



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, KOOME & KANTAL, J.J.A)**

**CIVIL APPLICATION NO 234 OF 2017**

**BETWEEN**

**SALEH KIPLAGAT CHEBI.....APPLICANT**

**AND**

**CENTRE FOR AFRICAN FAMILY STUDIES (CAFS).....RESPONDENT**

***(A Reference to a full Bench of this Court from a Ruling declining extension of time to file Notice and Record of Appeal Judge (Okwengu, JA) dated 22<sup>nd</sup> November 2018***

***in***

***Industrial Cause No. 585 of 2012)***

**\*\*\*\*\***

**RULING OF THE COURT**

[1] This is a reference from the decision of a single judge of this Court (**Okwengu, JA**) declining to grant the applicant **Saleh Kiplagat Chebii**, extension of time to file a Notice and Record of Appeal against the judgment of the then Industrial Court (**Rika, J**) dated 26<sup>th</sup> February 2014 in Industrial Cause No. 585 of 2012.

[2] The applicant filed suit against the respondent the Centre for African Family Studies (CAFS), his former employer, for unfair termination of contract of service on grounds of incompetence. In a statement of claim dated 10<sup>th</sup> April, 2012, the applicant alleged that the respondent owed him terminal dues amounting to Ksh. 6,904,5346. The respondent denied the allegation that the applicant had been dismissed unfairly and provided evidence that the applicant had been accorded fair hearing by a disciplinary panel. The Industrial Court reached the decision that the respondent had proved valid grounds for terminating the employment contract and, thus, dismissed the suit.

[3] The applicant was aggrieved by the dismissal of his suit. Nevertheless, no notice of appeal was filed. After a delay of more than one year, the applicant filed an application for extension of time within which to file and serve the Notice and Record of Appeal dated 16<sup>th</sup> March 2015.

[4] The motion for extension of time was heard by a single Judge of this Court (**Warsame, JA**). The learned Judge heard the appellant's prayer that he had been faced with financial difficulties and had been let down by his previous counsel. The Judge was convinced by the appellant's reasons and allowed the application for extension of time to file the Notice and Record of Appeal. In his ruling dated 21<sup>st</sup> September 2015, learned Judge directed that the same be filed and served within the next 7 days.

[5] Once again, the applicant failed to file the Notice and Record of Appeal in the time ordered. He applied again for extension of time to file and serve Notice and Record of Appeal on 9<sup>th</sup> October 2017. In his supporting affidavit, the applicant alleged that he had been unable to comply with the timeline ordered by **Warsame, JA** because he had been bedridden for the last one year eight months since the ruling and was therefore unable to pursue his appeal. The applicant produced a medical report from his physician stating that he had been receiving treatment and counseling for stress related ailments since 2009 and that his problems had worsened following the termination of employment in 2012.

[6] The application was strenuously opposed by the respondent through a replying affidavit dated 20<sup>th</sup> October 2017 and evidence was

produced to show that the appellant had, in fact, not been bedridden during the time in question. Reference was made to the appellant's vibrant online presence where he was shown to be socially and professionally active, disproving the allegation that he was physically, mentally and financially unfit to pursue his appeal. The respondent also brought to the Court's attention that it was dissatisfied with the ruling of the single judge and had sought a reference to a full bench.

[7] After careful consideration of the application, the Court (**Okwengu, JA**) referred to the case of **Gitetu v Kenya Commercial Bank Ltd [2009] KLR 545** where it was held that for an application made under Rule 4 of the Court of Appeal Rules to succeed, the court ought to be guided by consideration of factors including, but not limited to, the period of delay, reason for the delay, the degree of prejudice to the respondent if the application is granted and whether the intended appeal is arguable.

[8] The Court made findings that the applicant had delayed for four years since the ruling by the Industrial Court. Furthermore, even if he were indeed bedridden, filing of appeal could have been done by his counsel upon instructions by the applicant. The Court was not swayed by the applicant's reason for the delay, and declined to extend time for filing the appeal. The Court also found no reason to review or vary the timeline set in the ruling by **Warsame, JA**.

[9] At the hearing of the Reference held on 21<sup>st</sup> May 2019, counsel for the applicant, **Ms. Guserwa** submitted on two issues; namely that the applicant had indeed been sick and bedridden thus unable to pursue the appeal, and that the sickness was accompanied by memory loss which prevented the applicant from instructing his counsel to file the appeal in time.

[10] Vehemently opposing the application, counsel for respondent, **Ms. Nyabundi**, referred the Court to the replying affidavit dated 30<sup>th</sup> October 2017 which contested the applicant's allegation that he had been bedridden for the last one year eight months yet the medical report had failed to indicate so. Furthermore, the appellant appeared to have been in employment elsewhere since 2017, with further proof that he was financially sound.

[11] Referring to the cases of **The Standard Limited & 2 others v Wilson Kalya & another Civil application No. Nai 306 of 2002** and **Aviation Cargo Support Limited v Mark Freight Services, Civil application No. Nai 98 of 2013**, counsel urged this Court to dismiss the application as litigation must come to an end.

[12] In reply **Ms. Guserwa** argued that medical evidence could only be challenged by other medical evidence.

[13] We have considered the record, submissions of the respective counsel and the law. It is trite that extension of time is not a party's right. It is a discretionary remedy that is only available to a deserving party.

[14] The question before us is whether the learned Judge properly exercised her discretion by first, declining to extend the time for applicant to file his appeal and secondly, by failing to vary timelines set by **Warsame, JA**. Here, we are guided by the decision in **Benja Properties Limited vs. Syedna Mohammed BurhannudinSahed& 4 others [2015] eKLR** wherein this Court expressed itself thus;

**“An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”**

[15] The single Judge was acting on behalf of the full Court and we cannot interfere with the exercise of her discretion, save under the guiding principles discussed earlier at **Gitetu v Kenya Commercial Bank Ltd**(supra). Those principles were reiterated by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat -v- Independent Electoral and Boundaries Commission & 7 others [2015] eKLR** where the Court emphasized the discretionary nature of the grant of leave to file an appeal out of time. The Court emphasized that an applicant seeking extension of time has the burden of laying a basis to the satisfaction of the Court. Where there is a reasonable cause for delay, the delay should be explained to the satisfaction of the Court.

[16] There is also a duty now imposed on courts by the overriding principles of the Civil Procedure Act to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court. The Court is bound by the provisions of section 3B of the Appellate Jurisdiction Act *inter alia* in that it *‘shall handle all matters presented before it for the purpose of attaining the following aims—*

*(a) the just determination of the proceedings;*

*(b) the efficient use of the available judicial and administrative resources;*

*(c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*

*(d) the use of suitable technology.*

[17] From the record, it is clear that the learned Judge was not convinced by the applicant's claim that he was bedridden for the last one year eight months and made a finding that explanation for the delay was not plausible. In the absence of reasonable explanation, even where the appeal is arguable, the Court ought not normally grant an extension of time to file the appeal.

[18] Like the learned Judge, we find that the applicant's reason for the inordinate delay is not persuasive in the least. He has not

demonstrated what action he took to ensure that the notice of appeal and the record of appeal were filed within the time specified by **Warsame, JA**. The delay in filing the second application was inexcusable.

[19] From the record before us, we are satisfied that the learned Judge addressed herself to all the facts and evidence placed before her before arriving at the conclusion that;

**“I have considered the applicant’s explanation that he was unable to file his appeal within the seven days that he was given on 21<sup>st</sup> September 2015 because of ill-health. However, the medical report that had been produced by the applicant has not proved his allegation that he was actually bed-ridden. Moreover, the applicant had a counsel who was representing him in the year 2015 when the order was given. It is the same counsel who is representing the applicant in this application.**

**Filing a notice and a record of appeal are functions ordinarily done by the advocates. The entire applicant needed to do was to instruct his advocate (sic). Thus, I am not therefore, persuaded that the applicant has sufficiently explained his failure to file the appeal within time. The applicant has therefore failed to satisfy the court that this is an appropriate case in which the court should exercise its discretion in the applicant’s favor. I therefore decline to extend time for the applicant to file his appeal. In addition, there is no justification for this court to review or vary the timelines that were set on 21<sup>st</sup> September, 2015.”**

[20] Accordingly, we find no good reason to fault the learned Judge who upon weighing the interests of both parties declined to grant the orders sought in the application for extension of time to file the appeal.

[21] In the circumstances, we find that this reference is devoid of merit and dismiss it with costs.

*Dated and delivered Nairobi this 22<sup>nd</sup> day of November, 2019.*

*E. M. GITHINJI*

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*JUDGE OF APPEAL*

*M. K. KOOME*

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*JUDGE OF APPEAL*

*S. ole KANTAI*

.....

*JUDGE OF APPEAL*

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**