



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1260 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

FELIX MUCHEMI THIRIMA.....CLAIMANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

RULING

Before me, for determination is the Claimant/Applicant's Notice of Motion Application dated 13th July, 2020. It seeks the following orders that:

1. Spent.
2. This Court be pleased to grant the Claimant leave to file a Notice of Appeal out of time.
3. Cost of this application be provided for.

This Application is premised on the grounds that:

- a) The Claimant instituted a suit against the Respondent for wrongful termination on 23rd of July 2016.
- b) The suit was heard and set down for Judgement on 10th of July 2020.
- c) The Judgement was delivered virtually on 19th of June 2020 without notice to the Advocates on record for the Claimant.
- d) The Claimant's Advocate learnt that the Judgement was delivered on 19th of June 2020 after conducting an inquiry at the Milimani Law Courts customer care desk as it was not listed on the Cause List of the 10th of July 2020 when it was scheduled for judgement.
- e) The Applicant being dissatisfied with the judgement of this Court intends to appeal against the same to the Court of Appeal.
- f) The Applicant did not file the Notice of Appeal within the 14 days' timeline because he was not aware that the Judgement had been delivered.
- g) The delay to file the Notice of Appeal within the prescribed time was occasioned by the failure to notify the parties of the delivery of the judgement on 19th of June 2020.
- h) The Applicant will suffer irreparable harm if leave to file his Notice of Appeal is not allowed.
- i) It is in the interest of justice that the Applicant be granted leave to file the Notice of Appeal out of time.

The Application is further supported by the Affidavit of **SALLY OMOTTO**, Counsel on record for the Claimant herein sworn on 13th July, 2020 in which she reiterates the grounds as set out on the face of the Notice of Motion Application.

The Application is filed under Article 159(2)(d) of the Constitution of Kenya, 2010, Sections 1A, 1B of the Civil Procedure Act and Section

17 of the Employment and Labour Relations Court Act.

In response to the Application the Respondent filed a Replying Affidavit sworn by **NIMROD ODONGO MATUNDA**, counsel on record for the Respondent herein on 22nd July, 2020 in which he contends that the application as filed is a non-starter, bad in law and offends the law for the reason that this Court lacks jurisdiction to entertain the same by dint of the provisions of Rule 74 of the Court of Appeal Rules.

He further maintains that the Court of Appeal is the only court with powers to grant the Orders sought by virtue of the provisions of Rule 4 of the Court of Appeal Rules.

The Affiant further averred that the Court did communicate via its official email address (**elrcnaibict1@gmail.com**) on the change in delivery date of Judgment from 10th July, 2020 to 16th June, 2020 and that as a result the Claimant's failure to attend Court on the said date is inexcusable.

He maintained that the instant Application as filed is therefore devoid of merit urging this Court to accordingly dismiss it in its entirety with costs to the Respondent.

Parties agreed to dispose of the application by way of written submissions.

Submissions by the Parties

In its Submissions the Claimant/Applicant maintained that this Court is clothed with the requisite jurisdiction to hear and determine his Application by virtue of the provisions of Section 7 of the Appellate Jurisdiction Act, this Court being of equal status to the High Court under Article 162(2) of the Constitution of Kenya, 2010. The Claimant relied on the Court of Appeal decision in the case of **Kenya Airports Authority & Another v Timothy Nduvi Mutungi (2014) eKLR** where the Court held that the High Court has jurisdiction to hear and determine Applications to extend time to file notice of Appeal.

The Claimant further submitted that he has met the threshold for the grant of the Orders sought in his Application dated 13th July, 2020 as laid down in the Court of Appeal decision in the case of **Pan African Paper Mills (EA) Limited v Olaka (2001) eKLR**.

He further maintained that the delay in filing the said Notice of Appeal was occasioned by the changes in the date of delivery of the Court's Judgment and that his failure to attend Court on the judgment date was not intentional but was occasioned by the mix up in dates. The Claimant relied on case of **Charles Muthama v Wanainchi Group (2015) eKLR** where the Court exercised its discretion and granted the Applicant leave to file their Notice of Appeal due to a mix up in the day of delivery of the Court's Judgment as in the instant case.

The Claimant further argued that the Respondent has failed to demonstrate the manner in which it will be prejudiced if the Orders sought are granted. In the circumstances he averred that the Respondent will in-fact not suffer any prejudice and that allowing the Application will enhance the cause of justice. For emphasis the Claimant relied on the Court of Appeal decision in the case of **Multi Media University of Kenya v Kenya Union of Entertainment and Music Industry Employees (2019) eKLR** where the Court held that the Respondent had not demonstrated by way of Affidavit any prejudice that it stands to suffer in the event the orders sought are not granted.

In conclusion the Claimant submitted that this Court has inherent power to grant the Orders he seeks in his Application dated 13th July, 2020 and urged the Court to find merit in the same and allow it in terms of the Orders sought therein.

Respondent's Submissions

The Respondent on the other hand submitted that the Applicant has failed to give sufficient reasons to warrant the grant of the Orders sought in his instant Application.

It further submitted that the Applicant's failure to attend Court is inexcusable as the change in dates was properly communicated to the parties and that the Claimant deliberately failed to attend the Judgment. The Respondent relied on the case of **Berber Alibhai Mawji v Sultan Hasham Lalji & 2 Others (1990 – 1994) EA 337** where the Court held that *inaction by counsel and/or a refusal to act cannot amount to a mistake, which ought not to be visited on a client.*

Further reference was made to the case of **Itute Ngui & Another v Isumail Mwakavi Mwendwa Civil Application No. Nai. 166 of 1997** where the Court held that whereas an advocate's bona fide error is a special reason for extension of time within which to Appeal, the nature and quality of the mistake must be considered.

The Respondent further submitted that the Applicant failed to highlight to this Court the chances of the success of his Appeal by not attaching a draft Memorandum of Appeal to his Application for scrutiny by this Court. It is therefore the Respondent's contention that the Claimant's intended appeal has minimal chances of success.

The Respondent maintained that sufficient reasons have not been offered by the Applicant to warrant the extension of time to file the Notice of Appeal out of time and that failure to act does not constitute a good and sufficient cause. It further maintains that the Appeal is merely a time wasting tactic and should not be allowed by this Court.

The Respondent remains apprehensive that it stands to suffer prejudice with the continued pendency of this matter noting that the same commenced in the year 2016.

In conclusion the Respondent submitted that the Applicant has failed to sufficiently prosecute his Application and therefore leave ought not be granted as sought in the Application dated 13th July, 2020. The Respondent urged this Court to dismiss the Application in its entirety with costs to the Respondent.

Analysis and Determination

Having carefully considered the grounds in support of the application as set out on the face of the motion and the Supporting Affidavit, the averments in the Replying Affidavits and the submissions made by the parties. I find that the issues for determination are: -

1. Whether this court has jurisdiction to determine the application.
2. Whether leave to file notice of appeal out of time should be granted.

Whether the application is competent the court jurisdiction to determine the application.

The jurisdiction of this court to enlarge the time for filing 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.

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. The said jurisdiction for the trial court to extend the time required for lodging notice of appeal under section 7 aforesaid was confirmed by the Court of Appeal in **Kenya Airports Authority & Another v Timothy Nduvi Mutungi [2014] eKLR** in which Githinji JA had the following to say while faulting the High Court's decision to decline an application for extension of time for lodging notice of appeal: -

“The application of 10th December 2012, was properly made in the High Court as the High Court has power to extent time for giving notice of intention to appeal...”

I find that this Application is properly before this Court.

Whether leave to file notice of appeal out of time should be granted.

The threshold for granting extension of time to lodge notice of appeal was set out by the Court of Appeal in the case of **Pan African Paper Mills (EA) Ltd v Olaka [2001] KLR** in the following terms:

“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.

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.”*

In this case, the impugned judgment was delivered 19th June, 2020. Under rule 75(2) of the Court of Appeal Rules, any dissatisfied party has 14 days within which to file Notice of Appeal. The 14 days' window closed on 3rd July, 2020 before any notice was lodged and none has since been filed.

The instant Application was filed under certificate of urgency on 13th July, 2020, 10 days after the lapse of the limitation period and only 3 days from the date the judgment was due. The reason cited by the Applicant as having occasioned his failure to file the Notice of Appeal on time was that he was not aware of the changes in the date of delivery of the Judgment. Indeed, the judgment herein which was scheduled for delivery on 10th July 2020 was delivered earlier, on 19th June 2020. It is thus understandable that the Applicant may not have been expecting the judgment when it was delivered.

The Respondent on the other hand maintained that this reason is inexcusable as the Court did communicate of the changes in dates via email to the parties and therefore the Claimant had a duty to attend Court as directed.

Given the circumstances of this case, I find that the Claimant's failure to attend court is sufficiently explained and that he did proceed to move this Court immediately he learnt of the Judgment.

On the issue of whether or not the Applicant has an arguable Appeal, that is for the Court of Appeal to determine. In addition, I have considered that the applicant has a constitutional right to a fair hearing which encompasses being able to access justice to the highest level.

It is on this basis that I find that the instant Application has merit and proceed to make the following orders: -

- (1) The Claimant/Applicant is granted leave of fourteen (14) days from the date of this ruling to file and serve a Notice of Appeal.
- (2) The Claimant/Applicant is granted sixty (60) days from the date of the lodging of the Notice of Appeal to file and serve the Record of Appeal.
- (3) Costs of the application to abide the outcome of the intended appeal.
- (4) In default of either item 1 or 2, the leave granted herein will stand lapsed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

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 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

MAUREEN ONYANGO

JUDGE