



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1823 OF 2014**

**PASCALIA MWENDE MATHEKA.....CLAIMANT**

**- VERSUS -**

**SILVERBIRD TRAVEL PLUS LIMITED.....1<sup>ST</sup> RESPONDENT**

**CAROLINE MALINDA.....2<sup>ND</sup> RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> October, 2020)**

**RULING**

The claimant filed the notice of motion on 04.08.2020 through S.K Opiyo & Company Advocates. The application was under order 51 rule 1 of the Civil Procedure Rules, Sections 1A and 1B of the Civil Procedure Act and all other enabling provisions of the law. The applicant prays for orders:

1. That the entire monies (approximately Kshs.924,259) held in account No. [xxxx] at Guaranty Trust Bank (Kenya) Limited to the order of the advocates for both the decree holder/applicant and the judgment debtor/respondent be released to the firm of S.K Opiyo & Company Advocates, the advocates for the decree holder/applicant or to their order.
2. That costs of the application be provided for.

The application is based on the annexed affidavit of Pascalia Mwende Matheka and the supplementary affidavit of Pascalia Mwende Matheka filed sworn on 01.09.2020. The application is based upon the following grounds:

1. Judgment was delivered on 10.04.2019 in favour of the applicant in the sum of Kshs. 720, 000.00 plus costs and interest.
2. A consent order was recorded on 10.12.2019 that the decretal sum be deposited in a joint interest earning account with Guaranty Trust Bank (Kenya) Limited (the Bank) bearing account No. [xxxx]. By that consent order the respondent was to file the appeal out of time of which leave to do so was consented upon which deposit aforesaid was a condition therefor.
3. Over seven months from the date of the consent order, the applicant has not been served with the appeal record and no such record has been filed. Thus no appeal has been filed or is capable of being filed. Time to file the appeal having lapsed there is no reason why the cash held at the bank should not be released to the applicant.
4. The applicant is facing extreme hardship on account of being out of employment and her business has suffered extreme hardship due to Covid 19 situation.
5. The application is made without any unreasonable delay. The application be granted for interests of equity and justice.
6. There is no pending appeal.
7. Section 34 of the Civil Procedure Act obligates the Court that issued the decree to determine matters relating to the execution, discharge and satisfaction of the decree. The present application is therefore properly before the Court.
8. The respondent has filed an application in the Court of Appeal for extension of time to file the appeal and not for stay of execution.

9. There is no certificate of delay with respect to the respondent's belated application for proceedings.
10. The notice of appeal was filed belatedly on 15.04.2019.
11. The release of decretal sum shall not render the appeal nugatory.

The respondent opposed the application by filing the replying affidavit of Owino Opiyo Advocate and through Aminga, Opiyo, Masese & Company Advocates. The respondent's case is as follows:

1. On 10.12.2019 the consent order was given that there be stay of execution of the decree herein pending the hearing and determination of the proposed appeal subject to the full decretal sum being deposited by close 24.12.2019 in an interest earning account in the parties' advocates joint names.
2. The Court is *functus officio* and the matter has moved to the Court of Appeal. Having granted stay orders pending appeal, the Court cannot sit on appeal against its own decision. Any further deliberations should be before the Court of Appeal.
3. After the amount was deposited, the Court should take judicial notice that it proceeded on the Christmas Vacation and resumed in mid-January 2020 and the respondent has taken steps to follow up for the proceedings.
4. The typed proceedings were supplied by the Court on 10.03.2020. On 13.03.2020 the country declared the Covid 19 pandemic and the Courts closed on 16.03.2020. The Covid 19 situation disrupted running of business for the respondent's advocates and upon resuming duty on 18.05.2020 it was realised that the 60 days to lodge the record of appeal had lapsed on 10.05.2020 and on 19.05.2020 the respondent asked matter to be mentioned before the trial court on 19.05.2020.
5. The respondent has an arguable appeal.
6. The applicant is in serious financial distress and if the decretal amount is released to her and the proposed appeal succeeds, then the respondent may never recover the money.
7. A notice of appeal was filed and served on 16.04.2019 and under the Court of Appeal Rules it serves as an appeal unless it is struck out.
8. The decretal sum having been secured the appeal should proceed without any prejudice to the applicant.

Parties filed their respective submissions. The Court has considered the parties' respective cases and makes findings as follows.

First, as submitted for the applicant, in **Mae Properties Limited –Versus- Joseph Kibe & Planfarm Investments Limited Civil Appeal No. 201 of 2016** it was held that failure to comply with timelines set invites sure consequences and in the case of failure to comply with timelines to lodge an appeal within 60 days after filing of the notice of appeal, Rule 83 (of the Court of Appeal Rules) which was invoked by the applicant therein provides that if a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the Court may on its own motion or on application by any party make such order. The Court further held that the deeming sets in the moment the appointed time lapses and further, **“It is safe to say, therefore that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgement of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to rule 82(1) on exclusion.”** The “Court” referred to in that decided case is the Court of Appeal.

As submitted for the respondent, Order 42 rule 6 (1) of the Civil Procedure Rules provides that 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 Court gave a stay of execution pending appeal and by consent of the parties on 10.12.2019. That order is in place and as per Order 42 rule 6 (1), the applicant should move the Court of appeal. The applicant submits that under section 34 this Court as the trial Court which gave the decree should deal with all matters relating to the execution, discharge or satisfaction of the decree. The Court considers that to be the law but the Court further considers that it has discharged that jurisdiction when it granted the orders of 10.12.2019 and until the Court of Appeal decides the proposed appeal or surrounding matters one way or the other, this Court is *functus officio* in that regard.

The applicant admits that the notice of appeal was filed on 15.04.2019 and an application to file appeal out of time filed for the respondent on 27.11.2019. The Court finds that the matter of propriety and existence of the appeal is properly before the Court of Appeal and the holding in **Mae Properties Limited –Versus- Joseph Kibe & Planfarm Investments Limited Civil Appeal No. 201 of 2016** applies, that is, under rule 83 of the Court of Appeal Rules, the Court of Appeal may on its own motion or on application by any party make the order that the notice of appeal (or appeal) stands withdrawn. The Court considers that such are matters that will be canvassed in the application said to be pending before the Court of Appeal. If the Court of Appeal finds that there is no established case to allow the otherwise belated appeal, then the issue of the fate of the decretal sum held in the bank will fall due accordingly. The Court has well taken judicial notice, as urged for the respondent, that the Covid 19 situation has seriously disrupted the operation of courts and the Court considers that the respondent should be given an opportunity to ventilate the concerns raised (about the belated appeal process) at the Court of Appeal prior to disturbing the terms of the order of stay of execution as given on 10.12.2019, one way or the other. The Court considers that it should be open for the applicant to apply at the Court of Appeal, as may be necessary, with respect to the impugned notice of appeal and the belated record of appeal and, in accordance with the applicable rules of that Court.

In conclusion the application filed on 23.07.2020 is hereby dismissed with orders each party to bear own costs of the application.

**Signed, dated and delivered** by the court at **Nairobi** by video-link this **Friday 16<sup>th</sup> October, 2020**.

**BYRAM ONGAYA**

**JUDGE**