



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NUMBER 1 OF 2019

[Formerly Misc. Civil App. No. 6 of 2019 at the High Court Malindi]

BETWEEN

LEWIS FAIDA MBOGO.....APPLICANT

VERSUS

SALIM SAID T/A SADIN TIMBER & WOOD PRODUCTS.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kennedy Ngaira & Associates, Advocates for the Applicant

Kaluki Muriu & Company, Advocates for the Respondent

RULING

1. The Applicant was a successful Plaintiff, in CMCC No. 252 of 2013, Malindi. He was awarded, against his Employer, in a claim for work injury, general damages for pain, suffering and loss of amenities at Kshs. 90,000 and special damages at Kshs. 17,000 – total Kshs. 107,000. The problem is, he was ordered to shoulder 75% liability.
3. Judgment was delivered on 13th April 2018. The Claimant did not appeal immediately or any day soon thereafter. He approached the High Court at Malindi on 15th February 2019, 10 months later, seeking leave to file Appeal out of time.
4. The Application was forwarded by the High Court to the E&LRC, on jurisdictional ground. Parties appeared before the latter Court on 26th June 2019, and agreed to have the Application considered on the strength their Affidavits and Submissions.
5. The Applicant filed 2 Affidavits in support, sworn on 14th February 2019, and 14th May 2019 respectively. The Respondent filed his Replying Affidavit, sworn on 15th March 2019. The Applicant filed his Submissions on 5th September 2019, way out of the prescribed period.
6. The Applicant states that Judgment was delivered on 13th April 2018 in his absence. He sought review, through his Advocate, by word of mouth, on 14th August 2018. Review was declined. The Applicant relocated to Nairobi and was unable to communicate with his Advocate, to instruct the Advocate on Appeal. He lost his phone while at Nairobi hindering Advocate/Client communication. He has a good Appeal with probability of success.
7. The Respondent states that the Applicant and his Advocate absented themselves from the Trial Court, while the Trial Court had informed Parties Judgment would be released in the afternoon of 13th April 2018. Parties were given 30 days to appeal. The Applicant has not shown good ground for extension of time. Loss of phone is a frivolous ground advanced by the Applicant. 11 months lapsed from the date of Judgment, before the present Application was presented before the Court. There is no Application for review recorded by the Court.

The Court Finds:-

8. The Applicant has not explained delay of 11 months, from the date Judgment was delivered by the Trial Court, to the time this Application was filed at the High Court.

9. Loss of a phone, hindering communication between the Applicant and his Advocate, is a frivolous explanation. Was it not possible for the Applicant to borrow a phone from a relative, a friend or colleague at his workplace in Nairobi? Was it not possible to send a 'please call me'' message to his Advocates, all else failing? Could he not have communicated through other modes, such as his Advocate's P.O. BOX, disclosed in the Pleadings before the Trial Court? If he lost his Advocate's mobile phone contact, was it not possible to retrieve contact from the Law Society of Kenya at Nairobi? How was he able to instruct his Advocate to make an oral Application for review in August 2018?

10. There is no record showing that the Applicant has applied for review and failed to have review of Judgment, at the Trial Court. Proceedings of the Court are recorded. If they are not in recorded form, then it cannot be said that such proceedings took place at all.

11. The Court is not, in the circumstances, persuaded to exercise its discretion in favour of the Applicant. ***The Application is dismissed with no order on the costs.***

Dated and delivered at Mombasa this 31st day of October 2019.

James Rika

Judge