



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, JA (IN CHAMBERS))

CIVIL APPLICATION NO. E067 OF 2021

BETWEEN

ALOICE OTIENO ARUM.....APPLICANT

AND

CHEMILIL SUGAR COMPANY LTD.....RESPONDENT

(Being an application for extension of time to file appeal out of time from the orders of the

Employment & Labour Relations Court at Kisumu (S. Radido,J.) dated 24th March 2021)

in

ELRC NO. 209 OF 2014)

RULING OF THE COURT

The applicant sued the respondent at the Employment & Labour Relations court at Kisumu by way of an amended memorandum of claim dated 24th January, 2018. He claimed to have been an employee of the respondent having been employed on 2nd April, 1979 and that he had been unlawfully and unfairly dismissed from employment on the 8th October, 2009 without payment of his terminal dues and was not even given an opportunity to show cause before the termination of his services. He therefore prayed for a sum of Ksh. 3,770,620.00/= being the unpaid sums under the Regulation of Wages and Conditions of Employment Act from the date of employment to the date of termination; a sum of Ksh. 1,650,348.00/= being unpaid sums under the Collective Bargaining Agreement on the terms and conditions of employment between the Sugar Employers Group of the Federation of Kenya and the Kenya Union of Sugar Plantation and Allied Workers union and his redundancy dues.

The claim was opposed by the respondent vide an amended statement of defence dated 31st January, 2018. The respondent denied the sum claimed by the applicant for unlawful dismissal and that the claim was an abuse of the court process besides being statute barred.

On the 10th December, 2020 when the claim came up for hearing, the trial court on its own motion asked the parties to address it on the question of limitation of time raised by the respondent by way of written submissions. The applicant failed to file his submissions but the respondent did. In its judgment delivered on 24th March, 2021, the trial court upheld the preliminary objection and accordingly dismissed the applicant's claim with costs holding that since the claim was based on a contract it ought to have been lodged in court on or before the expiry of 6 years but that was not the case here. Further that the court did not have jurisdiction to extend leave or time in actions arising out of a contract. The claim was a test suit in respect other similar claims being **Numbers 206 of 2014 Peter Dan Oruko v. Chemelil Sugar Co. Ltd; 207 of 2014 George Ochieng' Onyango v. Chemelil Sugar Co. Ltd; No. 208 of 2014 Maurice Othech Ochomo v. Chemelil Sugar Co. Ltd; No. 210 of 2014 Paul Odhiambo Orita v. Chemelil Sugar Co. Ltd; No. 211 of 2014 Charles Onyango Ooro v. Chemelil Sugar Co. Ltd; No.212 of 2014 Shem Onyango Owing v. Chemelil Sugar Co. Ltd; No. 213 of 2014 Thomas Owing Omollo v. Chemelil Sugar Co. Ltd; No. 214 of 2014 Jackton Odhiambo Achola v. Chemelil Sugar Co.Ltd; No. 215 of 2014 Japheth Kwama Ogilo v. Chemelil Sugar Co. Ltd.** Thus the ruling by the trial Court impacted on the claims mentioned above as well.

Aggrieved by the outcome the applicant intimated his desire to lodge an appeal to this court against the said judgment and decree but was caught up with time. He is yet to file a notice of appeal within the timelines set by the rules of this court, hence the instant motion dated 29th

April, 2021 filed under rule 4 of this Court's rules.

I have been asked to grant leave to the applicant to file the notice of appeal out of time. The grounds in support of the motion are that: the applicant was the claimant in the test suit whose judgment and decree applied to the rest of the other claims filed by his colleagues to wit; Employment and Labour Relations Court cause numbers. 206 of 2014, 207 of 2019, 208 of 2014, 210 of 2014, 211 of 2014, 212 of 2014, 213 of 2014, 214 of 2014 and 215 of 2014; that he and his colleagues instructed their former counsel to lodge a notice of appeal, however on 12th April, 2021 they discovered that their counsel had not acted on their instructions by which time, the time limited for the filing of the notice of appeal had expired; that the intended appeal raises legal issues with high chances of success; that the motion was made timeously and the respondent shall not suffer any prejudice; that the failure to lodge the notice of appeal was occasioned by the mistake of their then counsel and it's in the interest of justice that leave be granted.

In support of the motion was an affidavit sworn by the applicant, who largely reiterated and expounded on the grounds in support of the motion aforesaid. I need not rehash the same here therefor.

In opposing the motion, the respondent's Acting Legal Services Manager **Collins Ochieng' Agai** swore an affidavit dated 2nd June, 2021 and deposed that; the applicant had not produced any evidence to show that he had instructed his advocate to file a notice of appeal; the applicant's claim had already been barred by limitation of time pursuant to Section 90 of the Employment Act which provides that no civil action could be commenced three years after the act; the court had no power to extend such time for a claim filed six years after the alleged action occurred; the intended appeal was not merited; it would suffer irreparable loss and damage and it was in the interest of justice that the motion be dismissed.

In his written submissions the applicant maintained that he was deserving of this court's discretion. I was urged to be guided by the decision in **Karny Zaharya & Another v. Shalom Levi [2018] eKLR**, in which Koome, JA, (as she then was) reiterated the principles that should guide the court whilst determining applications of this nature. She stated thus:

“Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single Judge to determine definitively the merits of the intended appeal.”

The respondent in it's written submissions maintained that the applicant's allegation that he instructed his advocate to file a notice of appeal but failed to do so was not proved as provided by section 107 of the Evidence act. That this assertion was a mere afterthought. Further that the applicant's intended appeal failed to raise serious points of law and that the law relied on by the court was clear that the claim was time barred. I was thus urged to dismiss the motion with costs thereof.

I have considered the application, the submission by the applicant and the authorities cited.

The motion is premised on rule 4 and 75 of this court's rules. Rule 4 of this Court's rules provides as follows,

“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 **Paul Wanjohi Methane 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.”

In **Athuman Nusura Juma v. Afwa Mohamed Ramadhan C.A NO. 227 of 2015**, this court stated thus, on that issue;

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

One of the grounds in support of the motion is that upon delivery of judgment which was in the presence of his counsel, together with the other claimants they instructed him to lodge a notice of appeal, however by the 12th April, 2021 he had not yet done so. By then, the time within which to lodge a notice of appeal had lapsed. The judgment of the Employment & Labour Relations Court was delivered on the 24th March, 2021, the notice of appeal had therefore to be filed latest by the 12th April, 2021 which was not done. The applicant further posited that together with the other claimants, they went to the former counsel's office on diverse dates on 25th March, 2021, 26th March, 2021, 31st March, 2021 and 7th April, 2021 to find out if he had acted on their instructions. However, from the record the applicant's assertions appear to be contradictory on this aspect. Whereas in the grounds in support of the motion he asserts that counsel was present when the judgment

was delivered and they immediately instructed him to file notice of appeal but in his supporting affidavit to motion he deposes that his colleagues **Japeth Kwama Ogilo** and **Jackton Odhiambo** went to the former counsel on 25th March, 2021 to instruct him to file a notice of appeal. The former counsel agreed to do so.

It seems to me pretty obvious that the applicant is not candid and never really instructed the previous counsel to take steps towards lodging an appeal. This reason by the applicant blaming the former counsel for his inaction is obviously afterthought after realizing that time had lapsed. It cannot be that for all the days he allegedly visited the counsel's office to check on the progress of his instructions, the counsel was conveniently absent from his chambers. The impugned judgment turned on whether or not the claim was statute barred. Without making a definitive finding on the issue, I entertain doubts as to whether the applicant will mount an arguable appeal

The remedy of extension of time is discretionary and an applicant needs to explain the reason for the delay truthfully and candidly since the burden of laying the basis to this court's satisfaction is on him. The applicant has fallen too far short of this expectation. The applicant 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.

This ruling herein shall apply *mutatis mutandis* to Civil Application Number E068 of 2021 and E075 of 2021.

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

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR