



Gergel v Arfa Afra Limited t/a Imax Africa Ltd (Civil Application E410 of 2020) [2021] KECA 93 (KLR) (22 October 2021) (Ruling)

Neutral citation: [2021] KECA 93 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E410 OF 2020
AK MURGOR, JA
OCTOBER 22, 2021**

BETWEEN

SERGII GERGEL APPLICANT

AND

ARFA AFRA LIMITED T/A IMAX AFRICA LTD RESPONDENT

(An application for leave to file an appeal out of time from the judgment of (Hon. B. Ongaya, J.) delivered on 8th November, 2019 in Nairobi ELRC No 234 OF 2019)

RULING

- 1 In the Notice of Motion dated 14th December, 2020, the applicant, Sergii Gergel has sought for leave to be granted to file the appeal out of time. The motion which was premised on the grounds on its face and the affidavit of Sergii Gergel sworn on the 14th December, 2020, and in written submissions, contended that the judgment was delivered by the Employment and Labour Relations Court (ELRC) Ongaya, J on the 8th November, 2019 whereupon, being dissatisfied with the trial judge's decision, the applicant instructed his advocates to file an application for review of the judgment on the basis that the judge had declined to award him compensatory damages, despite having found that his employment was wrongfully terminated and had further ordered that the applicant be paid Kshs. 120,000 in lieu of notice; that in a ruling delivered on 8th January, 2020 the trial judge dismissed the application for review. It was the applicant's further contention that thereafter, his advocates neglected to inform him of the ruling until sometime in June 2020; that this notwithstanding, the applicant instructed his advocates to file an appeal against the judgment to this Court; that despite constant follow-up, Mr. Mutabazi, his counsel, would inform him that the necessary documentation was under preparation and that he would update him on its progress; that when he noticed that time was running out and further communication was not forthcoming, he visited his counsel's office only to discover that he had relocated back to Uganda, without having filed the appeal.



- 2 In addition to his counsel's failings, it was also asserted that the delay was caused by the closure of courts following Chief Justice's directions arising from the Covid -19 prevalence within the country. It was his case that the delay occasioned by his counsel, prompted him to instruct a new lawyer to file the appeal on his behalf.
- 3 The applicant therefore contends that he will suffer irreparably if the appeal was not heard and determined by this Court, and that the mistakes and lapses of his previous counsel should not be visited on him; that he therefore stands to suffer gravely if his application seeking to file an appeal out of time is not allowed.
- 4 It was further contended that the appeal raised weighty issues as set out in the annexed draft memorandum of appeal and that the respondent would not be prejudiced in any way, but that instead, he would be subjected to grave loss.
- 5 Despite having been served with the hearing notice, there was no response from the respondent.
- 6 Having considered the application and submissions, under Rule 4 of this Court's Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not whimsically having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* – Civil Application No. Nai 251 of 1997. Beginning with the length of delay, the judgment was delivered in 8th November 2019, and this application was filed on 14th December 2019 which has resulted in a delay of about 401 days from the date the judgment was delivered.
- 7 The applicant mainly attributes the delay to failure on the part of his counsel to inform him of the outcome of a review application delivered on 8th January, 2020, that was filed following his dissatisfaction with the judgment; that despite regular prompting and enquiries, no action was taken by his then counsel.
- 8 Needless to say, that having interrogated his long and winding explanation, there is nothing to support the claim that the applicant had instructed counsel to file an appeal on his behalf. This is apparent from the lack of documentation evincing instructions to any counsel. There is no letter of instruction or receipt showing payment of instruction fees. Additionally, there is nothing that demonstrates that following delay, he demanded for immediate steps to be taken to file the appeal, or that he be provided with a status or progress report. To my mind, the applicant's claims that his counsel is to blame for the delay is unsubstantiated, unsupported and unconvincing. I therefore find that the delay in excess of one year had not in any way been explained.
- 9 With respect to whether the intended appeal has a chance of success, the applicant's main complaint is that the learned judge declined to award him compensation despite having found that his employment was wrongfully terminated and having further ordered that the applicant be paid KShs. 120,000 in lieu of notice. It is trite that an award of compensation is an exercise of discretion by the learned judge, and consequently, I am of the view that the applicant will be hard pressed to persuade this Court that the learned judge took into account irrelevant matters, or failed to take into account the matters that were before him, or was plainly wrong in declining to grant him compensation. See *Mbogo & Another vs Shab* [1968] EA 93.
- 10 On the question of whether the respondent will suffer prejudice were I to grant the orders for extension of time, it is evident that after the applicant was dissatisfied with the judgment of the trial court, he



filed an application for review of the decision. The applicant now seeks to file an appeal against that decision after his application for review was dismissed. In my view, the applicant merely seeks to have another bite at the cherry by filing an appeal, which for all intents and purposes would be prejudicial to the respondent.

11 In sum, I decline to exercise my discretion to extend time for filing of an appeal. The Notice of motion dated 14th December 2020 is dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

