



**IN THE COURT OF APPEAL**

**AT NAKURU**

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

**CIVIL APPLICATION NO. 38 OF 2017**

**BETWEEN**

**JUDITH JEMELI KESE.....APPLICANT**

**VERSUS**

**MOI TEACHING AND REFERRAL HOSPITAL.....RESPONDENT**

*(An application to file and serve a record of appeal out of time against*

*the decision of the Employment and Labour Relations Court*

*in Kericho (Njagi Marete, J.) made on 21<sup>st</sup> February, 2017*

**in**

**Claim No. 98 of 2016)**

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**RULING**

The applicant, **Judith Jemeli Kese** has, in the Motion dated 31<sup>st</sup> March, 2017 prayed that I extend time within which a Notice of Appeal should have been filed to challenge the Judgment of the Employment and Labour Relations Court delivered on 21<sup>st</sup> February, 2017 by **D.K. Njagi Marete, J.** The grounds set out in the Motion and in a supporting affidavit of the applicant are that after the said Judgment was delivered, the applicant was ignorant of the time within which to file an appeal and that by the time she instructed her advocates time for filing a notice of appeal had expired. She says at paragraphs 3, 4, 5 and 6 of her affidavit:

*“3. That the Judgment in the cause was issued on 21/2/2017.*

*4. That I thought that an appeal could be pursued within 30 days from 21/2/2017.*

*5. That on 8/3/2017 I visited my advocates offices and gave them instructions to have appeal pursued only to learn that the notice to appeal ought to have been filed by 7/3/2017.”*

The respondent, **Moi Teaching and Referral Hospital** filed a replying affidavit sworn by **Josphat**

**Mutuma Kirima**, the respondents internal lawyer, who says amongst other things that the applicant was duty bound to file an appeal within time as required by the Court of Appeal Rules; that the Motion lacks merit; that I should not exercise my discretion to extend time to an applicant who was represented in the High Court by an advocate; that the draft Memorandum of Appeal does not demonstrate an arguable appeal and other matters which I need not set out here.

I heard the Motion on 12<sup>th</sup> July, 2017 when learned counsel **Mr. Elijah Momanyi** appeared for the applicant while learned counsel **Mr. Fredrick Oundo** appeared for the respondent. Learned counsel for the applicant submitted that the applicant was unaware of the requirement that a notice of appeal should be filed within 14 days, thinking, mistakenly, that the period was 30 days. According to learned counsel the intended appeal was arguable as was shown in the draft Memorandum of Appeal filed with the application. In opposing the application Mr. Oundo submitted that there was inordinate delay in bringing the application; that the applicant had not demonstrated that there was an arguable appeal and that extending time to file an appeal would lead to an increase in costs in litigation.

I have considered the Motion, the affidavits and submissions made by learned counsel and the law.

Discretion to be exercised by a Judge in an application for leave to extend time under **Rule 4** of this **Court's Rules** is unfettered. An applicant, like the one here, must satisfy me that I should exercise my discretion in her favour. There are no hard or fast rules and each case should be decided on its circumstances. An oft-cited case on exercise of discretion under the said rule is **Mutiso v Mwangi Civil Application No. 255 of 1997 (ur)**. In the case of **Thuita Mwangi v Kenya Airways Limited [2003] eKLR** which considered factors applicable in an application for extension of time the following appears:

*“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”*

Factors that the single judge could take into account were considered in **Fakir Mohammed v Joseph Mugambi & 2 Others Civil Application No. NAI 332 of 2004 (ur)** as:

*“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 the 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 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 factors.”*

The matter before the trial judge was an employment dispute between the applicant and the respondent. The applicant had been charged with a criminal offence before the Chief Magistrate, Eldoret, and was acquitted of the said charge under **Section 210 Criminal Procedure Code**. It would appear from the judgment intended to be appealed that the respondent terminated the applicant from employment during the pendency of those criminal proceedings.

The learned trial judge heard the case before him and having found that termination of the applicant's employment was not unlawful. The case was dismissed and it is those findings that the applicant wishes to challenge in an intended appeal.

The judgment of the High Court was rendered on 21<sup>st</sup> February, 2017 and a notice of appeal should have been filed within 14 days of that date in accordance with **rule 75** of this **Court's Rules**. None was filed and the applicant's explanation is that she was not aware that such a notice needed to be filed within 14 days, believing that the period was 30 days. I note that the Motion was filed on 7<sup>th</sup> April, 2017, less than

1½ months after judgment, and I do not agree with learned counsel for the respondent that there was inordinate delay in doing so. The applicant has candidly stated that she did not know that the period for filing a notice of appeal was 14 days and that she thought that the period was 30 days. This I find to be a reasonable explanation.

Learned counsel for the applicant submitted that the intended appeal is arguable. I have perused the draft Memorandum of Appeal and find that the grounds set out thereat are not frivolous. I am not persuaded by the submission of learned counsel for the respondent that extending time to file appeal would add costs of litigation. That is not so. The applicant was dismissed from employment by the respondent and is entitled to challenge findings of the trial court in the intended appeal. I do not think that such an appeal would prejudice the respondent in any way as it would have the opportunity to oppose the appeal.

I am, on the whole, persuaded that this is a fit and proper case where I should exercise my discretion which I hereby do by extending time within which the applicant is to file notice of appeal. I direct that the applicant lodges a notice of appeal within 14 days of today and serve the same on the respondent in accordance with the rules of this Court. The costs of the Motion will abide the appeal.

**Dated and Delivered at Nakuru this 27th day of September, 2017.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**