



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA AT KISUMU

CIVIL APPLICATION NO. E062 OF 2021

GEORGE OCHIENG ONYANGO.....APPLICANT

VERSUS

CHEMILIL SUGAR COMPANY..... RESPONDENT

(Application for extension of time to file and serve Notice of Appeal out of time in an intended Appeal from the judgment and Decree of the Employment and Labor Relations Court at Kisumu by (Hon. Justice Radido Stephen) dated on 24th March 2021 in Kisumu ELRC Cause No. 207 OF 2014 a test case for No. 206, 208, 209, 210, 211, 212, 213, 214 & 215 of 2014)

RULING

1. By a Notice of Motion Application dated **29th** April 2021 brought pursuant to Rules 4 & 47 of Court of Appeal Rules 2010, and a supporting affidavit, **GEORGE OCHIENG ONYANGO** (The Applicant) seeks orders that: -

i. Leave be granted to extend time to lodge Notice of Appeal out of time against the judgment and decree in Kisumu **ELRC Cause No. 207 of 2014 dated 24th March 2021**.

ii. Costs in the cause.

2. The background to this matter is that the applicant claimed to have been employed by the respondent on 2nd April, 1979 and that he was unlawfully and unfairly dismissed from employment on the 8th October, 2009 without payment of his terminal dues. He lamented that he 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.

3. The applicant filed **Cause ELRC 207 OF 2014** dated 17th September 2014, which was a test suit for **Cause Nos. 206, 208, 209, 210, 211, 212, 213, 214 and 215 of 2014** alleging unfair termination of employment.

4. 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 pointed out that the claim was an abuse of the court process being statute barred under **section 27 of the Limitation of Actions Act**.

5. It was the Applicant's contention in his initial application that he together with others, were arrested and charged in **Nyando court**, so he could not have filed his case earlier due to the arrest and subsequent pending charges which ended in two batches on 22/02/12 and 16/04/13.

6. Subsequently by a ruling dated 30th July 2014, Wasilwa (J) granted leave to the Applicant herein to file his cause out of time, on the grounds that the Applicant was unable to file his case due to his arrest and pending criminal case. This gave the applicant a chance to file an Amended Statement of Claim on 6th November 2012. The Respondent then filed an amended statement of defence dated 14th November 2017 in response to the amended statement of claim.

7. Vide a judgment delivered virtually on 24th March 2021 in the presence of the then counsel for the Applicant and the Respondent's counsel, the court dismissed the claim with costs, on the grounds that it lacked jurisdiction to extend time within which to file the contract of service and entertain a claim that was statute barred 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(which order applied to the other cases falling under the test suit).

8. The applicant being dissatisfied with the judgment is desirous to file an appeal explaining that the failure to file and serve the Notice of Appeal, is because his then advocate failed to take up his instructions to proceed and lodge the Notice of Appeal which was due on or before

12th April 2021. He now seeks leave to file the Notice of Appeal out of time.

9. Rule 4 of the Court of Appeal Rules gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. The case of **Leo Sila Mutiso vs Rose Wangari Mwangi CA No. Nai 255/97** held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously or on a whim or sentiment. Another consideration is whether prima facie the intended Appeal/Appeal has chances of success or is a mere frivolity as was held in **Julius Kamau Kithaka vs Waruguru Kithaki & 2 Others CA No. 14/2013**.

8. M’Inoti, J had this to say concerning Rule 4 in **Imperial Bank (IR) & Anor vs Alnashir Popat and Others CA 395/2017**:

“A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favor. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”

9. It is now settled that extension of time is not an automatic right. In considering whether or not to grant extension of time, the court takes into account various factors, as demonstrated by this court in **Paul Wanjohi Methane v Duncan Gichane Mathenge [2013] eKLR** while referring to other decisions stated:

“The discretion under Rule 4 is unfettered, but it has to be exercised judiciously, 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.”

10. The Supreme Court has settled principles to guide in exercise of discretion extend time. The case of **Nicholas Kiptoo Korir Arap Salat vs IEBC [2014] e KLR** sets down those principles as follows:-

- i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
- iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
- iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
- v. Whether there will be any prejudice suffered by the Respondent if extension is granted.
- vi. Whether the application has been brought without undue delay.
- vii. Whether in certain cases public interest should be a consideration for extension of time.

12. The Applicant in his Supporting Affidavit has attempted to explain the delay, basically laying blame on their then advocate, Mr. Ken Omollo, who was instructed immediately upon the delivery of the judgment to lodge the Notice of Appeal. It is now an accepted

position that the mistake and/or omission of counsel ought not to be visited on the client.

I am aware that this court in its various of decisions such as the case of **Catherine Njoguini Kenya & 2 Others vs Commercial Bank of Africa Civil Appeal No. Nai 366/09** declined to visit wrongs committed by advocates on innocent clients where it has been sufficiently demonstrated that clients were not to blame for such default. (underlined for emphasis)

13. The Respondent’s contention is that the Applicant has not provided proof that he instructed his then Advocate to lodge a Notice of Appeal. That in any event, the Court cannot extend time to file contracts of service as per the judgment of the High Court.

14. In this case, judgment was delivered on 24th March 2021, and the Notice of Appeal was to be filed on or before 12th April 2021, but there is no proof in the form of affidavits or otherwise to corroborate his colleagues’ attempt to meet up with the former counsel as the Applicant has alleged in the paragraphs of the supporting affidavit.

14. Nothing tangible has been presented to support the Applicant’s assertions that he had given instructions to his then advocate to lodge an appeal against the impugned judgment. If the applicant had presented even just a scintilla of some communication with the purported advocate, then he would have satisfied the principles set out for this court to exercise its discretion in his favor and grant the extension. The inaction leading to delay has not been sufficiently demonstrated as to absolve the applicant from blame for such default

15. The applicant further contends that he has an arguable appeal which is likely to succeed. The Respondent in its submissions has maintains that the Intended Appeal has no chance of success. On this issue, I recognize that it is not the role of a single judge to determine the merits or otherwise of the Appeal. Indeed, this Court has held in the case of **Athuman Nasura Juma v Afwa Mohammed Ramadhan**

CA 227/15 that:

“...this court has to be careful to ensure that the intended Appeal has merit or not is not an issue to be determined with finality by a single Judge.”

I must therefore be very careful when addressing the arguability of the intended appeal. I have read the contested decision by the trial court, which revolved on the limitation of the action by virtue of statutory provisions. In my considered view, and taking care not to make a conclusive determination on the issue, I am not persuaded the applicant will mount an arguable appeal.

Consequently, I hold and find that the application lacks merit and must fail. It is accordingly dismissed with costs to the respondent. This ruling herein shall apply mutatis mutandis to **Civil Application No E064 of 2021 Paul Odhiambo Rita v Chemelil Sugar Co Ltd, E065 Hellen Adoyo Othech v Chemelil Sugar Co Ltd, and E066 of 2021 Shem Onyango Ogwang v Chemelil Sugar Co. Ltd.**

Delivered and dated this 23rd day of July 2021 at Nairobi

H.A. OMONDI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR