



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: ASIKE-MAKHANDIA (IN CHAMBERS)

CIVIL APPLICATION NO. 100 OF 2019

BETWEEN

JOHN ABUKO DIANGA..... APPLICANT

AND

FORANGE AUTO & ALLIED SUPPLIERS LTD..... RESPONDENT

(Being an application for extension of time to file appeal out of time of the orders of the Employment & Labour Relations Court at Nairobi (B. Ongaya,J.) dated 2nd November 2018

in

ELRC NO. 200 OF 2012)

RULING OF THE COURT

The dispute before the Employment & Labour Relations court in a claim filed by the applicant was his unlawful and unfair dismissal from employment without payment of his terminal dues. The claim was denied by the respondent who averred that had employed the applicant in his spare parts business but separated after he opened a garage near respondent's premises. They entered into a mutual agreement to separate after the respondent agree to pay Kshs. 140,000/= to the applicant as his terminal dues.

The trial court after hearing the parties delivered its judgment on the 2nd November 2011, in which it held that the termination of employment was by mutual agreement; thus there was no unfair termination of employment.

The claim was thus dismissed but the respondent was ordered to pay Kshs. 70,000/= being the balance of the payment agreed upon termination of employment.

Aggrieved by the outcome the applicant intimated his desire to lodge an appeal to this court by filing a notice of appeal which was however not within the timelines set by the rules of this court, hence the instant motion dated 28th February 2019 filed under rule 4 of this court's rules seeking leave to file the notice of appeal out of time. The grounds in support of the motion are that, the applicant's counsel had called to inform him about the judgment but he informed that his wife had passed on and besides being busy with burial arrangements death he was also devastated. In the process he was not able to give his lawyer instructions on the appeal and only did so after the time to lodge a notice of appeal had expired. The applicant further asserts that the respondent shall not suffer any prejudice if the application is allowed; that his intended appeal raises legal issues with high chances of success and its in the interest of justice that leave sought be granted.

In support of the motion is an affidavit sworn by John Abuko Dianga, who largely reiterates and expounds on the grounds in support motion aforesaid.

opposing the motion one, **Peter Kiere Mutungu** swore an affidavit dated 12th March 2021 deposing that; the motion was an after thought since judgment was delivered on the 2nd November 2018 and the applicant's wife's death occurred on the 19th December 2018; he had already satisfied the judgment and paid out the applicant a sum of ksh.70,000/=; that his business had since closed shop after being sold by way public auction due financial obligations it could not meet and finally, that the intended appeal did not have high chances of success.

The applicant failed to file his written submissions despite a reminder asking him to do so by the Deputy Registrar of this Court vide a notice dated 24th February 2021. However the respondent did so.

In its written submissions the respondent maintained that the applicant was undeserving of this court's discretion as he is economical with the truth. The applicant's delay being occasioned by the wife's death cannot be true since judgment was delivered on the 2nd November 2018, long before the death of his wife. He thus had ample time to instruct his lawyers on the appeal. I was urged to be guided by the Supreme Court decision in ***Fahin Yasin Twaha v. Timamy Issa Abdala & 2 others [2015]*** eKLR, which laid down the principles that the court should consider whilst determining applications of this nature.

I have considered the application, the rival affidavits, the submission by the respondent and the authorities cited. The motion is premised on rule 4 of this court's rules, and other provisions of the law such as Section 79G, 1A&B and 3A of the Civil Procedure Act and Order 42 of the Civil Procedure Rules. However, these other provisions of the law are really irrelevant for purposes of this application.

Rule 4 of this court's rules provides as,

“The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

It is trite that extension of time is not automatic. Whether or not to grant extension of time the court takes into account various factors. This court in the case of ***Paul Wanjohi Mathenge v. Duncan Gichane Mathenge [2013]*** eKLR while referring to other authorities, observed as follows:

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”

The Supreme Court in ***Nicolas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission (2014)***eKLR, upheld and summarized the principles above as follows:

- 1. “Extension of time is not a right of a party. It is an equitable remedy that is only available to a 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 should 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, the delay should 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; and***
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

One of the grounds in support of the motion was that upon delivery of judgment, his counsel called to advise him about the judgment but he informed him that he had lost his wife and was upcountry for the burial arrangements. By the time he visited his counsel on 28th February 2019 to give instructions on the appeal the time within to lodge a notice of appeal. From the record judgment from ELRC was delivered on the 2nd November 2018. The notice of appeal was to be filed by the 16th December 2018 but that was not to be. The death certificate indicates that death of the applicant's wife occurred on the 19th February 2018, this was almost six weeks after the date of judgment. It cannot be true therefore that the applicant was stopped from giving his advocates instructions on the appeal by the death of his wife.

Counsel on record is aware that time is of essence and there is a timeline within which to file a notice of appeal. Once the judgment was delivered it was prudent for him to inform and advise the applicant of the same immediately. I do not in the least buy this reason which as correctly submitted by the respondent is obviously afterthought by the applicant.

The remedy of extension of time is discretionary and an applicant needs to explain the reason for the delay truthfully and candidly. The applicant has fallen too far short of this expectation. A party who seeks exercise of this Court's discretion in his must put all his cards on the table. The applicant having deliberately embarked on a journey of deceit and falsehood is undeserving of my exercise of discretion in his favour. It is for this reason that the application must fail. It is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR