



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: GATEMBU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 45 OF 2019

BETWEEN

RAPID KATE SERVICES LIMITED APPLICANT

AND

MANGALE MWADZAME KUTA RESPONDENT

(Being an application for extension of time to file appeal out of time against the Judgment of the Employment & Labour Relations Court at Mombasa (Makau, J.) delivered on 9th June, 2017 in ELRC C No. 128 of 2016)

RULING

1. In a judgment delivered on 9th June 2017, the Employment and Labour Relations Court (ELRC) found that the applicant unfairly terminated the respondent's employment. As relief, the ELRC awarded the respondent one month's salary *in lieu* of notice; ten months' salary as compensation for unfair termination; and accrued leave for the last year of service. Judgment was entered for the respondent for a total award of Kshs.369,600.

2. Intending to challenge that judgment, the applicant filed a notice of appeal on 30th June 2017. That notice was filed outside the 14 days window allowed under Rule 75 of the Rules of the Court.

3. On 30th May 2019, just under two years after delivery of the judgment by the ELRC on 9th June 2017, the applicant filed the present application under Rule 4 of the Court of Appeal Rules seeking an order for extension of time to appeal against the ELRC judgment. Rule 4 of the Court of Appeal Rules, 2010 provides that:

“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.”

4. In considering the application, I am, as a single judge, called upon to exercise judicial discretion on behalf of the Court. The principles on which I should do so, were expressed by Waki, JA in ***Fakir Mohamed vs. Joseph Mugambi & 2 others [2005] eKLR***, thus:

“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.”

5. Recently, the Supreme Court of Kenya, in ***Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014[2014] eKLR*** pronounced that 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.

6. Is this then a proper case for me to exercise my discretion in favour of the applicant? Appearing for the applicant, learned counsel **Mr. Martin Tindi** relied on the grounds in support of the application, and the supporting and supplementary affidavits of K.K. Velani sworn on 28th May 2019 and 25th October 2019 respectively. It is the applicant's case that there was delay in its branch office in Mombasa obtaining necessary instructions from its head office in Nairobi; that the delay is not intentional and the respondent will not suffer prejudice; that proceedings were applied for on 14th July 2017 and certificate of delay excluding the period between 14th July 2017 and 9th February 2018 was issued by the court on 9th March 2018.

7. In opposition to the application learned counsel for the respondent **Mr. Oduor Okumu** referred to a replying affidavit sworn by the respondent on 2nd October 2019 and submitted that no good grounds exist for allowing the application; that the delay involved is inordinate; that no good reasons have been given for the delay; and that granting the application will be prejudicial to the respondent.

8. As already indicated, 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 and the party seeking extension of time has the burden to lay a basis to the satisfaction of the court. As already noted, judgment in this matter was delivered by the ELRC on 9th June 2017. A notice of appeal should have been filed within 14 days but that was not done. The applicant explained that its head office delayed in giving instructions to its branch office in Mombasa. I assume that by the time the notice of appeal was filed, albeit late, instructions to challenge the judgment had been received. Thereafter the advocates for the applicant applied for proceedings, which based on the certificate of delay, were supplied on 9th February 2018. The certificate of delay was issued on 8th March 2018. The present application was however not presented until 30th May 2019, which is over a year later. No explanation has been given for that delay.

9. As to chances of success of the intended appeal, there is no indication what the grievance with the judgment might be. The respondent has urged that it stands to suffer prejudice if this application is allowed as judgment amount, which the applicant says is held in a joint account between the advocates for the parties, is not accessible to him, despite the judgment having been delivered way back in June 2017 and it cannot enjoy the fruits of the judgment.

10. All in all, I am not satisfied that the applicant has demonstrated that it is deserving of exercise of the court's discretion. I accordingly decline to allow the application dated 29th May 2019.

The same is hereby dismissed with costs to the respondent.

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

S. GATEMBU KAIRU, FCI Arb

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR