



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: KOOME, J.A. (IN CHAMBERS))

CIVIL (MISC) APPLICATION NO. 99 OF 2018

BETWEEN

JOSEPH OTIENO OGUTU & 24 OTHERS1ST – 25TH APPLICANTS

AND

ITA MARINE SERVICES LIMITED1ST RESPONDENT

ALLIED WHARFAGE LIMITED.....2ND RESPONDENT

(In the matter of an application for leave to file and serve notice and record of appeal out of time from the Judgment and Order of the Employment and Labour Relations Court at Mombasa (Makau, J..) dated 18th November, 2016, in

Cause No. 396 of 2013.)

RULING

[1] By an application dated 31st July, 2018, Joseph Otieno Ogutu & 24 others (applicants) seek extension of time to file a Notice as well as Record of Appeal out of time. This application is predicated on the grounds stated on the body of the application and the matters deposed to in the applicants' supporting affidavit sworn on the 29th day of July, 2018.

[2] Briefly summarized, it is the applicants' case that after judgment was pronounced by the Employment and Labour Relations Court (ELRC) on the 18th November, 2016, the outcome thereof was duly communicated to them by their Advocate. However, given their vast numbers and the fact that they are located in different areas of the country, the applicants had challenges communicating with each other. Not only that, it also took them a while to reach a consensus on whether to mount an appeal. By the time they were in agreement and able to raise the requisite legal fees for the appeal, the statutory time to appeal had lapsed.

[3] The applicants contended that the delay was not inordinate and beseeched me to exercise my discretion while taking cognizance of the fact that they are men of straw who stand to be greatly prejudiced if this application is not allowed. They added that on the other hand, the respondent shall suffer no prejudice if the application is allowed.

[4] The application was opposed vide the 1st respondent's replying affidavit sworn on 29th October, 2018 who deposed that prior to the present application, the applicants had filed another Notice of Appeal, over the same matter, dated 7th December, 2016. Since the said Notice of Appeal was filed out of time, the 1st respondent filed an application dated 4th January, 2017 seeking to have the same struck out. It was the 1st respondent's contention that the said Notice of Appeal was struck out with costs; consequently, that the present application and the Notice of Appeal herein are incompetent and should not be entertained. The applicants were also faulted for withholding this information from the court. It was also contended that in any event, the applicants were disentitled to the orders sought as no reasonable explanation has been given for the delay; which is in any case inordinate.

[5] The hearing of this application proceeded by way of written submissions, with brief oral highlights by the respective counsel. For the applicants, learned counsel **Ms. Mbithe** reiterated that due to the constraints aforesaid, the applicants were unable to file their appeal in time. She thus urged that I allow the application as there is no prejudice to be suffered by the respondents in any event.

[6] In opposition to the application, learned counsel **Ms. Onyango** on her part contended that a Notice of Appeal sought to be filed out time ought to be struck out because a similar one had been belatedly filed and was struck out by this Court. Further, that given the said scenario,

the present application is meant to vex the court the second time and hence an abuse of the process. The judgment sought to be appealed against was delivered on 16th December, 2016 the parties have already litigated on the issue of whether the applicant can file a Notice of Appeal out of time. After the Ruling of this Court striking the Notice of Appeal, the applicants filed the present application three (3) months later but they did not serve the respondents until when they appeared in Court on 12th October, 2018 and directions were issued that respondent be served. According to counsel, the applicants did not demonstrate good faith by withholding material informations thus undeserving of an exercise of discretion as those who seek equity must come with clean hands.

[7] In order for an applicant to succeed in an application such as this, it must be demonstrated that their circumstances warrant the exercise of this Court's discretion. In the present case, the 1st respondent has emphasized that a similar Notice of Appeal had been lodged by the applicants out of time and that the same was struck out by this Court. Even though the pleadings in this regard were annexed to the 1st respondent's affidavit, the order issued thereafter was not produced. Nonetheless, a perusal of this Court's records reveals that such an order was indeed issued on the 23rd May, 2018. It is thus immediately apparent that the applicants are guilty of material non-disclosure, even as they seek favorable exercise of discretion.

[8] The prayers sought in the instant application call for the exercise of discretion which is generally unfettered. However, exercise of judicial discretion, is always done on reasonable basis; it must be based on facts or law that demonstrate the applicant is deserving of the orders of extension of time. In other words, judicial discretion cannot be exercised out of sympathy, whimsically or capriciously. The parameters that guide the Court are well set out in a long line of authorities. See the case of; -Leo Sila Mutiso v Rose Hellen Wangari Mwangi, C. A. Appl. No. Nai. 251/97 (ur):

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay; secondly, the reason for the delay; thirdly, (possibly); the chances of the appeal succeeding if the application is granted, and fourthly, the degree of prejudice to the respondent if the application is granted.”

[9] The above list is of course not exhaustive as held in the case of;- Mongira & Another v Mukaria & Another, 2005 2 KLR 103 at page 106-107, where the Court again cited Leo Sila Mutiso, (supra), and went on to state:-

“Those, in general are the things a Judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive, it was not meant to be exhaustive and that it is clear from the use of the words “in general” Rule 4 gives the Judge unfettered discretion is exercised judicially a Judge would be perfectly entitled to consider any other facts outside those listed in the paragraphs we have quoted above. ... To limit such issues only to the grounds set out in the above paragraph would be to fetter the discretion of single Judge and as we have pointed out, the rule itself gives a discretion which is not fettered in any way.”

[10] Applying the above principles to the present application, it turns out the same is an abuse of the court process, as a similar Notice of Appeal was dismissed by a full Bench of this Court as stated above. The applicant did not make this disclosure; which is a fundamental error, a party seeking the exercise of court's discretion must make full disclosure of all relevant matters that touch on the issue under consideration. This was material information that ought to have been disclosed. Secondly, this application is made one year and eight months since the judgment sought to be appealed against was pronounced. That in my considered view is inordinate delay which the applicants have not given cogent and reasonable explanation for. As per the facts deposed in the applicants' supporting affidavit, the delay was attributed to the applicants' failure to coordinate all the parties coupled with poor communication. This is to be contrasted with what the applicants said in their replying affidavit to the 1st respondent's previous application seeking to strike out the previous Notice of Appeal; the applicants attributed the late filing to a mistake by their erstwhile counsel.

[11] I think I have said enough to demonstrate this being a second Notice of Appeal, the applicants are seeking leave, given the inordinate delay and the material non-disclosure of pertinent facts and there being no credible explanation for the delay, there is no basis howsoever to warrant the exercise of discretion in their favour.

[12] For the foregoing reasons, the application is dismissed with costs to the respondent.

Delivered and dated at Mombasa this 4th day of April, 2019.

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR