



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

MISCELENEOUS CIVIL APPLICATION NO. 1 OF 2020

(Before Hon. Justice Mathews N. Nduma)

KISII COUNTY GOVERNMENT.....1ST APPLICANT

H. E JAMES ONGWAE.....2ND APPLICANT

VERSUS

JACKSON MOINDI ONTEGI RESPONDENT

RULING

1. The applicant prays for leave to lodge an Appeal out of time against the decision delivered on 20th August 2019 by the Nyamira Chief Magistrate Hon. M. O. Wambani on 20/8/2019.
2. The applicant also prays for stay of execution of the Judgment pending hearing and determination of the Appeal.
3. The application is premised on the grounds set out in the notice of motion and the supporting affidavit of Kennedy Chweya Onsembe sworn on 7th January 2020.
4. The impugned judgment was delivered on 20/8/2019 in favour of the Plaintiff/Respondent in the sum of Ksh. 5,305,500 plus costs and interest on 20/8/2019.
5. The applicant aggrieved by the decision of the Chief Magistrate, filed memorandum of Appeal dated 20th September 2019 in the High Court at Nyamira in **HCCA NO. 51 of 2019** on 24th September 2019.
6. On 19th December 2019, the Appeal came up for directions before Lady Justice E. N. Maina at the Nyamira High Court and the learned Judge ruled that the court had no Jurisdiction to hear and determine the Appeal and struck it out.
7. The Applicant has since filed a memorandum of appeal before this court on 15/1/2020 attached to this application.
8. The Counsel for the Plaintiff/respondent filed a preliminary objection to the application dated 3/2/2020 in the following terms: -
 - i. The court lacks jurisdiction to hear and determine this cause by virtue of Article 162(2) (a) and (3) of the constitution of Kenya 2010 and sections 3 and 12 of the Employment and Labour Relations Court.
9. That the application is an abuse of the court process and it should be dismissed.

Determination

10. The Court has considered the pleadings, proceedings and the Judgment of the Chief Magistrate and is satisfied that the subject matter of the suit related to Employment and Labour matter which fall within the Jurisdiction of Employment and Labour Relations Court by dint of Article 162(2)(a) and (3) of the Constitution of Kenya 2010 read with section 3 and 12 of the Employment and Labour Relations Court Act 2011 as amended.

11. The Court is satisfied that appeals from decisions of magistrate courts on matters whose subject matter is Employment and labour fall within the jurisdiction of this court in terms of the same provisions of the Constitution and the Employment and Labour Relations Court Act.

12. Appeals to this court are to be filed in terms of Rule 8(1), (2),(3) and (4) of the Employment and Labour Relations Court (procedure) Rules 2016 within the time frame specified for the Appeal under any written law.

13. In this case, the law applicable is the Work Injury Benefits Act, 2007 and the Common Law, during the period that Work Injury Benefits Act, 2007 was not operational upon being declared null and void by the High Court.

14. As at 20/8/2019, the Chief Magistrates' Court was seized of this work injury suit by dint of the Common Law.

15. This court is aware of the court of Appeal decision in **Civil Appeal No. 6 of 2012 Prof. Daniel N. Mugendi – VS- Kenyatta University & 3 others (2013) eKLR**, Per Nambuye, Muera & Kiage which found that a matter filed in a wrong Court ought not to be struck – out but should simply be transferred to the correct Court.

16. The Court of Appeal weighed in on the decision of the High Court per Majanja J. in **petition No. 170 of 2012 United States International University (USIU) –VS – The Attorney General & Others** on the issue of Jurisdiction and held: -

17. "Believing as we do that the approach taken by Majanja J. endeavoring to meet the end of Justice untrammelled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial court".

18. This Court on the present application finds that it has jurisdiction to hear and determine an appeal from a decision of the Chief Magistrates Court.

19. The court also finds that the applicant filed the notice of appeal timeously though initially in the wrong court but has now come to the court with Jurisdiction to here and determine the matter.

20. The Court finds that the Appellant has an arguable appeal and that the respondent will not be prejudiced by granting this application in a manner that cannot be remedied by way of costs.

21. The application to file the appeal out of time is therefore granted on the following terms: -

i. The draft notice of appeal is deemed as duly filed subject to payment of requisite fees.

ii. Stay of execution is granted pending the hearing and determination of the appeal on condition that the appellant deposits the decretal sum in a joint interest, earning account, held by Counsel for the Appellant and Counsel for the Respondent within 30 days failing which the stay of execution shall lapse.

Ruling Dated, Signed and Delivered at Nairobi this 25th day of June 2020.

Mathew N. Nduma

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 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Oilele for the Applicant

Mr. Lichaba for the respondent.

Chrispo:

Court

Clerk

