



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 93 OF 2019

BETWEEN

PROTECTIVE CUSTODY LIMITED.....APPLICANT

AND

ALFRED IMBWAGA MUSUNGU.....RESPONDENT

(Being an application for extension of time within which to file an appeal and for stay of execution of the judgment of the Employment and Labour Relations Court at Mombasa (Rika, J.) dated 30th July, 2019

in

ELRC C. No. 916 of 2018)

RULING

1. Before me is an application dated 16th October 2019 and presented to the Court on 17th October 2019. In it, the applicant, Protective Custody Limited, seeks an order for extension of time to file a notice of appeal and record of appeal. It intends to appeal against a judgment of the Employment and Labour Relations Court at Mombasa (**James Rika, J.**) given on 30th July 2019 awarding the respondent, Alfred Imbwaga Musungu, a security guard formerly in the applicant's employment, an amount of Kshs.1,149,700.00 for alleged salary arrears and terminal dues for 10 years.

2. The background, in brief, is that on 30th November 2016, the respondent lodged a claim before the ELC seeking an award of the said amount of Kshs.1,149,700.00 comprising of arrears of salary from 15th August 2006 to 15th September 2016, of Kshs.600,000.00; gratuity for 10 years, Kshs.50,000.00; leave not taken for 10 years, Kshs.200,000.00; and accumulated off days, Kshs.299,700.00. It was the respondent's case that he was employed by the applicant as a security guard and was underpaid over the years.

3. A default judgment for that amount was entered in favour of the respondent on 24th October 2017 following what appears to have been formal proof on the basis that the applicant had defaulted in filing a memorandum of appearance and a response to the claim. The applicant had indeed filed an appearance and response to the claim contesting the respondent's claim. In a ruling given on 17th May 2018, the ELC (**L. Ndolo, J.**) was satisfied that the default judgment was entered on the mistaken assumption that no appearance and response had been filed in answer to the claim. Accordingly, the Judge set aside the ex parte judgment and ordered the matter to commence *de novo*.

4. Subsequently, the matter was mentioned before the ELC on 5th July 2018 and on 25th October 2018 and thereafter scheduled for hearing on 6th March 2019 and 26th March 2019. On 6th March 2019, the respondent testified in the presence of counsel for both parties. On 26th March 2019, the applicant was not represented in court and the proceedings were closed. Subsequently, the ELC reserved judgment which was delivered on 30th July 2019 in which the court pronounced:

"6. For the second time, the respondent has failed to give evidence, when offered the opportunity to do so.

7. The evidence given by the claimant remains uncontradicted. The pleadings filed by the respondent have no support in evidence.

8. There is nothing in the fresh hearing, to justify altering the findings and conclusions of the Court made in the judgment of 24th October 2017.”

5. With that, the court ordered that, “*judgment is entered in favour of the claimant, in term (sic) stated in the judgment delivered on 24th October, 2017.*”

6. The applicant contends that it did not become aware of that judgment until auctioneers served it with warrants of attachment and sale of its property in execution of the judgment. By that time, the applicant asserts, the time provided for appealing under the rules of the Court had lapsed, thus necessitating the present application.

7. The applicant, through learned counsel **Mr. Aboubakar**, referred to the grounds appearing on the face of the application and the affidavit sworn by the applicant’s manager, Joel James Atuti, in support of the application and submitted that the applicant was let down by its previous advocates; that the applicant did not have an opportunity to testify and its right to fair hearing under Article 50 of the Constitution was violated; and that the applicant has an arguable appeal with high probability of success as the impugned judgment is illegal. Counsel submitted that the delay involved is just over two months and is not inordinate and has been explained; that the respondent will not suffer any prejudice if the application is granted.

8. Counsel for the applicant abandoned prayers 3, 4, and 5 of the application being matters for the full court.

9. In opposition to the application, learned counsel for the respondent **Mrs. L. M. Arika** referred to the respondent’s replying affidavit sworn on 12th November 2019 in which the respondent sets out at length the procedural history of the matter culminating in the impugned judgment. It was submitted that the respondent was well aware of the proceedings before the ELC; that the applicant was given the opportunity to be heard and the issue of fair hearing does not arise; that notice of delivery of judgment was given to the advocates; that the respondent is an old man who should enjoy the fruits of the judgment and will suffer prejudice if there is further delay in conclusion of the matter.

10. I have considered the application, the affidavits on record and the submissions and authorities cited. As the Supreme Court of Kenya stated in ***Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014/2014 eKLR*** extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

11. See also the decision of **Waki, J.A** in ***Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR*** where he stated that:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See Mutiso vs. Mwangi Civil Appl. NAI. 255 of 1997 (UR), Mwangi vs. Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General Civil Appl. NAI. 8/2000 (UR) and Murai v Wainaina (No 4) [1982] KLR 38.”

12. As regards the delay, the impugned judgment was delivered on 30th July 2019. The applicant says that it was let down by its previous advocates and that it did not get to know of the judgment until it was confronted by auctioneers whereupon it instructed its current advocates. Beyond a sweeping statement in the affidavit in support of the application that the applicant became aware of the judgment when served with warrants by auctioneers, the affidavit is scanty in details. There is no indication as to when the warrants were served.

13. However, the respondent depones in his affidavit in opposition to the application that the warrants in execution of decree were issued by the court on 6th September 2019. The present application was filed on 17th October 2019. In effect a delay of about a month and a half after the applicant became aware of the execution proceedings. It is however clear from the respondent’s replying affidavit that the applicant’s former advocates were duly notified of all steps being taken in court but do not appear to have been diligent.

14. In normal circumstances I would have declined to grant an extension of time on the basis that the applicant’s explanation for the delay has gaps. I am however troubled by the claim by the applicant that the impugned judgment is illegal on the grounds that, without considering the evidence presented before him, the learned Judge merely reinstated an *ex parte* judgment that had earlier been set aside without considering and analyzing the evidence at all. This is a weighty claim. I am persuaded that this is matter worthy of consideration on appeal.

15. Beyond stating that the applicant is an old person, counsel for the respondent did not demonstrate what prejudice the respondent will suffer if this application is allowed.

16. All in all, and considering in particular the weighty contention that the judgment will be challenged on the basis that it is illegal, I am inclined to exercise my discretion in favour of the applicant. I accordingly allow the application in terms of prayer 2 of the application. The applicant shall file and serve a notice of appeal and memorandum and record of appeal within 45 days from the date of delivery of this ruling. The respondent shall have the costs of this application.

Dated and delivered at Nairobi this 3rd day of April, 2020.

S. GATEMBU KAIRU, (FCIArb)

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR