



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 274 OF 2018

HERBERT MUCHELULE.....APPELLANT

VERSUS

SENECA EAST AFRICA LIMITED FORMALLY

SENTRY SECURITY LIMITED.....RESPONDENT

RULING

1. Application dated 21/9/2021 is by the applicant who prays for orders in the following terms:-

- (1) **THAT** the Honourable Court be pleased to extend time within which the applicant is to file and serve the Notice of Appeal in the decision delivered on 18th October, 2019 marked “**HM1**”
- (2) **THAT** the delay of filing the Notice of Appeal out of time was inadvertently occasioned by failure/inability of accessing the Court file and inability to get the decisions to enable the claimant to file the Notice of Appeal.
- (3) **THAT** the claimant had to seek assistance to be assisted in accessing the Court. The process of the above stated took part of 2019 and part of 2020 marked “**HM2**” is the correspondence between the Court and the Judiciary Ombudsman.
- (4) **THAT** by the time when the claimant was able to access the Court file, the time within which to file Notice of Appeal had lapsed under **Rule 75** of the Court of Appeal in the aforesaid decision and the Applicant is to file Notice of appeal in aforesaid decision.
- (5) **THAT** the applicant is desirous of challenging the Superior Court’s decision and that has reasonable grounds to belief that he has an arguable appeal with an extremely high chances of success.
- (6) **THAT** the orders sought herein within which the Notice of Appeal will not in any way prejudice the Respondent.

Ruling of Hon. Justice Abuodha Jorum Nelson given on 18th day of October, 2019 in ELRC No. 274 of 2018 the Applicant be granted unconditional leave to prosecute the intended appeal.

- (7) **THAT** the costs and incidental to the application abide the outcome of the intended Appeal.

2. The application is premised on grounds set out on the face of the application to wit;

1. That the suit was determined by Employment and Labour Relations Court on 18/10/2019 and a decision made against the claimant/Applicant.
2. That upon the Ruling being delivered by Hon. Abuodha, J. on 18/10/2019, the applicant moved to the Judiciary Ombudsman for assistance and by the time, the applicant accessed the Court through the assistance of the ombudsman, 14 days of filing notice of appeal had lapsed.
3. That the delay was exacerbated by the COVID-19 Pandemic, which made access to Court even more difficult.

3. The application is supported by the supporting affidavit of the applicant who restates the aforesaid grounds therein and adds that since he is a lay man and had no legal representation this hindered his ability to file the appeal timeously since he had to seek assistance from other agencies such as the judiciary ombudsman to help him.

4. The applicant has attached a letter dated 22/10/2019 he wrote to the Deputy Registrar requesting for a certified copies of proceedings and Ruling.
5. The applicant prays that the application be allowed.
6. The counsel for the respondent filed grounds of opposition dated 24th September, 2021 in which he states that the application dated 21st September, 2021 is misconceived since no sufficient and cogent reasons have been advanced to entitle the applicant to the orders sought.
7. That the application is baseless, fatally defective and does not meet the Legal threshold required for grant of the orders sought.

Determination

8. The Court has considered the application together with all the supporting documents and the grounds of opposition raised by the respondent.
9. The Court notes that no draft appeal has been filed by the applicant with this application for extension of time. This is a vital requirement as the Court needs to determine at the outset whether the intended Appeal has prospects of success. In **Siaya ELC Misc Application Case No 5 of 2021 Dr James Ouko Okumbe versus Joshua Abongo Okumbe District lands Registrar Bondo** the Court quoting the Supreme Court in **Nicholas Kiptoo Arap Salat versus Independent Electoral and Boundaries Commission and 7 Others** had the following to say, *'In this motion the Appellant failed to proffer to this Court a draft copy of his memorandum of Appeal which is a mandatory requirement. The Supreme Court of Kenya in the case of Nicholas Kiptoo Salat versus Independent Electoral and Boundaries Commission and 7 others held as follows; Where one intends to file an Appeal out of time and seeks extension of time, the much he can do is to annex the draft Memorandum of Appeal'*
10. The Court has also carefully considered the grounds upon which the application has been brought and the applicant has not in any way attempted to demonstrate that the intended appeal has any prospects of success.
11. The trial judge, considered a Preliminary Objection raised by the respondent that the suit was statutorily time barred by dint of Section 90 of the Employment Act, 2007 in that the claimant/applicant has specifically pleaded in the statement of claim that he was employed by the respondent from 1st November, 2005 and served with loyalty and diligence until 8th October, 2010 when his services were terminated.
12. The judge also found that it was common cause that the suit was filed on 7th March, 2018, more than seven (7) years from the date the cause of action arose.
13. The Court in its impugned ruling found that the suit ought to have been filed within a period of 3 years from the 8th October, 2010 and proceeded to strike out the suit for want of jurisdiction to hear and determine the same.
14. The applicant has completely failed to demonstrate that he has any prospects of success in the intended appeal.
15. Though the Court finds sympathy with the sentiments raised by the applicant with respect to having no legal representative to help him expedite the matter, this in itself is not a valid and reasonable cause for the inordinate delay in filing this application about three years from the date of the impugned ruling.
16. In the final analysis, the application lacks merit and is dismissed with no order as to costs considering the personal circumstances of the applicant as discerned from the application.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 20TH DAY OF JANUARY, 2022.

MATHEWS N. NDUMA

JUDGE

APPEARANCES

APPLICANT IN PERSON

KIMATHI MULI FOR RESPONDENT

EKALE – COURT ASSISTANT