



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1195 OF 2016**

**PETER MUTUKU NTHUKU.....CLAIMANT**

**VERSUS**

**PERIMETER PROTECTION LTD .....RESPONDENT**

**R U L I N G**

1. The Application before me is the Respondent Notice of motion dated 24/8/2018 seeking the following orders:

- (a) That there be stay of execution of any order or decree arising out of the Judgment delivered on 31/07/2018 pending hearing and determination of this application and the intended Appeal;
- (b) That Leave do issue to file the Notice of Appeal out of time;
- (c) That the applicant be supplied with certified copies of typed proceedings and judgment; and
- (d) That costs of this Motion to abide the result of the appeal.

2. The Motion is supported by the affidavit sworn by the applicant's Operations Manager one Daniel Wamarite, on 24/8/2018 and is premised on the following grounds set out on the body of the Motion in addition to the fact that the applicant's counsel was indisposed at the material time:

- i. The Respondent is greatly aggrieved by the Judgment delivered on 31st July 2018.
- ii. The 14 days granted to the Respondent to file the Notice of Appeal has expired.
- iii. The 30 days stay of execution granted to the Respondent is about to expire.
- iv. The delay in filing the Notice of Appeal is not inordinate.
- v. The delay in filing the Notice is excusable and was caused by unavoidable circumstances.
- vi. The Respondent has an arguable appeal with high chances of success.
- vii. The Respondent is an employer of about 200 security guards and enforcement of the judgment on similar cases will lead to closure of the Respondent.
- viii. The Respondent will suffer substantial loss in the event that the judgment delivered on 31/07/2018 is executed whereas the intended appeal is arguable and has a high chance of success.
- ix. In the event the Claimant is paid the decreed sum, chances of recovery in the event of the Appeal succeeding are minimal as the Claimant is not a man of any known means.
- x. The Respondent is willing and able to furnish such reasonable security as this Honourable Court may direct and is prepared to abide by any such conditions as to security as the court may deem fit and proper.

xi. This Application has been made without unreasonable delay.

xii. It is in the interest of justice that the prayers sought be granted.

3. The Claimant has opposed the application by his Replying Affidavit dated 11th September, 2018 stating that the Respondent's Application dated 24/08/2018 is incompetent and an abuse of the Court process and should be struck out or dismissed with costs. That the Respondent has come to this Honourable Court unprocedurally and with unclean hands because it has not served him with a Notice of Appeal to indicate that it is aggrieved by the Judgment delivered by this Court on 31/07/2018. That, it is trite law that an Applicant seeking to file an Appeal out of time must first file the notice of appeal and simultaneously seek the Court's leave to have such an appeal admitted out of time. That the law does not permit an intending appellant to first seek permission to admit a non-existent Notice of Appeal out of time.

4. The claimant further deposed that the Application is a tactic to deny him his right to enjoy the fruits of the orders and decree granted as the intended appeal lack merits and it is time barred. That the Respondent's allegation that her Advocate was sick is not a sufficient reason because the medical report adduced as exhibit shows that he had a week in between the hospital visits and should therefore have filed this Application and notice of appeal on or before 8/08/2018. He therefore contended that the Respondent's failure to file and serve the Notice of Appeal in time was deliberate and calculated to defeat the course of justice and as such, the stay sought herein should not be granted.

5. He further deposed that the application herein has been made after undue delay and as such granting the orders sought will prejudice the him by depriving him the right to enjoyment of his judgment. He therefore prayed for the application to be dismissed with costs.

#### Analysis

6. There is no dispute that I delivered judgment herein on 31/7/2018 whereby I awarded the claimant damages including gratuity under Regulation 17 of the Regulation of Wages (Protective Security Services) Order 1998. There is also no dispute that claimant never filed a Notice of Appeal within the limitation period to impugn the said judgment. The issues for determination are:

(a) Whether the application is competent the court jurisdiction to determine the application.

(b) Whether stay of execution should be granted pending appeal.

(c) Whether leave to file notice of appeal out of time should be granted.

#### Jurisdiction

7. The jurisdiction of this court to enlarge the time for giving notice of appeal is donated by Section 7 of the Appellate jurisdiction Act which provides as follows:

***“The High Court may extend the 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 of giving such notice or making such appeal may have already expired”.***

8. The foregoing provision applies to this court because under the 2010 constitution, decisions of this court, like those of High court are appealable to the Court of Appeal under the same Act and the Rules thereunder. The said jurisdiction for the trial court to extent the time required for lodging notice of appeal under section 7 aforesaid was confirmed by the Court of Appeal in ***Kenya Airports Authority & another vs Timothy Nduvi Mutungi [2014] eKLR*** in which Githinji JA had the following to say while faulting the high court's decision to decline an application for extension of time for lodging notice of appeal :

***“ The application of 10th December 2012 , was properly made in the High Court as the High Court has power to extent time for giving notice of intention to appeal...”***

#### file notice of appeal

Leave to

9. The threshold for granting extension of time to lodge notice of appeal was set out by the court of Appeal in ***Pan African Paper Mills (EA) Ltd -Vs- Olaka [2001] KLR*** in the following terms:

***“1. In an application for leave to file and serve a Notice and Record of Appeal out of time, the Court is being asked to exercise its unfettered discretion which is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it's not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.***

***2. The decision whether or not to extend the time for appealing is essentially discretionary. In general, the matters which the Court takes into account in deciding whether to grant an extension of time are:***

***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.”*

10. In this case, I entered the impugned judgment on 31/7/2018 and under rule 75(2) of the Court of Appeal Rules, any dissatisfied party had 14 days within which to file Notice of Appeal. The 14 days window closed on 14/8/2018 before any notice being lodged and none has since been filed. The application was filed on 27.8.2018, 13 days after the lapse of the limitation period. By all standard, I am of the view that the said time taken by the applicant to make the application herein cannot be described as an unreasonable delay.

11. The main reasons cited for the delay in filing the notice of appeal are that the applicant's counsel was ill and the impugned judgment was not availed to him in good time. The applicant has annexed as an exhibit the medical report for his counsel indicating that he had suffered a back problem and had been on bed rest between 8.8.2018 and 16.8.2018. The said medical condition has not been disputed and I believe the applicant should be excused from the default to file notice of appeal due to his counsel's sickness. Holding otherwise would result to an injustice and unwarranted prejudice to the applicant's right of appeal.

12. The claimant has contended that granting the leave will prejudice his right to enjoyment of the impugned judgment. However the applicant has shown willingness to pay to the claimant the undisputed Kshs.38,285 and to have the disputed sum of Kshs.174,611 deposited in an interest earning account in the joint name of the Advocates on record for both parties. In my view, the said arrangement is a proper way of guarding against prejudice to both parties. In any event the perceived prejudice can be remedied by an award of costs.

13. As regards the chances of success, I wish to eschew any opinion on that because I cannot sit on appeal over my own decision. All I can say is that after considering the applicant's affidavit, the annexed draft Memorandum of Appeal and submissions, I am satisfied that the intended appeal is arguable because it faults the court for awarding service gratuity that was allegedly not specifically pleaded but only raised in the submissions after the hearing.

14. The claimant objected to the application on ground that there is no notice of appeal filed out of time which the applicant seeks to be regularized by the leave sought. Although the claimant submits that it is trite law that the application should be filed after or simultaneously with the notice of appeal for which for enlargement of time is sought, no written law or precedents were cited to fortify that proposition. Section 7 of the Appellate Jurisdiction Act, cited above, only donates jurisdiction to the trial court to extend time for giving notice of intended appeal but it does not detail the procedure of doing so.

15. The court should therefore refuse to be caged by the procedural technicalities of what precedes the other between the notice of the intended appeal and the application for extension of time to file the said notice. Once the limitation period for lodging the notice of an intended appeal lapses, the intended appellant has the option of seeking leave to enlarge the time before lodging the notice, or to lodge the notice simultaneously or thereafter apply for extension for the limitation period. At the end of it all, the court should aim at achieving substantive justice.

16. In view of the foregoing analysis and in order to do justice, I return that the application has met the threshold for grant of leave to enlarge time for lodging notice of appeal out of time. I therefore grant the applicant leave of 14 days from the date hereof to lodge and serve her notice of appeal as prayed.

17. As regards the claim for stay, I return that it should wait until such a time as the applicant files a notice of the intended appeal for it to have any basis. Consequently, I decline to entertain the stay application at this juncture and proceed to strike it out.

#### **Conclusion and disposition**

18. I have found that the application for stay pending appeal is premature and not well founded and I struck it out. I have further found that the application for leave to lodge notice of intended appeal has merits and I allowed it. Consequently, the notice of Motion dated 24/8/2018 is partially allowed to the extent that the applicant is granted leave of 14 days within which to file and serve a notice of the intended appeal.

The applicant will however redress the upset caused to the claimant by paying him Kshs.15,000 as thrown away cost for the application.

**Dated, Signed and Delivered in Open Court at Nairobi this 23rd day of November, 2018**

**ONESMUS N. MAKAU**

**JUDGE**