



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 266 OF 2017

WHYCLIFFE BUNDI.....CLAIMANT

VERSUS

FLAME TREE AFRICA LIMITED.....RESPONDENT

RULING

1. This ruling proceeds from the Respondent's application brought by Notice of Motion dated 3rd August 2018 and amended on 18th October 2018 seeking leave to file appeal out of time. The Respondent further seeks an order of stay of execution pending the lodging, hearing and determination of the intended appeal.

2. The application, which is supported by the affidavits of the Respondent's Human Resource Manager, Dee Vona and Joan A. Atim, Advocate is premised on the following grounds:

- a) Following judgment by this Court delivered on 12th July 2018, the Claimant was awarded compensation for unlawful termination and costs of the suit;
- b) The Respondent only found out about the outcome of the case from its Advocates on record, Ms Ajaa Olubayi & Co Advocates on 1st August 2018 vide letter demanding for a cheque for onward transmission to the Claimant;
- c) The Respondent was aggrieved by the outcome of the judgment and also the actions of their Advocates on record in not informing them of the said outcome in time so as to weigh the available options;
- d) The Respondent has now appointed the firm of Momanyi Nyabonyi & Co Advocates to take up the matter;
- e) Unless the orders sought are granted, the intended appeal will be rendered nugatory;
- f) The balance of convenience weighs in favour of the Respondent owing to the substantial amount of money involved.

3. The Claimant filed grounds of opposition on 7th November 2018 stating as follows:

- a) That the application is defective, bad in law, unmerited and an abuse of the court process;
- b) That the Respondent is guilty of laches and the application has been brought after inordinate delay and is calculated to deny the Claimant the fruits of his judgment;
- c) That the application does not meet the mandatory requirements for granting stay of execution pending appeal and should therefore be dismissed;
- d) That the grounds given for seeking stay of execution and leave to appeal out of time are vexatious and frivolous;
- e) That the blame game between the Respondent and its former Advocates should not be extended to the Claimant who obtained a regular judgment.

4. The power of the Court to extend time for lodging a Notice of Appeal is donated by Section 7 of the Appellate Jurisdiction Act which states:

7. Power of the High Court to extend time

The High Court may extend 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 for giving such notice or making such an appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

5. As held by the Court of Appeal in ***Stanley Kahoro Mwangi & 2 others v Kanyamwi Trading Company Limited [2015] eKLR*** the powers of the Court to extend time are discretionary and unfettered and it is upon the applicant to convince the Court that they are entitled to the discretion of the Court in this regard.

6. The factors to be considered by the Court in exercising its discretion are varied and wide but the Court must always balance the competing interests of the parties. This was well articulated in ***Ms Portreitz Maternity v James Karanga Kabia (Civil Appeal No 63 of 1997)*** as follows:

“That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

7. From the record, the Respondent fully participated in the trial, including calling *viva voce* testimony and filing written submissions. The Respondent was therefore fully aware of the proceedings. I must at this point reiterate that cases belong to the parties and not to their Advocates. The refrain that a party was let down by their Advocate is now a tired one and must be confined where it belongs, that is in the realm of advocate/client relationships.

8. In this respect I agree with the holding by ***Mabeya J in Edney Adaka Ismail v Equity Bank Limited [2014]eKLR*** that a party seeking the exercise of discretion in their favour must show tangible steps taken by them to follow up their case. A party cannot be allowed to abdicate their responsibility as a litigant by pointing an accusing finger at their Advocate.

9. The timelines set in the appellate litigation chain are not merely technical. They play in the league of substantive justice as they inform litigants on their next course of action. Court cases have a way of holding life back and the Court has a responsibility to ensure that they are brought to closure expeditiously. For a party to be allowed to hold or step back this process, they must have a good reason.

10. The only reason advanced by the Respondent for failure to file the Notice of Appeal in time is that they were not advised by their Advocates on record in good time. With tremendous respect, this is at best a lame excuse and not a valid ground for extension of time.

11. In the circumstances therefore, this Court finds and holds that no sufficient reason has been presented to move it to exercise its discretion in favour of the Respondent. The result is that the Respondent’s application dated 3rd August 2018 and amended on 18th October 2018 is disallowed with costs to the Claimant.

12. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF NOVEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Ajigo for the Claimant

Miss Atim for the Respondent