment sum. The grounds are buttressed in the supporting affidavit of **Linda Chorio**, Legal officer of APA Insurance Company, the Insurer of the applicant and is responsible to pay judgment debtor.

6. That judgment was delivered on Microsoft teams on 26th February, 2021.

7. That on 1st March, 2021, the advocates for the respondent wrote to the applicant advising them of the judgment for a sum of Kshs.402,400.

8. That somehow the officer responsible to act on the matter did not learn about the judgment until the insurer received a reminder on 8th April, 2021 from the respondent's advocates.

9. That the Insurance felt that the award on damages was excessive and Court lacked jurisdiction to grant the awards.

10. That the department instructed the advocates on record to file an appeal by a letter dated 29th April, 2021.
11. That the appeal is arguable and if leave to file the appeal out of time is not granted the applicant will suffer injustice.
12. That application be granted.
13. The application is opposed vide a replying affidavit of the respondent who states that the application has no merit at all. That he is advised by his advocates that the applicant is guilty of material non-disclosure which renders the application untenable in that the applicant who now claims that the judgment was given by a Court without jurisdiction submitted to the jurisdiction of the Court and the parties recorded a consent judgment on 1st December, 2020, on liability at the ratio of 80%: 20% in favour of the respondent.
14. That the Court only heard the matter on the issue of quantum of damages in respect of which judgment was delivered on 26th February, 2021.
15. That the applicant participated fully in the proceedings of the Court. That this application is just a ploy to delay justice to the respondent.
16. That the advocates for the respondent promptly wrote the letter marked “AMM2” on 1st March, 2021 requesting for the payment of the judgment sum and tabulating costs payable by the applicant because the advocates’ of the applicant were aware of the judgment having been present when the said judgment was delivered.
17. That the allegation by the applicants in paragraphs 5, 7, 9, and 10 are therefore untruthful and the failure to file the appeal on time is inexcusable the applicant having failed to be forthright and candid.
18. That the applicant is taking advantage of the COVID-19 situation unjustifiably to explain the delay since it has not been an impediment for any party to file Notice of Appeal online timeously.
19. That by a letter dated 8th April, 2021, the advocates for the respondent wrote a reminder to the advocates for the applicant to pay the decretal sum and made follow up variously on phone calls. That the applicant is not candid at all and has no clean hands in this matter. The Court should decline to exercise its discretion to enlarge time within which the appeal is to be filed since the applicant has not advanced plausible or sufficient grounds to justify the delay of more than three (3) months to file the intended appeal.
20. The applicant was bound to file an appeal within the requisite period of thirty (30) days hence has no right thereafter to file the appeal.
21. That the respondent had not commenced execution of the decree and is only hell bent to delay payment of the judgment sum in bad faith.
22. That the applicant has not demonstrated that the memorandum of Appeal dated 4th May, 2021 attached to the supporting affidavit has been filed before Court prior to filing the application.
23. That the said Memorandum of Appeal has no case number and there is no evidence by way of a receipt that the applicant has paid for the Memorandum of Appeal. Indeed at paragraph 4 of the application, the applicant has conceded that the Memorandum of Appeal has not been paid for and the applicant refers to it at paragraph 12 as a draft.
24. That there is clearly no appeal filed before this Court nor has the applicant demonstrated that they have applied for and/or obtained the judgment and typed proceedings from the trial Court to enable them file the appeal since 16th February, 2021. The application be dismissed with costs.

Determination

The Court has considered the application, reply and submissions by the parties and proceeds thus:-

Section 79 G of the Civil Procedure Code invoked by the applicant provides:-

“Every appeal from the 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 anytime 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.”

14. In Nairobi Employment and Labour Relations Court Miscellaneous Application No. E010 of 2021 - **Caddel Construction Company Limited –vs- Elias Maina Kariuki [2021] eKLR**, this Court relied on the Court of Appeal decision in **Charles Karanja Kiiru –vs- Charles Githinji Mugwe [2017] eKLR** to dismiss a similar application as this one which had been brought before the applicant had filed the Memorandum of Appeal.

15. The Court of Appeal stated:-

“Having expressed ourselves as herein above, the other issue that falls for consideration is whether the appeal filed out of time on 24th October, 2014 could be deemed as being properly on record. There is a plethora of authorities from the High Court which interpret the proviso to Section 79G of the Civil Procedure Act, to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted.

16. Emukule, J. in the case of *Gerald M'limbine –vs- Joseph Kangangi (2009) eKLR* stated that:-

“My understanding of the proviso to Section 79G is that an applicant seeking an appeal to be admitted out of time must in effect file such an appeal and at the same time seek leave of Court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending applicant first seeks for the Court’s permission to admit a non-existent appeal out of the stipulated period. To do so would actually be an abuse of the Court’s process under Section 79B.”

17. It is manifestly clear from the application itself and admissions made by the applicant that the Memorandum of Appeal has not been filed yet. The applicant has neither demonstrated to the Court that it has applied for certified copies of judgment and proceedings of the lower Court to enable it file an appeal.

18. This application is clearly an abuse of the Court process and a non-starter having been filed before the appeal was filed. As was stated by the Court of Appeal in *Charles Karanja Kiiru (supra)*

“It seems to me therefore, it is not open to the Court to exercise its discretion under Proviso to Section 79G of the Civil Procedure Act, except, upon the existence and, perusal of the appeal to be admitted not to be filed out of time.”

‘Admission presupposes that the appeal has been filed and will be admitted for hearing after a judge has established under Section 79B, that there is ‘sufficient’ ground for interfering with the decree, part of a decree, or order appealed against.’

18. Accordingly the application is dismissed with costs there being no need to consider any of the other issues raised in the application.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 16TH DAY OF DECEMBER, 2021

MATHEWS N. NDUMA

JUDGE

Appearances

M/s Wangari Muchemi & Co. Advocates for Applicant

Mr. Momanyi for Respondent

Ekale: Court clerk