



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

MISCELLANEOUS APPLICATION NO. 70 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

TEACHERS SERVICE COMMISSION.....APPLICANT

VERSUS

BENSON KURIA MWANGI.....RESPONDENT

RULING

Vide application dated 6th June 2019 and filed under certificate of urgency, the applicant seeks the following orders –

1. Spent
2. The Court be pleased to order Stay of Execution of the Judgment and all consequent orders of Hon. T. Murigi in Thika CMCC No. 223 of 2008 delivered on 19th December, 2018 and pending the hearing and determination of this application.
3. The Court be pleased to grant Leave to the Applicant to file an appeal out of time against the Judgment of Hon. T. Murigi in Thika CMCC No. 223 of 2008 delivered on 19th December, 2018.
4. The Court be pleased to order a stay of execution of judgment and all consequent orders pending the lodgement, hearing and determination of the intended appeal.
5. The costs of this application be provided for.

The application is supported by the grounds on the face thereof and affidavit of Cavin Anyuor sworn on 6th June 2019. In both the grounds and affidavit, the applicant states that judgment in Thika CMCC No. 233 of 2008 was delivered on 19th December 2018 without notice to the applicant, that the applicant only became aware of the same on 8th May 2019 after the prescribed period for lodging appeal had lapsed and that as soon as the applicant became aware of the judgment it made this application without delay.

The applicant states that it is aggrieved by the judgment and desires to appeal, hence the filing of this application for leave to lodge its appeal out of time.

The respondent filed a replying affidavit in which he deposes that judgment was delivered on 19th December 2018 but the applicant has not shown any steps taken to follow up the matter from 3rd December 2018 to 7th May 2019. That the applicant filed the instant application on 6th June 2019 yet has not explained the delay of 7 months which is inordinate and inexcusable. That litigation must come to an end.

It is the respondent's averment in the replying affidavit that the application is malicious and intended to delay the execution of the judgment which in his opinion was too fair to the applicant as the respondent had prayed for an award of Kshs.4,049,600. He prays that the application be dismissed with costs.

The application was disposed of by way of written submissions.

In the submissions filed on behalf of the applicant on 10th December 2019, the applicant submits that this court has powers to grant the orders sought by virtue of Section 79G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules which provide that–

79G. Time for filing appeals from subordinate courts

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.

[Order 50, rule 5.] Power to enlarge time.

6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

It is the Applicant's submission that the application be allowed on the following grounds –

1. That the Judgment in this matter was delivered on 19th December, 2018 by the lower Court without notice and/or knowledge of the Applicant.
2. That the Court did not issue Judgment Notice to the Applicant as required by law and practice
3. That Applicant only got knowledge of the Judgment on 8th May, 2019 after the prescribed time for lodging an Appeal had lapsed.
4. That the Applicant has brought this application expeditiously and in good faith in exercise of its right of Appeal.
5. That the Applicant is aggrieved with the entire Judgment of the lower Court and intends to lodge an Appeal before this Court on various grounds of law to wit:
 - a. The learned Magistrate acted without Jurisdiction as employment matters are within the exclusive mandate of the Employment and Labour Relations Court.
 - b. The learned Magistrate grossly misinterpreted and misapplied the law and arrived at an erroneous conclusion of law.
 - c. The learned Magistrate awarded reliefs which are contrary to the provisions of the Employment Act.
 - d. The learned Magistrate has not provided legal and/or reasoned justification on the awards made in favour of the Plaintiff.
 - e. The Judgment is inconsistent with the provisions of the Defamation Act.
6. That the Applicant has an arguable appeal with high probability of success
7. That unless this application is urgently heard and determined, the Respondent may move and execute the Judgment to the detriment of the Applicant.
8. In the event the said Judgment is enforced in its present form, the Applicant is likely to suffer irreparable loss and damage which it may not recover should the intended appeal be successful.
9. It is in the interest of justice and fairness that the orders be granted to preserve the substratum of the appeal.
10. That the Respondent will not be prejudiced if the said leave and stay of execution of judgment is granted.

The applicant further submits that judgment notice is provided for under Order 21 Rule 1 of the Civil Procedure Rules as follows –

[Order 21, rule 1.] Judgment, when pronounced.

1. In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.

Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.

The applicant submits that the failure of the trial court to give judgment notice was thus in contravention of Order 21 Rule 1 of the Civil Procedure Rules. That the trial court apologised for the same by letter reference no. JUD/TKA/CC223/08 dated 7th May 2019. That this is justifiable reason for extension of time for filing appeal as was held in the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 Others [2014] eKLR** held: -

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it. “From the above case law, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant”

That in **Nyeri Civil Application No. 95 of 2017: TSC v Simon P. Kamau** where the trial court failed to issue Judgment Notice, the Court of Appeal held: -

“The reason advanced by the Applicant namely the default by the trial court in issuing a notice pursuant to the provisions of Order 21 Rule 1 of the Civil Procedure Rules remained uncontroverted by the Respondents...The reasons advanced by the Respondent herein remains qualified.”

The applicant submits that it filed the application promptly, being only 33 days after becoming aware of the judgment. That the right of appeal is enshrined in Article 164(3) of the Constitution and Section 17 of the Employment and Labour Relations Court Act. It submits that it has an arguable appeal that raises weighty issues of law as it contests the jurisdiction of the trial court among other issues. That this court is enjoined to facilitate the rights of parties to ventilate their appeals. The applicant relies on the decision of the Court of Appeal in **Civil Application No: 53 of 2010: African Safari Club Limited v Safe Rentals Limited (2010) eKLR** as quoted by Nduma J. in **Nairobi Cause No: 221 of 2010: Mutuma Mugambi v Kenya Methodist University [2016]** held –

“That courts are enjoined to act as to enable parties to exercise their appellate rights; they are to act fairly and justly; to have regard to the substantive justice of the matters before them and weigh the relative hardships of the parties before them.”

The applicant submits that should its application not be granted it will suffer irreparable loss as it stands to pay out about Kshs.1,00,000 being the decretal sum inclusive of interest and costs. That being a public entity this would result in loss of public funds. That it is thus in the public interest to grant the orders sought. That the appeal would further be rendered nugatory should the application not be granted. The applicant relies on the case of **Civil Application No. 238 of 2005; National Industrial Credit Bank Ltd v Aquinas Francis Wasike & Another [2006] eKLR** the Court of Appeal held –

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

On the issue of Security for costs, the Applicant submits that pursuant section 21 of the Teachers Service Commission Act and Article 260 of the Constitution, it is a Government organ and therefore exempt from depositing security for costs under Oder 42, rule 8 of the Civil Procedure Rules 2010. The Order states:-

[Order 42, rule 8.] No security to be Government

8. No such security as is mentioned in Rules 6 and 7 shall be required from the Government or where the Government has undertaken the defence of the suit or from any public officer sued in respect of an act alleged to be done by him in his official capacity.

The applicant submits that being a government institution with perpetual success, it will be in a position to satisfy any decree of the court. That the respondent is thus assured of the fruits of his judgment should the appeal not be successful.

The applicant concludes that it has satisfied all the requirements under Section 79G of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules and thus is entitled to the orders sought.

The respondent submits that the conditions for grant of stay of execution pending appeal as provided in Order 42 Rule 6(1) of the Civil Procedure Rules were set out in the case of **Kiplagat Kotut v Rose Jebor Kipngok [2015]** and **G. N. Muema P/A (sic), Mt. View Maternity and Nursing Home v Miriam Maalim Bishar and Another (2018)** wherein Kamau J. stated –

"Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is "and". It connotes that all three (3) conditions must be met simultaneously."

The respondent submits that none of the conditions in Order 42 Rule 6(1) have been met by the applicant. That the applicant has not demonstrated it would go through hardship should the orders sought herein not be granted. That there was inordinate delay and that the applicant has further not shown the willingness to furnish security. It is further submitted that that application is made in bad faith.

That the case of **Thuita Mwangi v Kenya Airways Ltd [2003] KLR** expounded on the factors to be considered in granting leave to file an Appeal out of time to include:

- i. The period of delay;
- ii. The reason for the delay;
- iii. The arguability of the appeal;
- iv. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- v. The importance of compliance with time limits to the particular litigation or issue; and
- vi. The effect if any on the administration of justice or public interest if any is involved.

That Ngugi J. in **Samuel Mwaura Muthumbi v Josephine Wanjiru Nquqi & another [2018] eKLR** stated that:

"The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be granted on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour."

That the Applicant's justifications as to the reason for delay are based on pure falsehood and are attempts to mislead this court. The Applicant avers that a judgment notice was not served by the court. The Applicant blatantly chose not to follow up on the matter, and did he show any interest whatsoever in following up the progress. Given this, the reasons furnished by the Applicant are not satisfactory.

The Respondent submitted that the Applicant's Application is bad in law, and the Applicant has failed to demonstrate that it has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. That Magistrates courts have jurisdiction to hear and determine matters related to employment and labour relations as envisaged by Section 9 of the Magistrates Courts Act 2015 thus want of jurisdiction is not a valid ground of appeal. Further that the Constitution of Kenya does not confer exclusive jurisdiction to the Employment and Labour Relations Court to the exclusion of the subordinate courts.

The respondent urged the court to dismiss the application.

Determination

I have considered the application together with the grounds and affidavit in support of the same. I have further considered the replying affidavit, the submissions by the parties and the authorities cited. Stay of execution pending appeal is provided for under Order 42 Rule 6(1) as follows –

[Order 42, rule 6.] Stay in case of appeal.

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

The right of appeal is also provided for under Article 164(3) of the Constitution and Section 17 of the Employment and Labour Relations Court Act.

As has been demonstrated by the applicant, it was not aware of the judgment in Thika CMCC No. 223 of 2008 delivered on 19th December 2018 as it had no notice of the date of judgment. This is a valid explanation for the delay in filing the application herein, which was filed within 33 days of becoming aware of the judgment.

Being a public institution, there is public interest in granting the orders of stay as the decretal sum is payable from public funds. I have considered the grounds of appeal attached as appendix 8 to the application and I am satisfied that the appeal is not frivolous. Being a public institution, the applicant is not required to deposit security by virtue of Order 42 Rule 8 of the Civil Procedure Rules.

For the foregoing reasons, I find that the application is merited and make the following orders –

1. Leave be and is hereby granted to the Applicant to file an appeal out of time against the Judgment of Hon. T. Murigi in Thika CMCC No. 223 of 2008 delivered on 19th December, 2018.

2. An order be and is hereby issued for stay of execution of judgment and all consequent orders pending the lodgement, hearing and determination of the intended appeal.

3. The stay is conditional upon the applicant filing appeal within 60 days from date of this ruling.

4. Costs shall be in the appeal.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE