



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu, DCJ & VP, M. Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

CIVIL APPLICATION NO. E032 OF 2023

FRANCIS OYATSIAPPLICANT

-VERSUS-

NZOIA SUGAR COMPANY LIMITEDRESPONDENT

(Being an application for enlargement of time to file and serve a notice of appeal and/or appeal and stay of execution of the order in Civil Appeal No. 47 of 2012 at Nairobi dated 22nd day of April 2023

And

An application seeking amendment leave to amend notice of motion)

Representation

Mr. Oyatsi for the Applicant
(Shapley Barret & Company Advocates)

Mr. Edmond Wekesa for the Respondent.
(Wekesa & Simiyu Advocates)

RULING OF THE COURT

[1] This Ruling will dispose of two applications that are before the Court. Both applications have been filed by the applicant. The first is dated 29th August 2023 seeking enlargement of time to file an appeal and stay of execution of the Court of Appeal judgment dated 22nd April 2021. The

second, dated 2nd October 2023, seeks leave of the Court to amend the Notice of Motion dated 29th August 2023.

[2] The litigation background between the applicant and the respondent commenced at the Employment and Labour Relations Court (ELRC) wherein the applicant had made a claim for wrongful dismissal. The ELRC found in his favour and awarded him a sum of Kshs. 13, 464,217.00. The respondent appealed against that decision and the Court of appeal reversed the ELRC judgement and vide its judgment dated 8th March 2019 reduced the award to Kshs. 2,285,189.00. (the date and mode of delivery of the Court of Appeal judgment is the main contention in both applications). The respondent thereafter made an application for settling terms of the decree. The same was determined by a one-judge bench of the Court of Appeal (*Asike Makhandia JA*) on 22nd April 2021.

[3] Given the nature of the orders sought in the application dated 2nd October 2023 we find it is apt to begin with the same. In the application, the applicant prays for this court to grant him the following orders:

1. ***THAT*** the applicant be granted leave to amend its notice of motion dated 29th August 2023 as per the attached draft amended notice of motion.
2. ***THAT*** the costs of the application be provided for.

[4] The application is supported by an affidavit sworn by the applicant and written submissions both dated 2nd October. The amendment ostensibly seeks to add the final decision of the Court of Appeal dated 8th March 2019 as part of the prayer seeking enlargement of time to file an appeal-initially the applicant had sought enlargement of time to appeal against the consequential orders of 22nd April 2021 only.

[5] The applicant, in making his application, contends that there is discovery of new and important facts disclosed by the respondent's replying affidavit served upon him on 25th September 2023. And that he

has realized, for the first time, that the Court of Appeal's judgment was delivered on 8th March 2019, without prior notice to him, reasons which are entirely different from the reasons preferred in his application dated 29th August 2023. He further contends that, he has all along doubted the genuineness of the Court of Appeal judgment since it was not lawful for the superior court to issue a notice of delivery of judgment on 4th March 2019, giving notice to the parties that judgment was to be delivered on 7th June 2019 and contrary to the said notice, deliver that judgment four (4) days later-on 8th March 2019-without giving notice to the parties; and that therefore, without prior notice to the parties and specifically to him, the decision of the Court of Appeal was invalid, null and void. In this regard the applicant referred to this court's decision in **Geoffrey. M. Asanyo & 3 Others versus Attorney General** SC Petition No. 21 of 2015.

[6] The application has been opposed by the respondent's vide grounds of opposition and a replying affidavit sworn by the respondent's company secretary, **Rita Mukhongo**-both dated 13th October 2023-and the respondent's written submissions dated 17th October 2023 wherein the respondent submits that it informed the applicant the circumstance under which it became aware of the judgment vide a letter dated 29th October 2019; and that, it was incumbent upon the applicant to make enquiries with the Court of Appeal Registry as to the circumstances under which the judgment was delivered on 8th March 2019; no such enquiries have been set out by the applicant. That, additional proceedings between the parties herein have also taken place subsequent to the delivery of the judgment of the Court of Appeal -without the applicant raising these new issues-including an application for settling terms of the decree, proceedings at the Employment and Labour Relations Court seeking refund of Kshs. 8,061,000.00 and thereafter, a ruling was delivered on 25th February 2022 and lastly, an application was filed and still pending determination at the Court of Appeal, dated 21st April 2021, wherein the applicant seeks orders

to set aside and/or review the Court of Appeal's judgement dated 8th March 2019.

[7] The respondent further submitted that the application is fatal for being predicated on the wrong statutory provisions; the applicant has not shown that he could not have obtained the alleged new information with reasonable due diligence for use at the time of filing the application dated 29th August 2023; previous conduct of the applicant disentitles him of the exercise of this Court's discretion and lastly, the applicant cannot maintain an appeal before this court and a review of the same judgment in the Court of Appeal. The respondent cited the following authorities in support of its submissions: ***Daniel Kimani Njihia v Francis Mwangi Kimani & another*** [2015] eKLR, ***Hamdia Yaro'i Shek Nuri v Faith Tumaini Kombe & 2 Others*** [2019] eKLR, ***Cyrus Shakhhalaga Khwa Jirongo v Soy Developers Limited & 9 Others*** [2020] eKLR, ***Sheikh t/a Hasa Hauliers v Highway Carriers Ltd*** [1988] eKLR ***Mary Wambui Njuguna v William Ole Nabala & 9 Others*** [2018] eKLR.

[8] Having considered the application dated 2nd October 2023, response and the submissions filed by both the applicant and by the respondent, we find that the provisions of Section 21(2) of the Supreme Court Act 2011 and Rule 3(5) of the Supreme Court Rules 2020 grant this Court inherent power to make any ancillary or interlocutory orders as may be necessary for the ends of justice. This Court therefore has discretion to allow amendments to determine the real questions in dispute and to do substantial justice. We have determined as much in ***Stephen Maina Githiga & 5 others v Kiru Tea Factory Company Ltd*** Sup. Ct. Application No.12 of 2019 [2019] eKLR, and in ***Kampala International University versus Housing Finance Company Limited*** Sup. Ct. Application No. 34 (E035) of 2021.

[9] The applicant states that he learnt of the Court of Appeal's determination on 25th September 2023 making the same a fresh and important discovery. In ***Cyrus Shakhilaga Khwa Jirongo v Soy Developers Limited & 9 others*** Sup. Ct. Appl. No. 38 of 2019 [2020] eKLR this Court held that an applicant has to show that the additional, new and fresh evidence could not have been obtained with reasonable diligence for use at the trial, was not within his knowledge, or could not have been produced at the time of the suit or petition due to the circumstances beyond him.

[10] Based on the evidence presented, it is now over four (4) years since the impugned decision was made and it is clear to us that, on or about 27th October 2019, the applicant was made aware of the delivery of the Court of Appeal judgment by the respondent and the decision was also made available at the Kenya Law Reports virtual portal. In those circumstances, the same does not qualify as a new discovery. Further to that fact, there have been proceedings-set out above- after delivery of the superior court's decision in which the applicant robustly participated. The application is reactionary and filed only upon the issue being raised by the respondent; his averment that he only became aware of the determination of the court of decision on 25th September 2023 is therefore misleading. It cannot in any event amount to a new discovery or a call for new/fresh evidence not within the applicant's knowledge. The applicant has, in the circumstances, not satisfied this Court that he is entitled to the exercise of discretion to warrant the prayers sought in his application dated 2nd October 2023.

[11] We now turn to the application dated 29th August 2023 wherein the applicant seeks the following Orders;

1. ***THAT*** the applicant be granted extension or enlargement of time to file and serve notice of appeal and or appeal against the order of the court of appeal dated the 22nd April 2021 in Nairobi Civil Appeal No. 47 of 2012.

2. THAT if leave is granted in (2) above this Honourable Court in exercise of its inherent power do further grant a stay of execution of the Court of appeal Order dated 22nd April 2021 in Nairobi Civil Appeal No. 47 of 2012 pending hearing and determination of the intended appeal.

[12] The application, is supported by the sworn affidavit of the applicant and written submissions both dated 29th August 2019 wherein he contends that the delivery of the Court of Appeal decision dated 8th March 2019 was not in accordance with Article 3 as read with Article 35 of the Constitution as well as Rule 32 of the Court of Appeal Rules. The applicant also highlights the sequence of events as follows; the Court of Appeal issued a notice on 4th March 2019 for delivery of its decision on 7th June 2019, but the decision was instead delivered earlier-on 8th March 2019. On 18th October 2019, the applicant's advocates then received a letter from the respondent's advocates seeking approval of a draft order extracted from the judgment. The applicant's advocates rejected the request to accept the validity of the judgement and approval of the draft Order. The respondent vide a letter dated 29th October 2019 advised the applicant that it had found the judgment at the Kenya law portal but had thereafter written to the court to be issued with a certified copy of the judgment.

[13] The applicant urges in the above context that he took the following steps at the Court of Appeal to show that he does not agree with the validity of the judgment; first, he filed submissions in the settling of terms application where he disputed its validity. Secondly, he filed an application dated 21st April 2021 seeking orders that the Court of Appeal does recall, cancel the judgment and hear the appeal afresh. That the Court of Appeal has not given any directions as to the hearing of the said application and he therefore relies on this court to issue him a remedy by enlarging the time to file his intended appeal and issuing stay orders against the

impugned decision. He cites the following authorities in support of his submissions: ***Geofrey M. Osanyo & 3 Others versus Attorney General*** (supra), ***Omega Enterprises (K) Ltd vs Kenya Tourist Development Corporation & 2 Others*** Civ. Appeal No. 59 of 1993 and in making the point that a decision not delivered in accordance with the law and in particular a judgment that is neither dated nor delivered in open court is a nullity.

[14] In response to the application the respondent filed notice of preliminary objection, grounds of opposition, replying affidavit sworn by **Rita Mukhongo**, all dated 25th September 2023 and submissions in support of the preliminary objection dated 26th September wherein it contends that, from the provisions of Article 163 of the Constitution and Rule 34 of the Court of Appeal Rules, this court lacks jurisdiction to hear appeals from the decision of a single judge of the Court of Appeal on the settlement of terms of an order and equally lacks jurisdiction to stay execution of the order of the single judge; the inordinate delay of over two (2) years' in bringing the application has not been explained hence the applicant has not met the conditions set out in ***Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 7 others*** [2014] eKLR.

[15] On the prayer for stay orders, the respondent submits that the jurisdictional entry point for an application for stay is the presence of a proper notice of appeal absent of which the court lacks jurisdiction to grant the order for stay of execution; it is untenable to appeal against the order for settling of terms whilst the judgement giving rise to the order is intact. In support of its preliminary objection the respondent cited the case this court's decisions in ***Daniel Kimani Njihia versus Francis Mwangi Kimani & Another*** (2015) eKLR, ***Teachers Service Commission versus Kenya National Union of Teachers & 3 Others*** [2015] eKLR, ***Lawrence Nduttu & 6000 Others versus Kenya Breweries***

Ltd & Another (2012) eKLR, *Mombasa County Government versus Kenya Ferry Services & Another* [2019] eKLR, *Executive of Kisumu versus County Government of Kisumu & 8 Others* [2017] eKLR.

[16] The applicant filed a rejoinder to the respondent's replying affidavit dated 2nd October 2023 wherein he reiterated that he only became aware of the Court of Appeal judgment on 25th September 2023 and therefore his plea before us is warranted.

[17] On our part we must reiterate our prior holding in many a case that, extension of time is not the right of a party. It is an equitable remedy that is only available to at the discretion of the Court to a well deserving party. The under-lying principles that a court should consider in determining whether to extend time to lodge an appeal were aptly set out in the *Nicholas Salat case* (*supra*) to include amongst others; a. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;* b. *Whether there will be any prejudice suffered by the respondents if the extension is granted and* c. *Whether the application has been brought without undue delay.*

[18] We have already held that the applicant was, from 29th October 2019, well aware of the final decision of the Court of Appeal and its delivery on 8th March 2019. The orders the applicant now seeks to appeal against is in relation to the one issued on 22nd April 2021. This order is in respect to settling terms of the decree and the same was issued by a one- judge bench (*Asike Makhandia JA*). *First*, In *David Kimani Njihia v Francis Kimani & Another* SC Civ Appl. No. 3 of 2014 [2015] eKLR we held that this court will not interfere with the mandate of the superior courts especially if the same arises from discretionary pronouncements appurtenant to appellate court's mandate. *Secondly*, the applicant does not dispute that he took part in the proceedings leading up to the decision; there has been no formidable explanation why it has taken the applicant

this long to seek the prayers sought. The application has therefore been brought with unreasonable delay. *Third*, even if this court were to find that the delay was reasonable the applicant concedes that he has filed an application dated 21st April 2021 seeking the Court of Appeal to recall, cancel the judgement and for the appeal to be heard afresh. Once the applicant took the root of reviewing the Court of Appeal's decision the option to pursue an appeal is no longer available or placed in abeyance to be reverted to at a later stage. We have found as much in ***Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others*** [2015] eKLR and in ***University of Eldoret & Another vs Hosea Sitienei & 3 others*** SC Application No.8 of 2020 [2020] eKLR where we held as follows:

“[34] We therefore note that when the applicants preferred to pursue review of the decision, as they were entitled to, that was the best option in their assessment even if it turned out to be unsuccessful. Allowing them to take the second option at this stage, as if they never exercised the first option in the first place, would not only contribute to protracting litigation but also defeat the whole essence of finality of the litigation process. This would mean that precious judicial time and resources would have been unnecessarily expended in not settling the dispute but rather satisfying the litigants’ options to cherry pick and engage in trial and error at the altar of judicial process without the attendant consequences.”

[19] We therefore find that the application for enlargement of time fails on two fronts; the application has been brought inordinately late, and there being a pending application before the Court of Appeal raising the same issues raised herein. Having found as much, and there being no notice of appeal, or substantive appeal before us, the application for stay of execution equally fails.

[20] On costs, we are guided by the decision in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others SC. Pet. No. 4 of 2012 [2014] eKLR** which held that an order on cost is a judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice considering the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation. Taking due regard of the merits of the case and the industry undertaken by the respondent we find that the respondent is entitled to costs of both applications.

[21] Consequently, we make the following orders:

- a) *The Notice of Motion dated 29th August 2023 and filed on 1st September 2023 is hereby dismissed.*
- b) *The Notice of Motion dated 2nd October 2023 and filed on 5th October 2023 is hereby dismissed.*
- c) *Costs of the both applications are awarded to the respondent.*

Orders accordingly.

DELIVERED at NAIROBI this 8th day of December, 2023.



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P.M. MWILU
DEPUTY CHIEF JUSTICE &
VICE PRESIDENT OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU

.....
I. LENAOLA

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

**REGISTRAR,
SUPREME COURT OF KENYA**

