



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2446 OF 2012**

**GEOFFREY CHUNGULI MUDANYA.....CLAIMANT**

**VERSUS**

**PANARI HOTEL LIMITED.....RESPONDENT**

**RULING**

1. The Respondent/Applicant filed a Notice of Motion Application dated 19<sup>th</sup> December 2018 seeking the following orders

- a) a temporary stay of execution of execution and decree in this case.
- b) leave to file its Notice of Appeal out of time.
- c) costs of this application to abide by the outcome of the appeal.

2. The Application is based on the grounds that the Claimant/ Decree Holder obtained judgment on 28<sup>th</sup> September 2018 and is on the verge of taking out execution proceedings against the Respondent/Applicant, which action is bound to cause the applicant irreparable harm; that if the orders are executed, it will render the appeal nugatory; that the Applicant stands to suffer irreparable loss; that the Claimant will not suffer any prejudice if the orders are granted; that this application has been brought with speed; that the appeal has overwhelming chances of success; and that the Respondent/Applicant is prepared to comply with any orders as to security.

3. The Application is supported by the affidavit dated 19<sup>th</sup> December 2018 sworn by the Respondent's Human Resource Manager, Douglas Wakhanu who avers that on the first hearing of this matter, the Claimant was examined in chief by his advocate and cross examined by their advocate before the matter was adjourned; that thereafter the Claimant brought an application to amend his claim which was allowed by the Court; that since then there was no communication on any or further hearing date on this matter; and that the only correspondence from the Claimant's advocate was a Notice of Judgment which was misplaced as he was not aware of any further proceeding in the cause.

4. Mr. wakhanu further deposed that the applicant participated in the initial hearing only and it will be greatly unjust for the court to proceed with the matter as if the Respondent was not interested in the matter; that the Claimant was awarded judgment of Kenya Shillings Two Million and Eighty Thousand, which is a colossal amount and that it is in their best interest to appeal the said judgment; and finally, the delay in filing the notice of appeal out of time was not deliberate but an honest mistake by counsel which should not be visited upon the litigant.

**Claimant's Case**

5. The Claimant/Respondent filed a Replying Affidavit on 23rd January 2019 contending that the Applicant was duly served with the application for amendment and never objected to the same. He further contended that the Applicant's advocate was well aware of all the proceedings in this matter as demonstrated hereunder:

- (i) On 30<sup>th</sup> October 2017, the Deputy Registrar, Employment & Labour Relations Court served summons to attend court upon the advocates on record.
- (ii) On 20<sup>th</sup> November 2017, the Applicant's Counsel was served with an amended claim.
- (iii) On 27<sup>th</sup> March 2018, the Applicant was served with written submissions together with a mention notice.
- (iv) On 21st September 2018, the Advocates herein received a judgement notice from the Deputy Registrar informing the parties of the judgement date.

6. The claimant further contended that the Applicant was given various chances to participate in the hearing of this matter but chose not to appear in court despite knowing the hearing date; that the Application for leave to appeal out of time is a waste of time because the applicant did not participate in the hearing of the suit and the evidence on record remains unrebutted; and that the Applicant has not explained the inordinate delay before making the application and described the Application as an afterthought.

7. He further contended that grant of the stay order sought will prejudice and delay him from enjoying his fruits of judgment. In conclusion, he contended that the applicant has recourse against its advocate for negligence and stated that he should not be stopped from enjoying the fruits of judgment.

#### **Issues for determination**

8. After careful consideration of the application, affidavits and submissions presented, it is clear that the order for temporary stay of execution and decree herein is already spent since it was only intended to operate pending hearing and determination of the instant application. The applicant did not ask the court for stay pending appeal and as such I will not consider the principles of granting stay pending appeal provided under Order 42 Rule 6 (2) of the Civil Procedure Rules. The only issue for determination is therefore, whether leave to file notice of appeal out of time should be granted.

9. The jurisdiction of this court to enlarge the time for giving notice of appeal is donated by Section 7 of the Appellate jurisdiction Act which provides as follows:

***“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal notwithstanding that the time of giving such notice or making such appeal may have already expired”.***

10. The foregoing provision applies to this court because under the 2010 constitution, decisions of this court, like those of High Court, are appealable to the Court of Appeal under the same Act and the Rules thereunder.

#### **Analysis and determination**

1. The discretion of the court to grant the order sought is wide and unfettered but must be exercised judicially on the basis of sound factual and legal basis. The threshold for granting extension of time to lodge notice of appeal was set out by the Court of Appeal in *Pan African Paper Mills (EA) Ltd -Vs- Olaka [2001] KLR* in the following terms:

***“1. In an application for leave to file and serve a Notice and Record of Appeal out of time, the Court is being asked to exercise its unfettered discretion which is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it’s not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.***

***2. The decision whether or not to extend the time for appealing is essentially discretionary. In general, the matters which the Court takes into account in deciding whether to grant an extension of time are:***

***a) The length of the delay;***

***b) The reason for the delay;***

***c) The chances of the appeal succeeding if the application is granted; and***

***d) The degree of prejudice to the respondent if the application is granted.”***

11. In my view the same threshold should apply in an application before this court because ultimately, the appeal is intended to go to the Court of Appeal. It follows therefore that applicant herein must demonstrate to this court the delay in filing the Notice is not inordinate; that the reasons for the delay is justified; that the appeal has good chances of success; and that granting the leave will no prejudice the respondent.

12. However, all what the applicant stated is that the reason for the delay in filing notice of appeal in time was to mistake of her counsel, which in her view, should not be visited on the litigant. On his part, the claimant has contended that his right to enjoy the fruit of his judgment should not be compromised by the negligence of the applicant’s counsel and urged that the applicant has recourse against her counsel for negligence.

13. After considering the material presented to the court by the two parties, I find that the reason advanced by the applicant is not sufficient to warrant this court’s discretion in her favour. She has not, for example, adduced any evidence to prove that she gave the counsel instructions to appeal, and if so, when. It is not enough for a party to hide under the umbrella of mistake of his counsel and the plead with the court not to punish him or her for the counsel’s mistake. The party must demonstrate that he or she instructed the counsel on time but the counsel innocently or inadvertently failed to execute the instructions within the statutory period.

14. In addition, the delay to file the notice has not been explained by both the applicant and her counsel, nor has she demonstrated that the intended appeal has probability of success. I therefore find to be inordinate the 3 months’ delay in filing the Notice of appeal or applying for leave to file out of time. I also agree with the claimant that the intended appeal lacks any chances of success because the applicant never

participated in the hearing to rebut his evidence.

15. Further, I have noted that the applicant has made false allegations in the supporting affidavit including the allegation that her counsel was not aware of the hearing date yet the counsel was served and acknowledged the service by signing and stamping on the Hearing Notice. In the said circumstances, granting the leave sought would prejudice the claimant because it will deny him the right to enjoy his judgment and cause him to incur costs in a frivolous appeal. It would also imply that the right to fair hearing accrues only to the defendant.

16. In view of the foregoing matters, I find that the applicant has not shown good cause to warrant this court's discretion in her favour. Consequently, I dismiss the application with costs to the claimant.

**Dated and delivered at Nairobi this 17<sup>th</sup> day of January 2020.**

**ONESMUS N. MAKAU**

**JUDGE**