

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 150 & 151 OF 2018

JACQUELINE KATUKU KASINGA & DANIEL MUTUA MWENDWA.....CLAIMANTS

VERSUS

KENYA FRESH PRODUCE EXPORTERS LIMITED.....RESPONDENT

RULING

1. Before me are the Claimants/Applicants' notice of motion applications dated 25th November 2019 seeking orders to permit the new advocates to come on record for the Claimants and also seek an extension time for filing and serving a memorandum of appeal against the decision of the court made in March 2019. The grounds upon which the applications are premised are expressed on the face of the motion and on the Claimants' affidavits. In brief, the grounds expressed are that the Claimants are dissatisfied with the decision of the court and that the time within which to file the appeals had lapsed hence the need to have the prayers sought granted.

2. The motion was apparently not opposed by the Respondent. There was no affidavit of service indicating service of the motion upon the Respondent. Submissions were filed by the Claimants/Applicants and the Applicants submitted that the delay was occasioned by the Claimants' previous advocates who filed the notice of appeal on time but the Claimants lost touch with the firm of advocates and upon approaching the new firm of advocates the new advocates were able to get in touch with the former advocates who confirmed receiving certified copies of proceedings around July and had until September to file the appeal but never managed to file due to unavoidable circumstances. The Claimants submitted that the power to extend time is donated by the Section 7 of the Appellate Jurisdiction Act and Rule 4 of the Court of Appeal Rules. Reliance was placed on the cases of **Kenya Airport Authority & Another v Timothy Nduvi Mutungi [2014] eKLR** per Githinji JA and **Edward Njane Ng'ang'a & Another v Damaris Wanjiku Kamau & Another [2016] eKLR** per Waithaka J. The Claimants submitted that in deciding whether to extend time or not a judge is called upon to exercise the unfettered discretion which must be exercised judiciously as held in the case of **Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1997] eKLR**. It was the Claimants submissions that the notice of appeal was filed within time and that the delay in filing the record of appeal was not of the Claimants' making as all they could was to find out the position of the said record and when they realised that the record had not been filed as per instruction they moved with speed to file the current applications. They submitted that they found about the issue in November and filed the application in less than a month which is not so long as to be inexcusable and that the applications had been brought without undue delay. The Claimants submitted that they were not aware the record of appeal had not been filed as they had instructed their former advocates to file and they submitted that it has been held by the Court of Appeal on several occasions that the mistake of counsel should not be visited on an innocent litigant. The case of **Philip Chemwolo & Another v Augustine Kabede (1982-88) KAR 103 at 1040** cited with approval by Gatembo JA in **Banking Insurance & Finance Union v Harambee Co-operative Savings & Credit Society [2015] eKLR** where the learned Judge of Appeal held "*A mistake is a mistake. It is no less a mistake because it is an unfortunate slip.... The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...*" The Applicants urged the court to exercise its discretion in their favour and grant the extension sought to permit them to launch the appeals.

3. In determining whether to extend time or not, a judge has unfettered discretion to consider such an application for extension of time as the ones before me and generally the matters taken into account are the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the Respondent if the application is granted and if the motion has been made without undue delay. Broken down further, the factors to consider are on the premise that the extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court. In the main a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court as to why discretion is to be exercised in his or her favour. Secondly, as to whether the Court should exercise the discretion to extend time is a consideration to be made on a case- to- case basis. Thirdly, where there is a reasonable cause for the delay, the same should be explained to the satisfaction of the Court. Fourthly, the court has to consider whether there will be any prejudice suffered by the Respondent(s), if the extension is granted. Finally, the court has to consider whether the application has been brought without undue delay. Undue delay is not merely the length of time but the period as well as the factors surrounding the delay. The Claimants/Applicants who filed the notices of appeal on time failed to file their records of appeal within the stipulated period. By way of explanation they state that the delay in filing the record of appeal was not of the Claimants' making as all they could was to find out the position of the said record and when they realised that the record had not been filed as per instruction they moved with speed to file the current applications. They indicated that once they found about the issue in November 2019 they moved with haste and filed the application in less than a month which they argue is not so long as to be inexcusable and that the applications had been brought without undue delay. I disagree. Whereas there could be an argument made that there was mistake by counsel, it does not augur well for the party seeking to obtain the extension in not disclosing reasons for the delay. The Claimants fail to explain what transpired from 26th March 2016. How is it that they were unable to reach their former advocates yet their new advocates were able to? What did they mean by the assertion that they lost contact? There is no explanation given as to the delay in filing the record and I decline to exercise my discretion in their favour. There will be no merit in discussing the merits of the intended appeal or the other factors such as prejudice to the Respondent. In the premises the 2 applications in Cause 150 of 2018 Jacqueline Katuku Kasinga v Kenya Fresh Produce Exporters Limited and Cause 151 of 2018 Daniel Mutua Mwendwa v Kenya Fresh Produce Exporters Limited are dismissed with no order as to costs.

4. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, precipitate action arising from this judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 30th day of March 2020

Nzioki wa Makau

JUDGE