



**REPUBLIC OF KENYA**

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

**CAUSE NO 845 OF 2017**

**WILSON WAGATHIRU MWITUMI.....CLAIMANT**

**VS**

**RAFIKI MICROFINANCE BANK.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion under Certificate of Urgency dated 20<sup>th</sup> April 2020, the 1<sup>st</sup> Respondent seeks leave to file a Notice of Appeal out of time or in the alternative an order admitting the Notice of Appeal dated 18<sup>th</sup> March 2020 as duly filed.
2. The 1<sup>st</sup> Respondent further seeks an order to arrest the judgment slated for delivery on 7<sup>th</sup> May 2020 pending the hearing and determination of its intended appeal.
3. The application is supported by an affidavit sworn by the 1<sup>st</sup> Respondent's Counsel, Dorcas Savini and is based on the following grounds:
  - a) On 15<sup>th</sup> March 2020, His Lordship the Chief Justice directed that court activities be scaled down for 2 weeks from the said to prevent the spread of COVID-19 in Kenya;
  - b) During the scaling down, courts were to operate with skeleton staff;
  - c) On 17<sup>th</sup> March 2020, the 1<sup>st</sup> Respondent instructed its Advocates, MS CFL Advocates to file a Notice of Appeal against the Ruling delivered on 5<sup>th</sup> March 2020, dismissing the 1<sup>st</sup> Respondent's Preliminary Objection;
  - d) Upon assessment of the Notice of Appeal, payment of court fees was made on 19<sup>th</sup> March 2020;
  - e) However, the staff at the court registry refused to issue the firm of CFL Advocates with a court receipt and further refused to stamp the Notice of Appeal because the matter was pending judgment and the court file was in the Judge's Chambers;
  - f) The 1<sup>st</sup> Respondent made its best efforts to have the Notice of Appeal stamped and placed on the court record, including seeking the intervention of the Deputy Registrar but its efforts were unsuccessful;
  - g) The 1<sup>st</sup> Respondent's Notice of Appeal is neither on the court record nor has it been served upon the Claimant due to circumstances beyond the 1<sup>st</sup> Respondent's control;
  - h) Mistakes of the court registry should not be visited on the 1<sup>st</sup> Respondent who took the necessary steps to ensure that the Notice of Appeal was filed in time;
  - i) The 1<sup>st</sup> Respondent's intended appeal raises serious questions of fact and law;
  - j) The 1<sup>st</sup> Respondent has moved diligently in bringing this application;
  - k) The Claimant will not suffer any prejudice if the orders sought are granted;

l) It is in the interest of justice that the 1<sup>st</sup> Respondent is granted an opportunity to pursue the intended appeal.

4. The Claimant's response is contained in a replying affidavit sworn by his Counsel, Titus Kirui on 27<sup>th</sup> April 2020. Counsel states that as per the Rules, any appeal against the Ruling delivered on 5<sup>th</sup> March 2020 ought to have been filed within 14 days the cut-off date being 19<sup>th</sup> March 2020.

5. The Claimant's Counsel takes the view that instructions given by the 1<sup>st</sup> Respondent to its Advocates on 17<sup>th</sup> March 2020, two days before the lapse of the period for lodging the Notice of Appeal, were issued too late in the day.

6. Mr. Kirui further depones that the 1<sup>st</sup> Respondent had not presented any proof of efforts made to file the Notice of Appeal within the prescribed time.

7. Counsel also takes issue with the period taken by the 1<sup>st</sup> Respondent to file the present application adding that no explanation had been given for the delay.

8. The issue for determination in this application is whether the 1<sup>st</sup> Respondent has made out a case for leave to file Notice of Appeal out of time and for the judgment slated for 7<sup>th</sup> May 2020 to be stayed pending determination of an intended appeal.

9. The power of the Court to enlarge time is granted by Section 95 of the Civil Procedure Act which provides as follows:

***95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.***

10. Regarding extension of time for appealing generally, the Court of Appeal in its decision in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi (Civil Application No. Nai. 255 of 1997)* stated thus:

***"It is now well settled that the decision whether or not to extend time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted."***

11. Both in the grounds on the face of the application as well as in the supporting affidavit, the 1<sup>st</sup> Respondent gives a narration of efforts made to file the Notice of Appeal in time. This Court takes judicial notice that this was in the wake of disruption of normal court operations caused by the onslaught of the COVID-19 pandemic.

12. Admittedly, in the early days of the pandemic, there was a fair amount of ambiguity with regard to court registry procedures and processes. It seems to me therefore that the 1<sup>st</sup> Respondent's failure to file the Notice of Appeal in time is excusable in the circumstances. For the same reason, I find and hold that the delay in bringing the present application cannot be said to be inordinate.

13. To disallow this application would effectively lock out the 1<sup>st</sup> Respondent from exercising its right of appeal. I therefore make the following orders:

- a) The 1<sup>st</sup> Respondent is granted leave to file and serve a Notice of Appeal within the next seven (7) days from the date of this ruling;
- b) The judgment slated for delivery on 7<sup>th</sup> May 2020 is stayed pending determination of the intended appeal by the Court of Appeal;
- c) The costs of this application will be in the cause.

14. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MACHAKOS THIS 6<sup>TH</sup> DAY OF MAY, 2020**

**LINNET NDOLO**

**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, this application has been considered remotely and ruling delivered electronically.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kirui for the Claimant

Ms Savini for the 1<sup>st</sup> Respondent