



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MALINDI
CIVIL APPEAL NO 2 OF 2018

CHANGAWA CHOME NGALA.....APPELLANT/APPLICANT

VS

ATHI RIVER MINING CEMENT LIMITED.....RESPONDENT

(Appeal from the judgment of Hon L.N Wasige (Mrs)

dated 21st March 2018 in Kaloleni SRMCC No 20 of 2015)

RULING

1. This ruling flows from the Appellant's application brought by Notice of Motion dated 16th July 2018 seeking leave to file Memorandum of Appeal out of time.
2. The application, which is supported by the Appellant's own affidavit is based on the following grounds:
 - a) Judgment was delivered in Kaloleni SRMCC No 20 of 2015 on 21st March 2018 but the Appellant, then being represented by the firm of Kariuki Gathuthi & Company Advocates was not made aware of the same;
 - b) From the copy of the judgment, there was no attendance by the Appellant or his Advocates on the date of delivery of judgment;
 - c) The Appellant had lost his mobile phone and along with it, most of his phone contacts, including those of his erstwhile Advocate;
 - d) The Appellant only got wind of the dismissal of his case from his former colleague on or about 5th April 2018 and he decided to travel from Kaloleni to Mombasa to the offices of Kariuki, Gathuthi & Company Advocates to obtain more information;
 - e) The said offices, as known by the Appellant were located at 1st Floor, Door No 25, Kaderbhoy Building but on arrival thereat, he was informed that his erstwhile Advocate had since relocated to an unknown location, which situation left him stranded as he had lost his Advocate's contacts as aforesaid;
 - f) The Appellant then went to Kaloleni Law Courts on 12th April 2018 and through the assistance of the court's customer care representatives thereat, was able to establish his case number and was subsequently able to confirm that indeed his suit had been dismissed on 21st March 2018;
 - g) The Appellant finally managed to obtain a copy of the judgment on 19th April 2018 with only one day left to file his Memorandum of Appeal as the final day within which he was to file his Memorandum of Appeal was 20th April 2018;
 - h) The Appellant also managed to retain the services of his current Advocates who got in touch with the Appellant's former Advocates to source their requisite consent to come on record after judgment, review the judgment in Kaloleni SRMCC No 20 of 2015, prepare and file the Memorandum of Appeal which was done on 24th April 2018, 4 days out of time;
 - i) The failure to file the Memorandum of Appeal within the required time was unintentional on the Appellant's part and was occasioned by circumstances that were beyond his control;
 - j) No prejudice will be suffered by the Respondent if the orders sought in this application are granted;

k) It is in the interest of justice that the orders sought are granted.

3. The Respondent did not oppose the application. What is left for determination therefore is whether the Appellant has advanced adequate grounds to move the Court to exercise its jurisdiction in his favour. In its decision in *Donald O. Raballa v Judicial Service Commission & another [2018] eKLR* the Court of Appeal restated the following factors to be taken into account in an application such as the one before me:

- a) The length of the delay;
- b) The reason for the delay;
- c) The chances of the appeal succeeding if the application is granted; and
- d) The degree of prejudice to the Respondent if the application is granted.

4. In *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR* the Supreme Court affirmed that the factors for consideration in an application to extend time for filing an appeal are not closed and each case is to be considered on its own merit. The Supreme Court went further to state that the discretion of the Court in this regard is unfettered and it is upon the Applicant to convince the Court that they deserve exercise of discretion in their favour.

5. In the affidavit sworn by the Applicant in support of his application he has given a detailed explanation as to the reasons for delay in filing his appeal. From the record, the delay is not inordinate and there is no demonstrable prejudice against the Respondent. On the face of it, the Memorandum of Appeal raises substantial issues meriting consideration by this Court.

6. Taking all factors into account, I am persuaded to exercise discretion in favour of the Applicant. The application dated 16th July 2018 is therefore allowed.

7. The firm of Wanjiku Mohamed Advocates is directed to perfect its appearance by obtaining and filing written concurrence from the firm of Kariuki, Gathuthi & Company Advocates.

8. I make no order for costs.

DATED SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF MAY 2019

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JUDGE

Appearance:

Ms. Wanjiku Mohamed for the Appellant

No appearance for the Respondent