



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 714 OF 2017

BETWEEN

PATRICK KIPLANGAT KIRUL.....CLAIMANT

VERSUS

ROADTAINERS (MSA) LTD.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Oyugi Kitoo & Company Advocates for the Claimant

Anaya & Company Advocates for the Respondent

RULING

1. In its application filed on 16th July 2019, the Respondent seeks the following main Orders:-

- i. Stay of Execution of Judgment delivered on 13th June 2019, pending Appeal.
- ii. Leave to appeal out of time, and Notice of Appeal filed herein is deemed properly filed.

2. The Application is supported by the Affidavit of Yusuf Ibrahim Pasta, Managing Director of the Respondent, sworn on 16th July 2019.

3. Pasta explains that delay in lodging of the Notice of Appeal happened because the Respondent was not aware of delivery of Judgment on 13th June 2019.

4. The Intended Appeal, he states, has high chances of success. If stay is not allowed, the Appeal would be rendered nugatory. The Claimant has no known source of income.

5. The Claimant opposes the Application, through his Replying Affidavit, sworn on 29th July, 2019. He states that the Respondent was throughout the proceedings represented by the Law Firm of Sachdeva Nabhan Swaleh. Judgment was delivered in the presence of all the Advocates. Delay in filing the Application is inordinate. The Draft Memorandum of Appeal does not show there is an arguable Appeal. The Claimant states he is in a position of repaying the decretal amount of Kshs.663.460 in event the Appeal succeeds, as he is presently farming in Kitale.

6. Parties agreed on 26th July 2019, to have the Application considered and determined, on the strength of the record. They confirmed filing of Submissions on 22nd November 2019.

The Court Finds:-

7. The assertion by the Respondent, that it was late in filing the Notice of Appeal, on the ground that it was not aware of the Judgment date, is not a correct statement of fact.

8. Proceedings took place, and Judgment was delivered, in the presence of all the Parties.

9. The Respondent states it decided to change Advocates after judgment suggesting delay could be attributed to the change. The change in representation cannot justifiably occasion delay in filing of Notice of Appeal.

10. At paragraph 8 of Pasta's Affidavit he states:

"That our former Advocates did not lodge the Notice of Appeal in time due to failure to notify the Respondent on Entry of Judgment."

11. The Respondent was represented in Court when Judgment was delivered. What further notice on Entry of Judgment did the Respondent require?

12. The Respondent has not shown adequate reason to warrant filing of Notice of Appeal out of time.

13. Without a Notice of Appeal validly filed, the other limb to the Application cannot stand. The Intended Appeal has no foundation.

14. Even assuming the failure to file Notice of Appeal on time can be remedied, and Intended Appeal filed, the Respondent has not established that the Claimant is a man of straw, incapable of paying back the decretal sum to the Respondent, in event the Intended Appeal succeeds. The Claimant swears he is a farmer in the Rift Valley Region, and is capable of paying back the decretal sum.

15. In the circumstances, the Court does not see any ground to bar the Claimant from executing Judgment.

IT IS ORDERED: -

a) The Application filed by the Respondent on 16th July 2019 is declined.

b) No order on the costs.

Dated and delivered at Mombasa this 13th day of December 2019.

James Rika

Judge