



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, JA IN CHAMBERS)

CIVIL APPLICATION NO. 60 OF 2021

BETWEEN

PETER DAN ORUKO.....APPLICANT

AND

CHEMELIL SUGAR CO. 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 24<sup>th</sup> March 2021)*

in

ELRC NO. 206 OF 2014

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RULING OF THE COURT

The applicant sued the respondent in the Employment & Labour Relations court (ELRC) at Kisumu by way of an amended memorandum of claim dated 11<sup>th</sup> December, 2017. He claimed to have been an employee of the respondent and that he had been unlawfully and unfairly dismissed from employment by the respondent on the 8<sup>th</sup> 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.4,273,854.00/= 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.1,909,047.00/= 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 and his redundancy dues.

The claim was opposed by the respondent vide an amended statement of defence dated 9<sup>th</sup> 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 as it was barred by statute of limitation.

On the 10<sup>th</sup> 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 ruling delivered on 24<sup>th</sup> March, 2021, the trial court upheld the preliminary objection and accordingly dismissed the applicants claim with costs by holding that since the applicant's 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. The claim was a test suit in respect of other similar claims being numbers 206 of 2014 Peter Dan Oruko v. Chemelil Sugar Co. Ltd; no. 208 of 2014 Maurice Othech Ochomo v. Chemelil Sugar Co. Ltd; no.209 of 2014 Aloice Otieno Arum 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 Ogwang v. Chemelil Sugar Co. Ltd; no. 213 of 2014 Thomas Owino 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 and order aforesaid applied to those other claims as well.

Aggrieved by the outcome the applicant intimated his desire to lodge an appeal to this court against the judgment and decree but was caught up with time. He is yet to file a notice of appeal as per the timelines set by the rules of this court, hence the instant motion dated 29<sup>th</sup> 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 is the claimant in the test suit whose ruling and order applied to the rest of the suits being; ELRC cause numbers. 208 of 2014, 209

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 immediately the ruling was delivered. However on 12<sup>th</sup> 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 its 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 therefore rehash the same here. The respondent failed to file its response to the motion or even written submissions despite a reminder to that effect by a notice dated 17<sup>th</sup> May, 2021 issued by this Court.

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 a judge should consider whilst determining applications of these 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.*”**

I have considered the application, the grounds and affidavit in support thereof, the submission by the applicant and the authorities cited.

The motion is premised on rule 4 and 75 of this court's rules, and Rule 4 of this court's rules in particular 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.” (emphasis provided)***

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 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.”***

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

In *Athuman Nusura Juma v. Afwa Mohamed Ramadhan*, CA 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 was that upon delivery of the ruling 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 12<sup>th</sup> April, 2021 he had not yet done so. By then, the time within which to lodge a notice of appeal had lapsed. The ruling from the ELRC was delivered on the 24<sup>th</sup> March 2021, the notice of appeal was to be filed by the 12<sup>th</sup> April, 2021. The applicant further submitted that together with the other claimants, they went to the former counsel's office on diverse dates between 25<sup>th</sup> March, 2021, 26<sup>th</sup> March, 2021, 31<sup>st</sup> March, 2021 and 7<sup>th</sup> April, 2021 to find out whether their instructions had been acted upon to no avail. I note however that the applicant's assertions are contradictory on this aspect. Whereas in the grounds in support of the motion he asserts that counsel was present when the ruling was delivered and afterwards they instructed him to file notice of appeal but in his supporting affidavit to motion he deposes that his colleagues **Japheth Kwama Ogilo** and **Jackton Odhiambo** went to the former counsel on 25<sup>th</sup> March, 2021 to instruct him to file a notice of appeal. That their former counsel agreed to file a notice of appeal when the other claimant **Japheth Kwama Ogilo** met him in his chambers.

It seems to me pretty obvious that the applicant never really instructed the previous counsel to take steps towards lodging an appeal. This reason advanced by the applicant blaming the former counsel for his inability to file notice of appeal in time is obviously afterthought, after realizing 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 remedy for 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 for my exercise of my unfettered in his favour discretion is on him. I cannot say that the applicant has been candid or truthful with regard to this application. The applicant has instead chosen the path of lies and sophistry which cannot advance his cause.

The applicant is therefore un-deserving of my exercise of discretion in his favour. It is for this reason that the application must fail. It is accordingly dismissed with costs no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**