



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: KOOME J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 62 OF 2017

BETWEEN

RUFUS KAIMENYI JOSEPH.....APPLICANT

AND

KENYA PORTS AUTHORITY SPORTS CLUB MBARAKI.....RESPONDENT

(Being an application for extension of time to file an appeal against the Judgment and Decree of the

Employment and Labour Relations Court at Mombasa (Makau, J.) delivered on 24th June, 2016

in

E&LRC Cause No. 605 of 2015)

RULING

[1] Before me is an application dated 14th November, 2017, by which the applicant seeks extension of time within which to file an appeal against the decision of Makau J. delivered on 24th June, 2016. The applicant had moved the trial court seeking compensation for unfair termination of employment. However, the court found his claim to be unsupported by evidence and dismissed it. It however awarded him KShs. 28,465/- being one month salary *in lieu* of notice. Dissatisfied by the aforesaid outcome, the applicant was desirous of mounting an appeal but lacked the funds to hire counsel to represent him. By the time he had instructed counsel, he realized he was regrettably out of time, thus this application. A similar application had been made before the trial court, but was subsequently dismissed because the counsel seized of the matter had not sought leave of court to come on record as required by the rules of the trial court. Undeterred, the applicant filed the present application before this Court.

[2] The application was opposed by the respondent vide a replying affidavit sworn on 19th January, 2018 by one Ken Odera as well as a notice of preliminary objection dated 15th March, 2018. According to the respondent, the present application is *res judicata* and should be struck out, given that a similar application was already presented before the trial court and was dismissed. The respondent also contends that the application was instituted after an inordinate and unexplained delay of more than a year and five months. In addition, it was deposed that allowing the application would greatly prejudice the respondent, who would be exposed to added litigation costs, not to mention the hardship of instructing counsel over a matter that was concluded two years ago. Further, that since the applicant has not annexed a copy of his intended memorandum of appeal, it is difficult to even tell whether his intended appeal has high chances of success.

[3] At the hearing of this application, the applicant appeared in person. With leave of court which was issued at his instance and request, the applicant was given time to file his written submissions. That notwithstanding, no such submissions are on record, I am therefore left to rely purely on the contents of the application and affidavits on record. On his part counsel for the respondent Mr. Cheruiyot, simply submitted that a similar application had been made before the trial court and was dismissed and the matter was thus *res judicata*. He also relied on a long list of authorities which included *William Koross (Legal personal representatives of Elijah C. A Korros) v Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR and *E. T. V Attorney General & Another* [2012] eKLR.

[4] On the onset in determining applications such as this, the enabling provision of the law is Rule 4 of the Court of Appeal Rules. **It** allows a single Judge to extend the time limited by the Rules or by any decision of the Court for the doing any act “*on such terms as it thinks just.*” This rule provides an unfettered discretion to the Court to extend time. However, such discretion must be exercised judiciously. In ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Appeal No. Nai 255 of 1997***, the Court gave guidance on the exercise of this discretion as

follows:

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

In Mwangi v Kenya Airways Ltd [2003] 486, the Court referring to the above quote explained that guidance further as follows:

“We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives a single judge an unfettered discretion so long as the discretion is exercised judicially, a judge will be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues, only to the four set out in the 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”.

[5] The first issue I must grapple with however, is whether the present application is *res judicata*. Per the respondent, since a similar application was heard and determined by the trial court, the present application is *res judicata* and should be dismissed. **Section 7** of the **Civil Procedure Act**, deals with *res judicata* by stipulating as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

A further definition is to be found in **Black’s Law Dictionary, 9th edition**, which states *res judicata* to be:

“(i) An issue that has been definitively settled by judicial decision;

(ii) An affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction, or series of transactions and that could have been –but was not-raised in the first suit.”

[6] The basic principles of *res judicata* were simplified in the case of Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others [1996] eKLR; in which it was held that for *res judicata* to arise, there has to be

- (i) a previous suit in which the same matter was in issue and;
- (ii) the parties were the same or litigating under the same title and;
- (iii) a competent court heard the matter in issue and;
- (iv) the issue has been raised once again in a fresh suit.

Essentially, this means that where parties litigate over an issue before a competent court and the same is determined, the same issue cannot be raised again before another court save on appeal. In this case, it is without doubt that the applicant has previously unsuccessfully made an application for extension of time to file an appeal before the trial court.

[7] From the ruling delivered in that regard, it is equally apparent that the grounds advanced in the said application mirror and are identical to those contained in the present application. Further, the application before me now is being raised afresh and invokes the original jurisdiction of this Court and not an appeal from the refusal by the trial Judge to extend time. In other words, the applicant is not before this court on appeal of the ruling of the trial court delivered on 29th September, 2017. Rather, he seeks to re litigate his dismissed application afresh. In my own appreciation of the aforesaid legal provisions, the present application, being similar to that heard and determined by the trial court, is indeed *res judicata*.

[8] That being the case and although I sympathize with the appellant who is unrepresented but determined to appeal against the award by the trial court, this is not a valid reason for exercise of judicial discretion. The application has simply no merit and it is hereby dismissed with no orders as to costs. This is for reasons that the applicant is acting in person, and the dispute arose from employer/employee relationship.

Dated and delivered at Mombasa this 20th day of September, 2018

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M.K. KOOME

JUDGE OF APPEAL

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

DEPUTY REGISTRAR