



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL (APPLICATION) NO. 28 OF 2014

BETWEEN

BEATRICE KAHAI ADAGALAAPPLICANT

AND

THE POSTAL CORPORATION OF KENYADEFENDANT

(An Application to Review the orders of the Court of Appeal at Kisumu,

(Maraga, Azangalala & Kantai, JJ.A) dated 19th November, 2014

in

CIVIL APPEAL NO. 28 OF 2014)

RULING OF THE COURT

1. This appeal was listed for hearing on 19th November 2014. When called out, though served, neither the appellant nor her counsel was in Court. Upon the application of counsel for the respondent, we dismissed the appeal under **Rule 102(1)** of the Court of Appeal Rules for nonattendance. On 18th May, 2015, the appellant filed an application under the same Rule and sought a review of this Court's said order of 19th November, 2014 and the restoration of her appeal for hearing. This ruling is on that application.
2. The appellant's application is based mainly on the ground that though her advocate was served with the hearing notice for 19th November, 2014, he did not inform her of the same hence her failure to attend court on that day. She said she learnt of the dismissal of her appeal on 3rd May, 2015 when at Vihiga Resident Magistrate's Court where she had gone for the hearing of an application in Vihiga RMCC No. 32 of 2012 involving the same parties. She thereafter filed the present application on 18th May, 2015 which was within 30 days as required by Rule 102 of the Court of Appeal Rules.
3. The application is strongly opposed. Besides the averments that no good reason has been given why neither the appellant nor her counsel appeared in Court on 19th November, 2014 for the

hearing of the appeal, granting this application will be an exercise in futility as the appellant's appeal has no chances of success.

4. The facts of the case are fairly simple and straight forward. The appellant was in 1988 employed by the respondent as a Postal Officer. She rose through the ranks to the position of Postal Superintendent and in March 2008, she was the Post Master in charge of Vihiga Post Office.
5. By its letter dated 11th August 2008, the respondent summarily dismissed the appellant on allegations of theft prompting her to file Cause No. 234 of 2013 in the Industrial Court (now the Employment and Labour Relations Court) (the ELRC) at Kisumu on 15th August, 2013.
6. The respondent raised a preliminary objection challenging the competence of that Cause on the ground that the same was statute barred. That preliminary objection was heard together with the appellant's application for extension of time to deem that Cause as having been filed with leave. After hearing, Wasilwa, J. sustained the preliminary objection, dismissed the application for extension of time, and struck out the cause on the ground that leave should have been sought before filing it.
7. Aggrieved by that decision, the appellant filed the present appeal which as we have stated was on 19th November, 2014 dismissed for non attendance thus provoking the present application.
8. In exercising its jurisdiction under the proviso to Rule 102(1) of the Court of Appeal Rules, this Court has a wide and unfettered discretion. Among the factors to be considered in such an application is whether or not sufficient reason has been given for nonattendance and whether or not the appeal sought to be restored is arguable.
9. Having carefully read the application, the affidavit in support, the replying affidavit and the appellant's written submission on the application as well as those of counsel for the respondent, we are of the view that this application can be disposed of on one ground: limitation.
10. It is not in dispute that the appellant's claim in ELRC Cause No. 234 of 2013 is founded on her contract of employment with the respondent. Her claim in that Cause is for arrears of salary from March, 2008 to March, 2012 of Kes.1,256,089/= and "*Net lost salary for expected years to retirement*" of Kes.5,317,414/= making a total of Kes. 6,573,503/=.
11. **Section 90** of the Employment Act 2007, states that:

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

12. Pursuant to this provision, the appellant having been dismissed on 11th August 2008, she should have filed her claim by 10th August 2011. However, as we have stated, she filed it on 15th August 2013 and that is obviously the reason why she sought an extension of time to deem the Cause as having been filed out of time with leave of the Court.
13. It may very well be that the appellant was let down by her erstwhile lawyers who filed her claim out of time and later failed to prosecute the appeal that sought to reverse that dismissal order.
14. Much as we sympathize with the appellant if that is true, we cannot help her as the law ties our hands. **Section 90** of the Employment Act 2007 which we have quoted verbatim herein above, is in mandatory terms. A claim based on a contract of employment must be filed within 3 years. As

this Court stated in the case of **Divecon Limited -vs- Samani [1995-1998] 1 EA P.48**, a decision relied upon by Radido, J. in **Josephat Ndirangu - vs – Henkel Chemicals (EA) Limited, [2013] eKLR**, the limitation period is never extended in matters based on contract. The period can only be extended in claims founded on tort and only when the applicant satisfies the requirements of **Sections 27 and 28** of the Limitation of Actions Act.

15. Although for different reasons, as we have said Wasilwa, J. refused to extend the limitation period in the said Cause thus prompting this appeal. Even if the appeal was heard on 19th November 2014, we have no doubt that it was going to be dismissed. It follows that even if we allow the appellant's present application and restore her appeal, it will still be dismissed on the self same ground that the limitation period is never extended in claims arising from contracts.

16. As we have stated, much as we sympathize with the appellant, allowing this application will not only be an exercise in futility but will instead cause her to incur more costs. Consequently, we dismiss this application with costs to the respondent.

DATED and delivered at Kisumu this 6th day of November, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR