



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 195 of 2009

SIMON Q. OGILA ..... APPLICANT

AND

THE HON. ATTORNEY GENERAL ..... RESPONDENT

(Application for extension of time to lodge and serve the record of appeal from a ruling of the High Court of Kenya at Nairobi (Ransley J) dated 29<sup>th</sup> September, 2004

in

H.C.C.C. NO. 4218 OF 1990)

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R U L I N G

This is an application under **Rule 4** of the Court of Appeal Rules for extension of time within which to lodge a record appeal.

The applicant intends to appeal against the ruling of the superior court (Ransley J) dated 29<sup>th</sup> September, 2004 wherein the superior court dismissed an application to review the judgment of the superior court (Aluoch J – as she then was) dated 12<sup>th</sup> October, 1995. It is manifest from that ruling that the applicant filed a suit against the respondent relating to termination of his employment on 28<sup>th</sup> August, 1989. It appears that the applicant was retired at 50 years instead of 55 years. By the suit he claimed, among other things, 5 years salary and house allowance, payment for 45 days leave and salary in lieu of 6 months notice.

The trial Judge allowed the claim for six months salary in lieu of notice but dismissed the claim for salary for 5 years on the ground that the applicant did not give evidence in support of that claim and further that there was documentary evidence that applicant was paid part of his remaining salary and house allowances upon retirement under the 50 years rule.

The application for review filed in the superior court has not been annexed. It seems however that the applicant was aggrieved by the rejection of his claim for salary for 5 years and applied for review of that portion of the judgment. The superior court dismissed the application on the ground that there was no error apparent on the record of the superior court saying:

**“The learned judge dealt with the plaintiffs claim. If she misconstrued the plaintiff’s claim which was for salary from 3/9/1998 until retirement age of 55 years with annual increaments then this would appear to be a misdirection giving right to as appeal. A court in an application for review cannot re-write its judgment even if it thinks it may have been wrong. That is a matter for the Court of Appeal”.**

The Court has a discretion to extend time being guided by the well known principles (see Wasike vs. Swalla [1984] KLR 59.

On the question of the merits of the intended appeal, the applicant has annexed a draft memorandum of appeal stating six grounds. However, the applicant did not in his affidavit indicate why the ruling of Ransley, J. is erroneous. Moreover, the applicant’s counsel did not demonstrate that any of the stated grounds are indeed arguable. In my view, the applicant has not shown that the intended appeal would have merit.

Furthermore, the application was filed over 4 years after the ruling of Ransley J, a fact which is admitted. The ruling is dated 29<sup>th</sup> September, 2004 and the application was lodged on 3<sup>rd</sup> July, 2009. The applicant has explained the delay. He says that he filed the notice of appeal in time but did not file the record of appeal because he could not raise the required fees as he was not in gainful employment. The copy of the notice of appeal he claims to have he lodged is not part of the record of the application. The explanation given by the applicant is not reasonable as he could have made an application under **Rule 112** of the Court of Appeal Rules for relief from pay fees.

For those reasons, the application has no merit. It is dismissed with no orders as to costs.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of October, 2009.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

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

DEPUTY REGISTRAR