



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO.79 OF 2015**

(Before Hon. Justice Hellen S. Wasilwa on 28<sup>th</sup> May, 2020)

**CHESTIT MOSES CHEMBEN & 92 OTHERS.....PETITIONERS**

**VERSUS**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**RULING**

1. The Applicants filed an application on 18/4/2019 seeking the following orders:-

**1. Spent.**

**2. THAT this Court be pleased to grant leave to the Applicants to appeal out of time against the Judgement made by the Hon. Justice Hellen Wasilwa on 30/5/2018 in Nairobi Constitutional Petition No. 79 of 2015.**

2. The application is based on grounds that:-

**1. Due to an unfortunate breakdown of communication with the then Applicants' Advocates, the Applicants got to know of the Judgment several weeks after it was delivered, on 30/5/2018.**

**2. They expressed their interest in lodging an appeal against the Judgment and therefore made an application for a certified copy of the typed proceedings which are yet to be availed.**

**3. The Applicants are elderly and disparate and owing to the nature of the suit and financial implication on the members there was need for them to seek consensus on the way forward and it was difficult to trace all 92 Applicants to organise a meeting.**

**4. The statutory time for appeal ran out and that the applicants have an arguable appeal.**

**5. The Respondent will suffer no prejudice if the said leave is granted.**

3. The application is supported by the affidavit of Chestit Moses Chemben, the 1<sup>st</sup> Applicant herein sworn on 11/4/2019. He depones that none of the Applicants were present in Court when Judgment was delivered and that the advocate on record left the firm of Letangule & Co. Advocates and forgot to brief the incoming advocate.

4. He further depones that he was not able to meet all the Applicants on time and communicate to them the outcome of the Judgment and further obtain instructions from them to the Advocates as they had difficulty in raising legal fees for the appeal.

5. The Respondent filed Grounds of Appeal on 2/5/2019 in which it states that:-

**1. This application ought to have been filed under Rule 4 of the court of Appeal Rules 2010 at the Court of Appeal and not before this Honourable Court. Therefore, this Court lacks jurisdiction to grant the orders sought.**

**2. There has been an inordinate delay before the filing of this application.**

3. *The Applicants' Advocates were in Court on 30/5/2018 when the decision was delivered hence there is no plausible reason why the appeal was not lodged within the statutory timelines. They have not demonstrated any efforts made to secure the typed proceedings.*

4. *The assertion by the Applicants that the financial implications on the members played a part in the delay in filing of the appeal is insincere since the members who wished to pursue the appeal ought to have done so within the statutory timelines. The rest would have joined later.*

5. *Owing to the lapse of 2 financial years before the filing of the appeal, the Respondent will suffer immense prejudice since a provision for such litigation has not been made in the financial years 2018/2019 and 2019/2020.*

6. The Application was disposed of by way of written submissions.

#### **Applicant's submissions**

7. They relied on Sections 3 and 20 of the Employment and Labour Relations Court (ELRC) Act and submitted that this Court has the power to grant leave to the Applicants to appeal out of time. They further submitted that similar to the High Court, this Court has power to grant leave to appeal out of time under Section 95 of the Civil Procedure Act as read with Section 7 of the Appellate Jurisdiction Act.

8. They relied on the case of **Loise Chemutai Ngurule & another v Wilfred Leshwari Kimung'en & 2 others [2015] eKLR** where the Court held that section 7 is explicit that the High Court, which under the Constitution includes the Environment and Land Court and this Court, can extend time for giving notice of intention to appeal from a judgement of that Court.

9. They submitted that they have met the threshold for grant of the prayer sought as set out in the case of **LSG Lufthansa Service Europa/Afrika GmbH & another v Eliab Muturi Mwangi (Practising in the name and style of Muturi Mwangi & Associates Advocates) [2019] eKLR**. They argued that the delay was not inordinate and can be explained by the fact that the previous advocates committed some mistakes and the Applicant ought to be crucified for those mistakes.

10. They submitted that should there be any prejudice to be suffered by the refusal to grant leave, the same shall be borne by the Applicants as any prejudice can be addressed by payment of damages. It was therefore its submission that the Court ought to allow the instant application.

#### **Respondent's submissions**

11. The Respondent submitted that none of the 93 Applicants approached the Court on record for a period of 11 months to know the status of the matter thus they seem to have lost interest in the matter.

12. The Respondent relied on the case of **Savings and Loans Limited v Susan Wanjiru Muritu Nairobi HCCNo. 397 of 2002** where the Court held that a case belongs to a litigant and not her advocate and that she has a duty to pursue prosecution of his or her case.

13. They Respondent submitted that no attempt has been made to explain the Applicants' indolence. They relied on the cases of **Samuel Gathu Kamau v Peter Kaniu Gathungu [2006] eKLR, Mbogo & Ano v Shah [1968] EA 93** and **Leonard Oseme Karani v Sunflag Textile & Knitwear Mills Limited [2019] eKLR** where the Courts held that equity does not aid the indolent.

14. They further submitted that this Court should be guided by the provisions of Section 3 (1) of the ELRC Act and find that granting the Orders sought is tantamount to stepping on the doctrines which are well envisioned in the provisions.

15. The Respondents also submitted that while a mere negligent mistake by counsel may be excusable, the situation is vastly different where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude. It argued that the Applicants herein abandoned the Petition and now seeks to open dried wounds. In support of this, they relied on the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR**.

16. They argued that the delay in receipt of the typed proceedings is not sufficient reason for the inordinate delay. They relied on the case of **County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR** where the Supreme Court held that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded.

17. The Respondent also submitted that the Applicants stated that they got to know of the delay on 1/8/2018 but there is no clear explanation for the delay from 1/8/2018 to 18/4/2019, which amounts to 9 months, when they changed the advocate. They submitted that the Supreme Court in **Naomi Wangechi Gitonga v Independent Electoral & Boundaries Commission & 17 others [2018] eKLR** found that a period of 9 months was an inordinate delay and dismissed the application. They further submitted that no steps have been taken to arrest the delay.

18. They also submitted that its financial burdens are guided by annual budgets and that no notice of appeal or request for proceedings was served on it thus it did not request treasury for allocation for funds to cover the subject matter. It submitted that it should be allowed to enjoy the fruits of the judgment and further litigation will not only put it into quagmire but also open it up for fresh litigation from other staff.

19. The Respondent submitted that if the application herein was being brought in good faith, it should have been brought together with an already filed appeal. It submitted that the applicable law should be rule 4 of the Court of Appeal Rules, which gives the mandate to grant extension of time to file an appeal in the Court of Appeal.

20. They also submitted that this Court is not able to measure whether there is an arguable appeal and that the Court should not exercise its discretion where the conduct of the applicants fail to demonstrate any due diligence. It further submitted that this Court would not apply to exercise its mind to find whether the appeal is frivolous if the grounds of appeal have been hidden from it. It relied on the case of **Boniface Nzau Muia v Shengli Engineering Construction Company & another [2019] eKLR.**

21. In conclusion, it submitted that the application lacks merit and should be dismissed.

22. I have examined the averments of the Parties herein. The judgement in this case was delivered on 30/5/2018. The Applicants sought to file this application on 18/4/2019 over one year since judgement was delivered which in my view is inordinately too late in the day.

23. The Applicants have not given any plausible reason as to why they are coming this late in the day. I therefore dismiss this application. There will be no order as to costs.

**Dated and delivered in Chambers via zoom this 28<sup>th</sup> day of May, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties