



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. NAI. 81 OF 2016

JOSEPH MUIRURI MINJA.....APPLICANT/INTENDED APPELLANT

AND

DELMONTE KENYA LIMITED.....RESPONDENT

(An Application for leave to file and appeal out of time being against the ruling and orders of the Employment and Labour Relations Court at Nairobi (Abuodha, J.) dated 19th June, 2015

in

Employment and Labour Relations Cause No. 2311 of 2012)

RULING

The notice of motion dated 21st March, 2016 is said to be brought under various provisions of law and asks in the main that I extend time within which the applicant is required to lodge the Memorandum and Record of Appeal. It is supported by grounds which are set out on the face of the motion and an affidavit of the applicant, Joseph Muiruri Minja.

In sum the applicant says that the Employment and Labour Relations Court at Nairobi delivered a ruling on 19th June, 2015; that he is in possession of a Certificate of Delay denoting that proceedings in that court were applied for timeously and it was not his fault that a record of appeal was not filed on time; that there was a preliminary objection filed at the trial court; that in the ruling sought to be appealed, the trial court upheld a preliminary objection and struck out the suit; that when proceedings of the lower court were ready, they were posted to the applicant's advocate's address and received on a date which is not stated; that his advocate had filed an application seeking for extension of time to file the struck out suit out of time which application did not succeed; that he has an arguable appeal on the interpretation of when time starts to run for purposes of the Employment Act; that he had filed a notice of appeal on time and that the respondent would suffer no prejudice if I allow the application.

There is a supplementary affidavit where the applicant admits that notice of appeal was filed out of time but says that his lawyers had to await his instructions on whether to prefer an appeal. He further says that he was out of reach during the period when the ruling was delivered having travelled to his rural home, a place which he does not state, and where, he says, communication is difficult. It is also admitted in the supplementary affidavit that notice of appeal was served out of time through an oversight on the part of the applicant's advocates.

In what the respondent calls an "affidavit in reply", Harry Odondi, the Legal Officer of the respondent repeats matters that are not in controversy but says that the application is devoid of merit and should be dismissed. He depones that the notice of appeal was filed and served late and no reasonable explanation has been given for delay; that there is no application to extend the time for filing or serving that notice of appeal out of time; that failure on the part of the

applicant to file and serve a notice of appeal on time made the respondent to believe that there was not going to be appeal and arranged its affairs in that belief. There are many other matters set out in that affidavit and in various annexures but I need not set out them out here for purposes of determination of this motion.

The motion came up for hearing before me on 16th May, 2018 and was urged by Mr. Adams Chelule, learned counsel for the applicant, but was opposed by learned counsel for the respondent, Mr. A. Maruti. According to Mr. Chelule the applicant was unable to file a record of appeal within 60 days as required because proceedings of the lower court had not been availed. He referred me to page 38 of the record of motion where there is a letter dated 5th October, 2015 by the Registrar of the Employment and Labour Relations Court addressed to his law firm which informed the law firm that proceedings were ready for collection upon payment of appropriate court fees.

The motion was filed on 31st March, 2016. Mr. Chelule referred to a Certificate of Delay which he confirms was not on record before me. On the chances of success on the intended appeal, Mr. Chelule was of the view that the trial Judge was wrong to rely on facts not law and that the Judge was also wrong and misapplied the law on when a cause of action accrues in an employment dispute. For all that he asked me to allow the motion.

In opposing the motion, Mr. Maruti relied on the replying affidavit of his client and submitted that a notice of appeal was filed out of time. Learned counsel pointed out to me that the ruling of 19th June, 2015 arose from a decision on an Originating Summons where the applicant sought leave to institute a suit out of time. According to learned counsel the applicant had in that application admitted that his intended suit was time barred. Learned counsel concluded his submissions by stating that the power to extend time does not apply in matters contract and granting leave would not assist the applicant. According to learned counsel there was considerable passage of time from the date of the suit and the respondent would not be able to produce witnesses if a hearing of the suit which was struck out is reinstated.

I have considered the motion, the rival affidavits and submissions made. The principles that govern exercise of discretion in an application like this one for extension of time to file record of appeal out of time were well captured in the case of Wachiuri Wahome v Festus Gatheru Wahome & 6 Others [2016] eKLR where it is held:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in

1985. As it 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 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 the 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 facts: See Mutiso vs Mwangi, Civil Application No. Nai. 255 of 1997 (ur), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General, Civil Application No. Nai.8 of 2000 (ur) and Murai vs Wainaina (No. 4) [1982] KLR 38”.

I note that the ruling of the High Court was delivered on 19th June, 2015 and according to both parties a notice of appeal was filed on 7th July, 2015 which was outside of the time allowed for filing a notice of appeal. I also note that at paragraph 5 of the respondent’s affidavit it is stated that the notice was served on the respondent on 23rd July, 2015 again out of time. That is not denied by the applicant. The applicant has not applied for extension of time to file or serve a notice of appeal out of time.

Mr. Chelule, learned counsel for the applicant, pointed out to me the letter dated 6th October, 2015 where the Employment and Labour Relations Court informed the applicant’s advocate that proceedings were ready for collection. I was not told when proceedings were actually collected and learned counsel did not give any explanation for the period between October, 2015 and 31st March, 2016 a period of over 5 months from when counsel for the applicant was informed that proceedings were ready to the date of filing of the motion. That period was not explained and I think the delay is inordinate in the circumstances.

On the chances of success of the intended appeal, I have perused the draft memorandum of appeal and I also note that in an Originating Summons filed at the Employment and Labour Relations Court on 6th March, 2015 the applicant applied to be granted leave to file a suit out of time. That application failed and was dismissed. The applicant admitted before the trial court that his suit was time barred. I cannot see that there can be any chance of success in the intended appeal where the applicant has himself admitted that the suit was time barred.

All in all the applicant has not satisfied me that there is any material on which I can exercise my discretion in his favour to allow the application.

I find no merit in the application which I dismiss with costs to the respondent.

Dated and delivered at Nairobi this 8th day of June, 2018.

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR