



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M KARIUKI JA)

CIVIL APPLICATION NO.114 OF 2017

OMARIBA ELIJAH KEMONDE.....APPLICANT

VERSUS

THE SECRETARY, TEACHER SERVICE COMMISSION.....RESPONDENT

(An application to be relieved from court fees and security for costs and for extension of time to file record of appeal out of time from the judgment of the Employment and Labour Court at Nairobi (Abuodha, J) dated and delivered on 10th day of February 2017

in

Employment & Labour Relations Cause No. 1783 OF 2014)

RULING

1. The applicant, Omariba Elijah Kemonde, applied on 24th May 2017 to this court by way of notice of motion dated 12th May, 2017 for two orders, first, that he be relieved from paying court fees and security for costs and second, that he be granted leave to file appeal out of time.
2. The applicant is seeking to challenge on appeal to this court the decision of the Employment and Labour Relations Court (Abuodha J) made on 10th February 2017 in Nbi Cause No.1783 of 2014. In that decision, the Employment and Labour Relations Court (“**ELR Court**”) determined the applicant’s claim in which the applicant alleged that his employment with the Teachers Service Commission was terminated wrongfully and sought reinstatement. The E & LR court declined to order his reinstatement as the new job offer that had been advertised which the applicant could have taken up had lapsed. The court directed the respondent to give the applicant priority and recruit him as a teacher at the next available recruitment exercise.
3. Dissatisfied with the determination, the applicant gave on 2nd March 2017 a Notice of Appeal dated 13th February 2017 pursuant to rule 75 of the Rules of this Court manifesting his intention to challenge the whole of the said decision. Under the said rule, the applicant was enjoined to give notice of appeal within 14 days from the date of the decision intended to be impugned.

As the notice of appeal was lodged on 2nd March 2017 (instead of on or before 24th February 2017) it was out of time by about six (6) days. The applicant did not seek or obtain leave to file it out of time. However, on 24th May 2017, he filed the application now before me seeking the two aforementioned

orders. If he satisfies the court that he has a plausible explanation why he was late in giving the notice of appeal and in lodging the memorandum and record of appeal, the court is clothed with discretionary power under rule 4 of the Rules of this Court to extend time to appeal.

4. The reasons advanced by the applicant for his lateness are stated in his affidavit sworn on 12th May 2017 in support of the application. The record of this application shows that when the judgment of the E & LR court was read out in court on 10th February, 2017, the applicant was present as was the advocate for the respondent. In paragraph 4 of the applicant's affidavit in support of the application, the applicant avers that Messrs Mosota Mokayi Advocates represented him up to 10th February 2017 when they opted to step out of the case due to "lack of fees." The applicant further avers that upon delivery of the judgment on 10th February 2017, he instructed the firm of Masika & Koross advocates to file a Notice of Appeal. It seems the said advocates did not lodge a notice of appeal immediately or as required by rule 75 of this Court's Rules and when they eventually did so on 2nd March 2017, the period of 14 days provided for under the Rules had elapsed. As stated above, it is ostensible that the Notice of Appeal was out of time by six (6) days. In law, in absence of an order extending time for lodging the notice of appeal, there is not now in place a competent notice of appeal on the basis of which the record of appeal can be lodged.

5. There is no explanation why the notice of appeal was not filed timeously. But the period of the delay of six days was not inordinate and could be excused upon a reasonable explanation being proffered. Delays that are not inordinate also require to be explained. If this were not so, the object and purpose of the rules would be defeated.

6. Under rule 82 of the Rules of this Court, an intending appellant is required to institute appeal by lodging in the appropriate court registry within 60 days of the date when the notice of appeal was lodged the memorandum of appeal, record of appeal, prescribed fees and security for costs. From the date when the notice of appeal should have been filed (on or before 24th February 2017) to the date when this application was filed on 24th May 2017 three months had elapsed and from the date when the Notice of Appeal was filed on 2nd March 2017 to the date when the application was made on 24th May 2017, two months and three weeks had elapsed. The proceedings in E & LR Court Cause No.1783 of 2014 were ready for collection on 3rd April 2017. As the period of 60 days from the last date on which the Notice of Appeal should have been filed elapsed on 24th April 2017, and as the period of 60 days from the date on which the notice of appeal was lodged elapsed on 2nd May 2017 an explanation why the record of appeal was not prepared and lodged on or before 24th April 2017 or on or on or before 2nd May 2017 was necessary. By the time the applicant filed his application on 24th May 2017 for extension of time to appeal, 90 days from 24th February 2017 had elapsed and 82 days from 2nd May 2017 had elapsed.

7. Although the applicant avers that he retained messrs Masika & Koross advocates to act for him in the appeal, they did not ensure that a letter bespeaking the proceedings was copied to the advocates for the respondent to notifying them of the applicant's intended appeal. The effect of this default is that the applicant cannot take advantage of the proviso to rule 82(1) of this Court's Rules which facilitates exclusion of time certified by the registrar of the High Court as having been required for the preparation and delivery of the proceedings to the applicant. However, in this case, no exclusion of time was necessary because the proceedings were ready for collection on 3rd April 2017 long before the period of 60 days for appealing run out. The appeal should have been filed within 60 days from 24th February 2017 when the notice of appeal should have been filed or 60 days from 2nd March 2017 if extension of time was sought and obtained. A court of law will not shut out a litigant who acts with a sense of dispatch and is able to show that he was diligent in pursuing the filing of the appeal especially where the delay was unavoidable.

There is no explanation in this case why the applicant did not seek extension of time soon after receipt of the proceedings, or why the applicant has neither compiled the record of appeal nor the memorandum of appeal by now.

8. Moreover, there is absence of averment or statement by the applicant as to whether he has an arguable appeal. It is not shown what in the decision the applicant intends to challenge the applicant intends to impugn. On the face of it, no case has been made out on the arguability of the intended appeal.

9. The applicant has failed to satisfy the court that he had a plausible reason for his failure to file the notice of appeal in time as required by rule 75 (supra) or apply for extension of time within a reasonable time after receipt of the proceedings on 3rd April 2017.

10. It becomes unnecessary for me to delve into the applicant's prayer seeking to be relieved of the burden of paying the court fees and security for costs, but on the face of it no case has been made out either in this regard. I dismiss the application for want of merit. The respondent shall have the costs of the application.

Dated and delivered at Nairobi this 24th day of November, 2017.

G. B. M. KARIUKI SC

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR