



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET

MISCELLANEOUS NO 1 OF 2019

STEPHEN K. KIYEN.....APPLICANT

VERSUS

KENYA FARMERS ASSOCIATION.....RESPONDENT

RULING

1. By an application dated 24th January,2019 the applicant sought orders among others that the Court enlarges time and grants the applicant leave to file an appeal against the Judgement of Honourable Mbogo (CM) delivered on 5th February,2013 and that the annexed Memorandum of Appeal dated 24th January,2019 be deemed by the Court as properly filed.
2. The application was based on the grounds among others that the applicant was dissatisfied with the decision of the Chief Magistrate in Eldoret CMCC NO 443 of 2011 where he sought compensation in the sum of kshs. 2,052,394/60 for wrongful and unlawful termination of his employment and a declaration that his arrest and prosecution was malicious and general damages for mental anguish and defamation of character.
3. The Court heard and determined the suit and a judgement was delivered on 5th February,2013 in absence of the applicant and according to the applicant, without notice of delivery of judgement directed by the Court in the previous sitting. It was not until about July, 2014 when the applicant went to the Court registry to inquire about the date of delivery of judgement after lapse of so much time and was informed by the Court registry officials that judgement had already been delivered and upon perusal of the file he noted that an advocate by the name **Manani** had held his brief without his instructions and did not inform him about the delivery of judgement.
4. The applicant also noted upon perusal of the judgement that he had been mis-designated and untried as Manager of Kenya Farmers Association Nakuru Branch which was not true. One noting the discrepancies, he sought advice from Counsel who was within the Court premises with regard to appealing on the matter but counsel who he later learned to be representing the respondent in several matters, misadvised and discouraged the applicant from appealing on account of costs and slim chance of success and that the only avenue was to file a fresh matter before ELRC.
5. The ELRC opened at Eldoret in 2017 and the applicant proceeded and filed ELRC case number 104 of 2017 which proceeded for hearing on an application by the respondent to dismiss the matter as res judicata and a ruling was delivered on 18th December,2018 whereby the matter was dismissed for res judicata.
6. Mr. Cheruiyot for the applicant submitted that the applicant has been vigilant in prosecuting the matter and that no indolence had been exhibited by him but due to the fact that he was acting in person, he was ignorant and was mis advised.
7. In urging the application, Counsel relied on the cases of Nicholas Kiptoo arap Korir Salat & 7 Others v I EBC (2014) eKLR where the Court held among others that extension of time is not a right of a party. It is an equitable remedy available to a deserving party at the discretion of the Court. The party seeking extension has the burden of laying a basis to the satisfaction of the Court and there should be a reasonable reason for the delay. Counsel further relied on the case of Factory Guars Limited v. Abel Vundi Kitungi (2014) eKLR where the Court stated that the report of appeal should not be impeded as it is a constitutional right and conelatum of the rule of law.
8. The respondent opposed the application and submitted that the conditions precedent to granting extension of time to file an appeal are settled Mr. Kalya for the respondent relied on the case of Murungi Kirigia v. Catherine Kagwira (2011) eKLR where it was stated that the decision whether or not to extend the time for application is essentially discretion. The matters which the Court takes into account in deciding whether to grant an extension of time are first, the length of delay, second the reason for delay, thirdly possible chances of the appeal succeeding and fourthly the degree of prejudice to the respondent if the application is granted. Counsel urged the Court to consider the length of the delay in filing the application. That is to say it took the applicant five years to file the application.
9. According to the respondent the allegation that the applicant was misadvised within the Court precincts against appealing are were allegations which had not been supported by cogent facts and evidence. On this score Counsel relied on the case of Philemon Cheruiyot

Kenduiywa v Hellen Chemeli and 3 others (2018) eKLR where the Court stated that there was inordinate delay of more than four years in bringing the application and that the applicants had not given a reasonable explanation for the delay but simply sought to shift the blame to his former Counsel.

10. In this particular case the applicant shifted blame to an anonymous advocate whose existence could not be rightfully ascertained.

11. The law on extension of time to file an appeal is fully appreciated by both counsels. First, the delay must not be inordinate, second, the applicant must tender reasonable explanation for the delay and finally the Court must also consider the prejudice which could be occasioned to the respondent of the application is granted. The Court also takes into account the chances of success of the intended appeal.

12. In his affidavit in support of the application, the applicant stated the he was aware the judgement in the matter was delivered on 5th February, 2013. He does not state on Oath as alleged in the submissions that judgement was to be delivered on notice and that an advocate by the name Mr. Manani held his brief without permission and took the judgement. In fact the Motion makes no mention of Cause no ELRC No 104 of 2017 which was dismissed as being res judicata.

13. The Court has noted that the applicant's Counsel in his submissions introduced additional facts which were not contained in the application. Submissions are persuasion by Counsel based on the evidence before the Court or pleadings. A party is not allowed to introduce new facts and evidence through submissions.

14. In his affidavit in support of the application, the applicant only talks of being misadvised without mentioning who misadvised him. He further talks of recently visiting a legal expert who correctly educated or advised him of his right to appeal. In the court's view the reasons advanced by the applicant to explain the delay of 5 years are not sufficient. Further the fact that the applicant did not plead the fact that he filed ELRC case no 104 of 2017 after the judgement in CMCC NO 443 of 2011 which was dismissed on grounds of res judicata was material non-disclosure. Reference to the said suit in the submissions was unprocedural introduction of additional facts.

15. It is therefore the Courts view that the delay of five years is inordinate and no reasonable explanation has been tendered to warrant the exercise of the Court's discretion in favour of the applicant. To grant leave to appeal after a lapse of five years would obviously occasion prejudice and inconvenience to the respondent.

16. The application is therefore unsuccessful and is hereby dismissed with costs.

17. It is so ordered.

Dated at Nairobi this 14th day of November 2019

Abuodha Jorum Nelson

Judge

Delivered this 14th day of November 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge