



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 67 OF 2013

[FORMERLY NAIROBI CAUSE NO 2279 OF 2012]

KENYA CHEMICAL AND ALLIED WORKERS UNION.....CLAIMANT

CYRUS MULWA MUTINDA

(suing on his own behalf and on behalf of all former employees of

PACKAGING MANUFACTURERS (1976) LTD and on

behalf of 145 others).....**INTENDED CLAIMANT/APPLICANT**

VS

PACKAGING MANUFACTURERS (1976) LTD.....RESPONDENT

RULING

1. By a Notice of Motion dated 1st November 2017, the Applicant seeks the following orders:

- a) That the Court be pleased to grant leave to the intended Claimant/Applicant to lodge a Notice of Appeal out of time;
- b) That the Notice of Appeal filed on 30th October 2017 be deemed duly filed and properly on record.

2. The application which is supported by an affidavit sworn by a court clerk in the firm of J.M Makau & Co Advocates, Tabitha Mumba is based on the following grounds:

- a) That on 19th October 2016, the Applicant filed a Notice of Motion dated 13th October 2016, whose ruling was delivered by **Makau J** on 14th October 2017;
- b) That being dissatisfied with the ruling, the Applicant commenced the process of appealing the decision by filing and lodging a Notice of Appeal;
- c) That on 24th October 2017, the Applicant visited the Court Registry to lodge the aforesaid Notice of Appeal but was unable to file the Notice because the Registry was closed;
- d) That the following day being 25th October 2017, was declared a public holiday by the Minister for Interior and Coordination of National Government, thus the Notice of Appeal could not be filed;
- e) That 26th October 2017 being the date of the fresh presidential election, had already been declared a public holiday;
- f) That the deadline for lodging the Notice of Appeal was 27th October 2017 and upon visiting the Court Registry, the Applicant found only one staff by the name Sofia, who informed him that she was unable to process the Notice of Appeal for filing because she neither had the knowledge nor the tools to carry out the process;
- g) That the delay in lodging the Notice of Appeal was beyond the Applicant's control and it is in the interest of justice that the application be allowed;

h) That the application has been filed without unreasonable delay.

3. In her affidavit in support of the application, Tabitha Mumbé depones that on 27th October 2017, she was informed by a staff of the Court by the name Sofia that she could not process the filing of the Notice of Appeal because she neither had the expertise in assessment nor was she conversant with the procedure to be followed in the filing of such a document.

4. However, in a replying affidavit sworn by Swafiya Alawy, who identifies herself as the Executive Officer of the Court, she denies giving any such information to Tabitha Mumbé. Alawy depones that on 27th October 2017, at about 11.00 am, the said Tabitha Mumbé called her at the Court Registry and asked her to stamp a Notice of Appeal.

5. Alawy told Mumbé to obtain a court receipt and thereafter go back for stamping of the Notice of Appeal and endorsement by the Deputy Registrar. Alawy states that Mumbé did not go back to her that day. Instead, Mumbé went back to the Court Registry on 30th October 2017 and asked Alawy to backdate the Notice of Appeal to 27th October 2017. Alawy declined and Mumbé left.

6. Mumbé returned to the Court Registry on the same day and produced a court receipt dated 30th October 2017 in respect of court fees for filing of the Notice of Appeal, whereupon Alawy stamped the Notice of Appeal with the court stamp of 30th October 2017.

7. The Respondent filed Grounds of Opposition on 1st December 2017, stating that:

a) On the basis of the Replying Affidavit of Swafiya Alawy sworn on 30th November 2017, the application is not *bona fide* and the Court should not therefore exercise its discretion in favour of the Applicant;

b) The failure to file and lodge the Notice of Appeal on time was not beyond the control of the Applicant or his agents as is evident by the Replying Affidavit of Swafiya Alawy;

c) No grounds are disclosed to support the statement made by Tabitha Mumbé to the effect that the intended appeal is arguable with overwhelming chances of success;

d) The Notice of Appeal dated 24th October 2017 and filed on 30th October 2017 is not endorsed by the Deputy Registrar and cannot therefore be deemed properly filed.

8. By consent of the parties, the application was urged by way of written submissions. In the submissions filed on behalf of the Applicant on 18th April 2018, reference was made to the decision in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR*** where the Supreme Court affirmed that the discretion of the Court to extend time though unfettered, must be exercised judiciously.

9. In this regard, the Supreme Court set the following as underlying principles to be considered by the Court:

a) *Extension of time is not a right of a party; it is an equitable remedy available on merit at the discretion of the Court;*

b) *A party who seeks extension of time bears the burden of laying a basis to the satisfaction of the Court;*

c) *Whether the Court should exercise its discretion to extend time is a consideration to be made on a case to case basis;*

d) *The delay should be explained to the satisfaction of the Court;*

e) *The Court should consider whether any prejudice will be suffered by the Respondent if the extension is granted;*

f) *Whether the application has been brought without undue delay.*

10. In the present application, the Applicant blames the delay in lodging the Notice of Appeal on the Court on two fronts; first, an unexplained closure of the Registry on 24th October 2017 and second on some form of incompetence by a staff of the Court who is referred to as Sofia. In a replying affidavit filed on 1st December 2017, the said staff identifies herself as the Executive Officer of the Court, Swafiya Alawy.

11. Alawy not only denies the averments made by Tabitha Mumbé regarding the delay in lodging the Notice of Appeal, she also makes a very disturbing statement that Mumbé had attempted to influence her to backdate the court stamp. The Court was stunned that the Applicant and his Counsel made no attempt to respond to this damning allegation. The order sought in this application is equitable and discretionary and as stated by the Supreme Court in the ***Nicholas Salat Case*** (supra):

“Extension of time being a creature of equity, one can only enjoy it if he acts equitably.”

12. The accusation made against Mumbé, who was an agent of the Applicant, was so severe that it ought to have elicited a response or even a request by the Applicant’s Counsel that Alawy be summoned for cross examination. Whoever seeks extension of time must take responsibility for turning the mind of the Court in their favour.

13. In this case, the Applicant allowed a very serious allegation against his agent to go unchallenged. The Court was therefore unmoved to exercise its discretion in his favour. Consequently, the application dated 1st November 2017 is declined with costs to the Respondent.

14. I will say nothing about the Applicant's submissions in the alternative that the Notice of Appeal was filed in time, as this was not part of the application before the Court.

15. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF JULY 2018

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JUDGE

Mr. Makau for the Applicant

Mr. Nanji for the Respondent