



**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. 39 OF 2017**

**BETWEEN**

**PAUL MZUNGU SUMBA.....APPLICANT**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA.....RESPONDENT**

*(Being an application for extension of time to file an appeal out of time*

*from the judgment of the Employment and Labour Relations*

*Court (Abuodha, J.) delivered on 28<sup>th</sup> October, 2016*

**in**

**Industrial Cause no. 1000 of 2013)**

\*\*\*\*\*

**RULING**

I am asked in the notice of motion dated 3rd February, 2017 to grant the applicant **Paul Mzungu Sumba** leave and enlarge time to file memorandum of appeal out of time and that I be pleased to grant any other orders befitting the circumstances.

In the grounds in support of the motion it is stated that the court has unfettered discretion to grant the orders sought; that the applicant's appeal raises serious fundamental points of law and fact that need to be considered and determined by the court; that extension of time will ensure that the ends of justice are met; that delay in filing appeal has adequately been explained and that the respondent will not suffer prejudice if the application is granted. Those grounds are repeated in an affidavit of the applicant which further states at paragraphs 6 and 9:

***“6. THAT it was sometime on or about 9th day of December, 2016 that SAMUEL AKOLO WANYANGA, Advocate who was holding brief for P.C. ONDUSO, Advocate passed by the chambers of the above mentioned judge and was informed that judgment had been read on or about the 31st day of October, 2016 and he was then given a copy of the judgment.***

**7. ....**

**8. ....**

**9. THAT further delay was occasioned by the fact that my advocates were closing for the Christmas holidays and also the fact that I had to pay fees for my children in January 2017 and thus I was not in a position to give full instructions.”**

The application is opposed by the respondent **Housing Finance Company of Kenya** which in a replying affidavit sworn by its Legal Officer, **Joseph Lule** it is deponed amongst other things that advocates were informed of the delivery of judgment; that the applicant's advocate has not explained when he discovered that judgment had been delivered; that there is no explanation for the time taken from when it was discovered to the time the application was filed; that the applicant's employment was terminated way back in the year 2008 and that the litigation must end; and that the applicant has not demonstrated whether the intended appeal has any chance of success.

In a supplementary affidavit the applicant states that judgment was delivered on 28th October, 2017.

The application came before me on 7th May, 2018 when learned counsel **Mr. Samuel Akulo Wanyanga** appeared for the applicant while learned counsel Mr. Kiprono appeared for the respondent. Mr. Wanyanga relied on the grounds on the face of the application and affidavits. According to counsel on receipt of information on 9th December, 2016 that judgment had been delivered on 28th October, 2016 they closed for Christmas and thereafter the applicant did not give the law firm full instructions. For all that he asked me to allow the motion.

Mr. Kiprono informed me that he received a telephone call from court where he was informed of the date for delivery of judgment which was to be 28th October, 2016. Learned counsel wondered why the applicant's advocates had not made a follow up with the court to find out when judgment would be delivered. According to learned counsel there was no explanation why the application now before me was not brought until 6th March, 2017 about three months after the applicant's advocates were informed that judgment had been delivered. Learned counsel pointed out that the applicant resigned from the respondent's employment in 2008 and the suit before the Employment and Labour Relations Court was filed in the year 2013.

As has been said many times by this Court when it is called upon to exercise discretion to extend time for doing various things required by the Court of Appeal Rules principles applicable in considering such applications were well set out in the case of **Fakir Mohammed v Joseph Mugambi and 2 Others Civil Application No. 332 of 2014 (ur)** cited in the case of **Wachiuri Wahome v Festus Gatheru Wahome and 6 Others [2016] eKLR:**

*“The exercise of this court's discretion under rule 4 has followed a well-beaten path since the stricture “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 v Mwangi Civil Application No. NAI 255 of 1997 (UR), Mwangi v Kenya Airways Limited [2003] KLR 486, Major Joseph Mwereri Igweta v Murika M'Ithare and Attorney-General Civil Application No. NAI 8 of 2000 (UR) and Murai v Wainaina (No. 4) 1982 KLR 38.”*

We now also have **Sections 3A and 3B** of the **Appellate Jurisdiction Act** which sets out the overriding objective of civil litigation which must ensure the just expeditious proportionate and affordable resolution of disputes that come before the court. The said provisions were considered in the case of **City Chemist (NBI) and Another v Oriental Commercial Bank Limited Civil Application No. NAI 302 of 2008 (UR) 199/2008** where the following passage appears:

*“The overriding objective thus confers on this court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective”.*

It was however, recognized in the **City Chemist (supra)** case that rules of Court had their place and standing; parties being bound by them. It was stated:

*“That is not to say that the new thinking totally up-roots well established principles or precedent in the exercise of the discretion of the Court which is a Judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and un-ambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in Court. It also guides the lower Courts and maintains stability in the law and its application”.*

Taking all these principles into account has the applicant made out a case to entitle me to exercise a discretion in his favour?

It is accepted by lawyers for both parties that judgment of Employment and Labour Relations Court was to be delivered on notice. According to the advocate for the applicant, his law firm did not receive notice from that court and it was not until the 9th of December, 2016 that he came to know that judgment had been delivered on 28th October, 2016. According to counsel for the applicant they then closed for Christmas holidays and the applicant did not give instructions and was attending to school fees issues in January 2017 thus was unable to file a notice of appeal.

One of the issues I must consider in an application like this one is whether there is a reasonable explanation for the delay. I note that the motion was filed on 6th March, 2017 nearly three months after counsel for the applicant got to know about the judgment of the lower court on 9th of December, 2016. According to learned counsel on getting to know that judgment had been delivered they closed for Christmas on a date that he does not state and when they resumed after those holidays again on a date that is not stated they did not receive instructions from the applicant. He does not state when instructions were eventually received.

I do not find the explanation preferred by the applicant or his advocate to be reasonable. I take judicial notice that the period of Christmas holidays is stated in the Civil Procedure Act to run from 22nd December to 13th January. The applicant had nearly 2 weeks from 9th December, 2016 when his lawyer was informed that judgment had been delivered to the commencement of Christmas holiday period to decide whether he wished to appeal against the judgment delivered on 28th October, 2016 or not. The applicant's advocate knew on 9th December, 2016 that judgment had been delivered but took no step to indicate intention to appeal. Even after resumption to office on a date which is not disclosed but which I assume to be January, 2017, no step was taken until 6th March, 2017 when the motion before me was filed. I have not been given any reasonable explanation for this delay and I am of the opinion that the same is unexplained and is inordinate.

I have also perused the judgment of Abuotha, J. delivered on 28th October, 2016. I note at paragraph 4 of that judgment that the applicant actually resigned from his employment with the respondent on the 11th March, 2008 when he wrote a letter of resignation to the respondent which resignation was accepted by the respondent. I cannot see any chance of the intended appeal succeeding.

I do not find any merit in the application which I accordingly 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**