



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR**

**RELATIONS COURT AT MOMBASA**

**MISCELLANEOUS CIVIL APPLICATION NUMBER 42 OF 2018**

**BETWEEN**

**CHINA JIANGXI INTERNATIONAL [K] LIMITED.....APPLICANT**

**VERSUS**

**ANTHONY WAMBUA DAVID alias**

**ANTHONY DAVID MULU.....RESPONDENT**

**RULING**

1. The Applicant seeks to have execution of Judgment in Kilifi SPMCC No. 29 of 2017 made in favour of the Respondent on 4<sup>th</sup> July 2018, stayed pending Appeal. The Respondent was granted general and special damages arising from work injury, at the SPM'S Court. In the Application filed on 20<sup>th</sup> August 2018, supported by the Affidavit of Applicant's Human Resource Officer sworn on even date, the Applicant prays also, to be granted leave to file Appeal out of time, and annexed Memorandum of Appeal is deemed as duly filed.
2. The Application is opposed by the Respondent, through a Replying Affidavit which he swore on 27<sup>th</sup> August 2018.
3. The Application was heard during the Court Vacation on 29<sup>th</sup> August 2018.
4. The record indicates proceedings closed before the Learned SPM Kilifi in October 2017. Judgment was delivered on 4<sup>th</sup> July 2018, more than 7 months after hearing concluded. There was no notice issued on delivery of Judgment to either Party. A letter from Respondent's Advocates to Applicant's Advocates dated 10<sup>th</sup> July 2018, confirms Judgment was delivered in the absence of the Parties.
5. The Applicant has attached a draft copy of the intended Appeal. There are reasonable and arguable grounds of appeal. The Application was filed without delay, upon discovery that Judgment had been delivered without notice to the Parties.
6. The main ground of opposition argued by the Respondent is that the Applicant ought to have filed an Appeal, and file its Application within that Appeal, instead of filing a Miscellaneous Application.
7. Section 3 and 12 of the Employment and Labour Relations Court [E&LRC] Act, and the E&LRC [Procedure] Rules 2016, which are invoked by the Applicant in approaching the Court, do not create a mandatory procedure on filing of Applications for Stay of Execution and Leave to Appeal out of time. There is nothing in the Law and Rules to which this Court is subject, requiring a Party to file an Appeal before asking for stay of execution or leave to appeal out of time. If a Party feels time within which to present his Appeal has lapsed, it does not look sensible to require that he files the Appeal any way, and seeks extension within the Appeal. A Miscellaneous Application such as the one filed by the Applicant seems to this Court, under the Rules regulating this Court's proceedings, to be the reasonable course to take. The question whether there is an arguable Appeal, is answered through the draft Memorandum of Appeal, exhibited in the Miscellaneous Application.
8. The Court is satisfied the Applicant has demonstrated it has reasonable and arguable grounds of appeal; Judgment was delivered without notice to the Parties; it was a late delivery; the Applicant could not have taken any action without notice of Judgment; and the Application was made without delay upon having wind of delivery of Judgment. The draft Memorandum of Appeal however shall not be deemed as the Memorandum of Appeal duly filed, as sought by the Applicant. The Applicant ought to file a proper Memorandum of Appeal, with a complete Record of Appeal, which shall be received by the Court only upon payment of the requisite Court fees.

IT IS ORDERED:-

*a) Stay of execution of Judgment delivered in Kilifi SPMCC No. 29 of 2017 pending hearing and determination of Applicant's Intended Appeal, is granted.*

*b) The Applicant is granted leave to file its Appeal out of time.*

*c) Appeal shall be filed within the next 45 days.*

*d) Costs of this Application shall be in the Appeal.*

**Dated and delivered at Mombasa this 20<sup>th</sup> day of September 2018.**

**JAMES RIKA**

**JUDGE**