



Odhiambo & 4 others (Sued in Their Capacity as the Trustees of the Cradle – The Children Foundation) v Odera (Civil Appeal (Application) 151 of 2019) [2024] KECA 368 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KECA 368 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 151 OF 2019
SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA
APRIL 12, 2024**

BETWEEN

**MILLIE G.A. ODHIAMBO 1ST APPELLANT
JACQUILINE ANAM 2ND APPELLANT
JEFFREY MAGANYA 3RD APPELLANT
WANJAU MURIU 4TH APPELLANT
ANDIA ADEKA 5TH APPELLANT
SUED IN THEIR CAPACITY AS THE TRUSTEES OF THE CRADLE – THE
CHILDREN FOUNDATION**

AND

TONY MOSES ODERA RESPONDENT

(An application to strike out the appeal filed against the judgment of the Employment and Labour Relations Court at Nairobi (Rika, J.) delivered on 18th August 2016 in ELRC Cause No. 1373 of 2010)

RULING

1. Tony Moses Odera, the applicant in this application and the respondent in the appeal moved the Court by application dated 25th April 2019 seeking an order that this appeal be struck out. The appeal arises from the judgment of the Employment and Labour Relations Court (ELRC) (Rika, J.) delivered on 18th August 2016 awarding the applicant damages for unfair termination of his employment by the appellant. The Notice of Appeal dated 14th May 2018 was deemed as having been properly filed out



of time by an order of the Court given on 20th December 2018 and the Memorandum and Record of Appeal subsequently filed on 16th April 2019.

2. Although there was no appearance for the applicant during the hearing of the motion on 6th February 2024 despite service of notice of hearing, his contention, as articulated in the grounds in support of the application, the affidavit in support and the submissions filed on his behalf by Rabala & Company Advocates dated 25th November 2019, is that the appeal should be deemed as withdrawn under rule 83 (now rule 86) of the Court of Appeal Rules as the Record of Appeal should have been filed within the prescribed 60 days. The decision in Tropicana Hotels Limited vs. SBM Bank (Kenya) Limited (formerly known as Fidelity Commercial Bank Ltd [2020] eKLR in support of the proposition that the appeal should be deemed as withdrawn was cited.
3. On the other hand, the appellant (respondent in the application) through a replying affidavit sworn by learned counsel Mr. Collins Namachanja, as well as his written submissions of 6th July 2022, that it applied for typed proceedings from the ELRC by a letter dated 14th May 2018 which was duly copied to the applicant's advocates; and that the effect was that the time for filing the record of appeal was postponed. The case of Kenya Ports Authority vs. Maur Abdalla Bwanamaka [2018] eKLR was cited.
4. It was pointed out that a Certificate of Delay dated 15th April 2019 was issued by the ELRC, which according to learned counsel for the appellant has not been duly considered by the applicant in making the present application, and neither, it was submitted, did the applicant take into account the Christmas Vacation between 21st December 2018 and 13th January 2019 which should be excluded in computing the time for filing the record of appeal.
5. As the Court stated in the case of Kenya Ports Authority vs. Maur Abdalla Bwanamaka (above) where an application for typed proceedings is made and duly served on the respondent to the appeal, the time taken to compile the proceedings is exempted in the computation of the 60 days, within which a memorandum and record of appeal should be filed.
6. We have seen at page 193 of the Record of Appeal, a Certificate of Delay dated 15th April 2019 issued by the Deputy Registrar of the ELRC certifying that the period for preparation and delivery of the proceedings and award "is 14th May 2018 to 18th March 2019 that is 308 days" and that the Certificate of Delay "was prepared and made ready for collection on 15th April 2019". The Memorandum and Record of Appeal was filed promptly the following day on 16th April 2019.
7. Having regard to that unchallenged Certificate of Delay which appears to have escaped the attention of the applicant, the applicant's application dated 25th April 2019 fails and is hereby dismissed with costs to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

