



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2268 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

MAINA MUNYUA.....CLAIMANT

VERSUS

AMREF HEALTH AFRICA

(PREVIOUSLY AFRICAN MEDICAL AND

RESEARCH FOUNDATION KENYA).....RESPONDENT

RULING

The Claimant/Applicant, Maina Munyua, filed a Notice of Motion Application dated 17th June 2019 brought under Article 159(2)(d) of the Constitution, Sections 3A and 7 of the Appellate Jurisdiction Act Cap 9, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules 2010 seeking Orders that this Court be pleased to extend the time within which the Claimant may file a Notice of Appeal against the Judgment of this Court delivered on 6th May 2019 and for costs of the Application. The grounds in support of the application are that:-

- a) The Claimant is desirous of pursuing an Appeal against the Judgment of this Court delivered by Onyango J. on 6th May 2019.
- b) Failure to file Notice of Appeal in time was not deliberate since the typed Judgment was obtained on 22nd May 2019.
- c) The intended Appeal has a high chance of success as it raises substantial issues of fact and law.
- d) It has only been a month since the said Judgment was delivered and therefore there has not been undue or inordinate delay on the part of the Claimant in filing this Application.
- e) The Respondent will not be prejudiced nor suffer any harm if the Application is granted since the Judgment did not require specific performance on the part of the Claimant or Respondent.
- f) This Application is made in good faith and the grant of the orders herein would be in the best interest of justice.

The Application is supported by the Claimant's Affidavit wherein he avers that his Advocates on record promptly wrote to the Deputy Registrar of the Employment and Labour Relations Court requesting for a certified copy of the said judgment. That when his Advocates visited the Employment and Labour Relations Court registry at Nairobi to file the request for the Judgment, they were informed that the file was still in the Judge's chambers and they could not be furnished with a certified copy of the same until it had been returned to the registry. That when his advocates finally obtained the certified copy of the Judgment, he instructed them to appeal the said judgment but by then, the 14 days statutory period of filing a Notice of Appeal had already lapsed. That his advocates even explored the option of having the time enlarged by consent but the Respondent's advocates did not respond to their letter dated 27th May 2019 requesting for the same. He contends that the further delay was occasioned by their wait in hope that the Respondent's advocates would indulge them in good faith.

He continues to aver that since his hands are tied, he seeks the indulgence of this Court in exercising its discretion for purposes of ensuring dispensation of justice. That he would suffer irreparable harm if he is denied the chance to appeal as he will have lost his last recourse if the Application herein is not allowed. That his right to appeal should only be denied under exceptional circumstances and he believes that the delay has not been inordinate enough to warrant such draconian measure to be taken by this Court. He relies on documents marked **MM-1** to

MM-4 annexed to his affidavit in support of his Application.

Respondent's Case

The Respondent filed a Replying Affidavit dated 28th June 2019 sworn by its Legal Manager, Diana Amuhaya who avers that the Judgment was delivered in the presence of counsel for both parties and that the Claimant does not dispute being aware of the Court's decision as at 6th May 2019. That she is informed by the Respondent's advocates on record that **Rule 75(2) of the Court of Appeal Rules 2010** provides that a party desiring to lodge an appeal against the decision of a superior court ought to give notice in writing which must be lodged within 14 days of the date of the decision. That the Claimant failed, neglected and/or refused to file his Notice of Appeal within the stipulated time and without justification and that the filing of a Notice of Appeal is not dependent on the certification of the Judgment as propounded by the Claimant. That the assertion that the Claimant's advocates acted promptly following the delivery of the Judgment is false because:

- i) The letter purportedly written to the Court on 6th May 2019 requesting for a copy of the Judgment annexed as MM-2 was filed at the Registry on 17th May 2019, 11 days after the Judgment was delivered. No records have been provided to show that the Claimant made subsequent follow-ups with the registry after 6th May 2019.
- ii) The Respondent's advocates wrote a letter to the Claimants on 7th May 2019 forwarding a copy of the draft decree drawn in terms of the Judgment and requesting that they approve the same within 7 days from the date of the letter. That despite acknowledging receipt of the said letter, the Respondent's advocates failed, refused and/or neglected to respond to that letter or communicate their intention to file their Notice of Appeal out of time.
- iii) The Respondent's advocates applied for and obtained a copy of the Judgment on 20th May 2019 and subsequently wrote to the court on 21st May 2019 communicating the lack of response from the Claimant's advocates and requesting for a certified copy of the decree which was issued on 24th May 2019.
- iv) The Claimant's advocates wrote to the Respondent's advocates on 27th May 2019, 21 days after the judgment had already been delivered under the façade of approving the draft decree, which had already been approved and certified by the Court. That it is only then that they communicated their intention to appeal against the Judgment.
- v) The Claimant's advocates filed their present application 42 days after the delivery of the Judgment.

She continues to aver that the Claimant's failure to file a Notice of Appeal in time demonstrates his failure to appreciate the overriding objective of this Court's mandate as set out under Section 3(1) of the Employment and Labour Relations Court Act being the expeditious, efficient and proportionate resolution of employment disputes. That the Claimant has not demonstrated sufficient cause for the delay for the Court to exercise its discretion in his favour and that the relief sought being equitable, equity does not aid the indolent. That the Claimant's case has already been heard substantively and determined by this Court, that the Respondent has been laden with the litigation process since 2014 and has had to bear legal costs on the same. That the Respondent will be unnecessarily burdened with additional costs in respect of an intended appeal which does not raise arguable grounds and that the Application ought to be struck out with costs to the Respondent. She annexes documents marked **DA-1** and **DA-2** in support of the Respondent's case.

Submissions

The application came up for hearing before this court on 3rd July 2019. The Applicant's advocate Ms. Kirui submitted that she relied on the grounds on the face of the application and the affidavit of Maina Munyua. She stated that the applicant had filed a draft Memorandum of Appeal which raises important issues of facts and law and that the Respondent will not be prejudiced as no adverse order was made against it.

The Respondent's advocate, Mrs. Wetende opposed the application and relied on their Replying Affidavit. She stated that the application has not set out good grounds on which the Court can grant the orders sought and prayed that it be dismissed. In a rejoinder the Applicant's advocate stated that on 17th May 2019, the notice period had not lapsed.

Analysis and Determination

The issue for determination is whether the Claimant/Applicant has set out sufficient grounds to justify an extension of time to file his Notice of Appeal.

The Applicant has averred that the intended Appeal raises substantial

issues and that there has been no inordinate delay on his part and further, that the Respondent will not be prejudiced since the said Judgment did not require specific performance by any of them. The Respondent on its part averred that the Applicant has not justified reasons for failing to file the Notice of Appeal in time and that such filing is not dependent on the certification of a Judgment. The Respondent further averred that the Claimant filed this application 42 days after delivery of judgment and has failed to appreciate the overriding objective of this Court. In the case of *Njuguna -v- Magichu & 73 others [2003] KLR 507* Waki, JA held that:

"The discretion exercisable under Rule 4 of this Court's Rules is unfettered. The main concern of the court is to do justice between the parties. Nevertheless the discretion has to be exercised judicially, that is on sound factual and legal basis."

The court in *Pan African Paper Mills (EA) Ltd -Vs- Olaka [2001] KLR* held that a Court, even though in its own discretion, should take into consideration:

- 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 *Christopher Mugo Kamotho vs. the Hon. Attorney General [2009] eKLR*, the relief was withheld for the failure to explain why it took thirteen (13) days to apply for a certified copy of the proceedings. I agree with the Respondent that the Applicant herein has not demonstrated what he did after requesting for the certified copy of the Judgment or why he did not indicate to the Respondent that he intended to file an appeal. He has further not been candid that he did not apply for certified copy of judgment until 17th May 2019. The claimant further did not explain why he needed a certified copy of judgment for purposes of deciding whether or not to appeal.

I have however considered that the applicant has a constitutional right to a fair hearing which encompasses being able to access justice to the highest level. I will therefore grant the application for leave to file notice of appeal out of time but the claimant will pay respondent's costs for this application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF AUGUST 2019

MAUREEN ONYANGO

JUDGE