



REPUBLIC OF KENYA



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**Judicial Service Commission v Obaga (Civil Application 34 of 2018)
[2018] KECA 318 (KLR) (14 September 2018) (Ruling)**

Judicial Service Commission v Siro Andrew Leo Obaga [2018] eKLR

Neutral citation: [2018] KECA 318 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 34 OF 2018
HM OKWENGU, JA
SEPTEMBER 14, 2018**

BETWEEN

JUDICIAL SERVICE COMMISSION APPLICANT

AND

SIRO ANDREW LEO OBAGA RESPONDENT

(Application for extension of time to file Notice of Appeal from the judgment of the Employment and Labour Relations court at Kisumu (M. Onyango, J.) dated 2nd November, 2017 in Kisumu Employment and Labour Relations Cause No. 305 of 2014)

RULING

1. By a notice of motion dated 10th April 2013, filed on 18th April, 2013, Judicial Service Commission (applicant) who was the respondent in a claim filed by Siro Andrew Leo Obaga (now respondent) in Employment and Labour Relations Court, and who is dissatisfied with the judgment delivered by that court on 2nd November, 2017 seeks to have time enlarged to enable it file its notice of appeal dated 13th January 2018 out of time, and the notice that was lodged in the Employment and Labour Relations Court on 22nd January 2018 deemed as duly filed and served.
2. The application is supported by grounds stated on the face of the motion and an affidavit sworn by Winfrida Mokaya who is the Registrar of the applicant. The main reason advanced for the delay in filing the notice of appeal is the fact that the judgment of the Employment and Labour Relations Court was delivered without notice to the parties and in their absence; and that the applicant only came to learn of the judgment after being served by the respondent with a party and party bill of costs, and notice of taxation, on 9th January 2018.
3. The applicant maintains that it has a meritorious appeal and has annexed a draft memorandum of appeal in which seven grounds have been listed. The respondent has filed a replying affidavit opposing



- the applicant's motion. The respondent contends that the application is fatally defective, bad in law and an abuse of the court process as it is brought in bad faith with the intention of denying the respondents the fruits of his judgment.
4. In addition, the respondent maintains that the applicant has not satisfied the principles upon which the court can grant it the orders sought as the application has been made after an unreasonable delay; that it has not been established that the applicant has an arguable appeal, or that substantial loss may result if the orders sought are not made. The respondent therefore urges the court to dismiss the applicant's motion.
 5. In arguing the application, Ms Muthoni Mugo, counsel for the applicant relied on *Maritim v Kibaru* [2005] 2 EA 162; *Judicial Service Commission v Gilbert Njuguna Mwangi & Attorney General* [2016] eKLR; *Tobias O See v Maseno University & 3 others* [2016] eKLR; and *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, Counsel maintained that the applicants delay in filing the notice of appeal was excusable and that the applicant has demonstrated that he had an arguable appeal.
 6. Mr. G. K. Suter, counsel for the respondent argued that the reasons given by the applicant for the delay were not genuine, and that the applicant failed to exercise due diligence. Counsel distinguished the authorities of *Maritime v Kibaru* (supra) and *Tobias O. See v Maseno University* (supra) that were relied on by the applicant on the grounds that the reasons for the delay in those authorities were beyond the control of the parties as the court files were missing.
 7. I have carefully considered the applicants motion. The application being one under rule 4 of the *Court Rules*, I have discretion to extend time for filing the notice of appeal. However, such discretion must be exercised judicially. In *Leo Sila Mutiso v Rose Hellen Wangare Mwangi* (Civil Application o. Ni 255 of 1997) (unreported) the general principles upon which such discretion is to be exercised were stated as the taking into account of the length of the delay, reasons for the delay, chances of the appeal succeeding and the degree of prejudice if any, likely to be suffered by the respondent if the application is granted. This requires that the applicant do adequately explain the reasons for the delay and satisfy the Court that it is in the interest of justice that the application be granted.
 8. In this case, it is common ground that the judgment delivered by the Employment and Labour Relations Court on 2nd November 2017 was delivered without notice and in the absence of the parties and their advocates. That was highly irregular. Given that the date which the court had given to the parties for judgment fell on a public holiday, an appropriate notice ought to have been sent to the parties. Without notice of the delivery of judgment, the applicants were prejudiced as time for the filing of the appeal started running when they were not aware of the judgment.
 9. It is evident that the applicant filed a notice of appeal on 22nd January 2018 which was less than 14 days after learning of the judgment. In the circumstances, the applicant has provided a plausible explanation for the delay in filing of the appeal. In addition, the applicant's draft memorandum of appeal raises arguable grounds particularly, on the propriety of the award of Kshs.200,000/= made to the respondent.
 10. In the circumstances, I am satisfied that there is appropriate justification for me to exercise my discretion in the applicant's favour. Accordingly, I allow the applicant's motion dated 20th April 2018 and deem the notice of appeal dated 13th January 2018 and filed on 22nd January 2018 as duly filed and served. Costs of the motion shall be in the appeal.

Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 14TH DAY OF SEPTEMBER, 2018.



HANNAH OKWENGU

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JUDGE OF APPEAL

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

Deputy Registrar

