



**Mungori & another v Diamond Trust Bank Limited (Civil Application
E120 of 2023) [2023] KECA 859 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 859 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E120 OF 2023
HM OKWENGU, JA
JULY 7, 2023**

BETWEEN

HUMPHREY M MUNGORI 1ST APPLICANT

SAMSON THUKU MUTISO 2ND APPLICANT

AND

DIAMOND TRUST BANK LIMITED RESPONDENT

(An application for extension of time within which to file and serve the record of appeal from the judgment of Employment & Labour Relations Court at Nairobi (Abuotha J.) dated 2nd October 2015 in ELRC Cause No. 907 of 2013. As consolidated with ELRC Cause Nos. 904, 905 & 906 of 2013.)

RULING

1. The applicants, Humphrey M Mungori and Samson Thuku Mutiso have moved this Court under sections 3(1) of the *Appellate Jurisdiction Act*, Cap 9 of the Laws of Kenya and Rules 4, 41, 42 & 49 of the *Court of Appeal Rules 2010*. They are seeking leave of the Court to file and serve the record of appeal against the judgment delivered on October 2, 2015, out of time.
2. The applicants were the claimants in the Employment and Labour Relations Court (ELRC). Together with others, they had sued their employer Diamond Trust Bank Limited for unfair and unlawful termination. The cases were consolidated and heard together. In his judgment, the learned Judge dismissed the claim by the 2nd applicant Samson Thuku Mutiso, allowed the 1st applicant's (Humphrey Mungori) claim for unfair termination of services, and awarded him 6 months' salary as compensation.
3. Both applicants were dissatisfied with the judgment. A notice of appeal dated October 14, 2015 was lodged in the ELRC by their advocate on October 19, 2015. However, no further action seems to have been taken. In the supporting affidavit, the 1st applicant has blamed their former advocate Mukele



- & Co. for failing to take action within the prescribed time. As a result, they took their file from the advocate and instructed Guserwa & Co Advocate to apply for extension of time in March 2020 but the Corona pandemic was a hindrance.
4. The applicants maintain that they have a good appeal and that the delay was due to circumstances beyond their control. They, therefore, urge the Court to allow the application.
 5. Although the application was duly served on both parties' advocates with instructions that the application would be heard by way of written submissions and giving them time to file the same, none of the parties filed any written submissions. I will therefore determine the application on the evidence before me.
 6. The principles for determining an application for extension of time are now clear, having been well laid out by the Supreme Court in *Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] eKLR*. The principles are as follows:
 - ' 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to the deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
 3. Whether the Court ought to exercise the discretion to extend time is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay which ought to be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay;
 7. Whether in certain cases like election petition, public interest ought to be a consideration for extending time.'
 7. This means that an applicant must lay the basis upon which the Court can exercise its discretion to extend time by satisfying the Court that the delay in filing the appeal was not inordinate and that there were plausible reasons for the delay. In this case, the judgment was delivered on October 2, 2015. The application for extension of time was filed on March 29, 2023. That is about 7½ years after the delivery of the judgment subject of the intended appeal. The applicants have blamed their advocates for failing to take appropriate action. They have however not explained what they themselves did to pursue their right of appeal. They claim to have taken their file from their previous advocate in 2020, but the application for extension of time was not filed until March this year 2023.
 8. Although the applicants have blamed the Covid pandemic for the delay in filing the application after 2020, that excuse cannot lie because the courts have been in near normal operations for the last 3 years. Moreover, the advocate has not filed any affidavit to explain the efforts if any, that she took in filing the application for extension of time before this year. I come to the conclusion that the period of 7½ years delay is inordinate and the explanation given for the delay is completely unsatisfactory.
 9. For these reasons, I find no basis to exercise my discretion in the applicants' favour. The application is accordingly dismissed.



DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

