



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 881 OF 2011

(Before D.K.N. Marete)

KENYA BUILDING, CONSTRUCTION, TIMBER, FURNITURE
AND ALLIED EMPLOYEES UNION.....CLAIMANT

Versus

SMOKY HILL LIMITED.....1ST RESPONDENT

RULING

This is an application dated 28th November, 2013 and brought to court under a certificate of urgency of the same date. It seeks the following orders of court;

1. *THAT this matter be certified as urgent, service upon the **claimant/respondent** be dispensed with.*
2. *THAT this Honorable Court be pleased to enlarge time within which the Applicant shall file its Notice of Appeal against the ruling of **Hon. D.K. Njagi Marete J.** delivered on **18.7.2013** at the Industrial Court sitting at Nairobi under this cause.*
3. ***THAT** this Honourable Court be pleased to grant stay of execution of the ruling of **Hon. D.K. NJAGI MARETE** delivered on 18.7.2013 at the Industrial Court sitting at Nairobi under this cause pending the hearing and determination of this application.*
4. *THAT this Honourable court be pleased to grant stay of execution of the ruling of **Hon. D.K. NJAGI MARETE** delivered on 18.7.2013 at the Industrial Court sitting at Nairobi under this application at the Industrial Court sitting at Nairobi under this cause for thirty days.*
5. *THAT the cost of this application be in the cause.*

It is supported by the affidavit of Tony Rusafio sworn on the same date.

The respondent in a replying affidavit sworn on 16th January, 2014 opposed the application on grounds of being frivolous, vexatious and prays that the same be struck out.

The matter variously came to court until the 22nd January, 2014 when the parties agreed to dispose of the matter by way of written submissions. This was done.

In their replying affidavit the claimant/respondent submits and avers that the applicants are to blame for being absent at the time of the ruling. This is because both parties were advised of the date of the ruling but the respondent/applicant did not show up for the ruling on due date. He only now wakes up from a slumber when the claimant moves on to execute judgement as delivered in court on 19th October, 2011.

The respondent further argues that the present application comes to court about five months down the line which in itself is inordinate delay intended to delay the realization of judgement in the matter. Again, the respondent/applicant seems to engage the claimant to endless court battles on a simplistic matter of recognition where he even intends to appeal against the judgement of court. This is a waste and should be dismissed with costs. Moreover, the respondent/applicant has not demonstrated the slightest chances of success in her appeal. The claimant/respondent deems this an attempt at obstructing the cause of justice and prays the same be dismissed with costs.

The applicant in her written submissions invokes the inherent powers of the court as provided in Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya that give the courts wide and free power the management and application of the discretion in deciding cases before them. This is more so bearing in mind Article 159 (2)(d) of the Constitution of Kenya, 2010 that empowers courts to administer justice without undue regard to the technicalities. Two, the applicant argues that he should not be blamed for the delay in filing a notice of appeal or the appeal itself as this is the domain of her counsel and in any event this should not be visited on herself. She therefore prays that this matter be sustained.

The claimant/respondent opposes the application. She sought to rely on the authority of **Leo Sila Mutiso Vs. Rose Hellen Wangari Mwangi, Civil application No. Nai 251 of 1997**

“It is now well settled that the decision whether to extend the time for appealing is purely discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are (1), the length of the delay, (2) the reason for delay, (3) the chances of the appeal succeeding if the application is granted and (4) the degree of prejudice to the Respondent if the application is granted”.

In the circumstances of this case there is inordinate delay the ruling intended to be appealed against having been delivered on 18th July, 2013 and present application being filed on 10th December, 2013 well over four months down the line. The applicant argues that the reasons for the delay was that he was not present at the reading of the ruling but again this is not excused. She does not adduce any concrete grounds for being absent during the ruling. The applicant is therefore the author of her own misfortune and should not be heard to complain.

The applicant has not lobbied for a case on the viability and arguability of the intended appeal. She does not demonstrate her chances at the Court of Appeal, or at all. She does not even launch a notice of appeal in the circumstances. This should not be sustained. It is a case of daring carried too far. The applicant just comes out of her way to take the court and the parties for a ride.

The application should therefore be dismissed for being frivolous and an abuse of the process of court.

This court buys into the submissions of counsel for the claimant/respondent. The application cannot stand the test of time and space and I therefore dismiss it with cost to the respondent.

Delivered, dated and signed the 9th day of April, 2014.

D.K. Njagi Marete,

JUDGE.

Appearances:

1. Ms. Chege for the claimant union.
2. Mr. Nzaku instructed by Mwema & Associates Advocates for the respondent.