



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
MISCELLANEOUS APPLICATION NO. 102 OF 2015

(Formerly Miscellaneous Application No. 254 of 2015)

(Before Hon. Lady Justice Hellen S. Wasilwa on 26th September, 2018)

JACOB BUHUNGI ELAKI.....APPLICANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL....RESPONDENT

RULING

1. The Application by the Applicants herein is the one dated 12.6.2015 filed by the Applicants herein seeking orders as follows:-

1. That the Applicant be granted a further extension of time to file appeal against the judgment and decree of the Hon. Mrs. Muketi (SPM) given in Milimani CMCC No. 7177 of 2004.

2. That the 30 days granted by Honourable Justice M. Ang'awa in H.C Miscellaneous Application No. 233 of 2011 on 27th July 2011 for filing the intended appeal be extended for a further 30 days from the date of this order.

3. That the costs of this application do abide by the results of the attended appeal.

2. The Application is based on the following grounds that:-

1. The file on which the order given for leave to appeal out of time i.e Miscellaneous Application No. 233 of 2011 went missing immediately the order was given and could not be extracted so that it is included in the Record of Appeal.

2. It is not until recently that the file resurfaced long after the time for filing appeal had elapsed.

3. The Judge who granted leave (Hon. Justice Ang'awa) would appear not to have returned the file to the Court Registry hence the unavailability of the file at the Court.

4. In view of the recent decisions of this Court in cases related to this case i.e. Industrial Cause No. 550 of 2013, it is in the interests of justice that the Applicant be granted further leave to appeal against the Learned Magistrate's judgment.

3. The Application is also supported by the Supporting Affidavit of Simeo Mugalavai Keyonzo the Counsel for the Applicant herein who depones that he has the conduct of this suit and hence competent to swear this affidavit on behalf of the Applicant herein.

4. He deponed that he learnt of the delivery of the judgment in CMCC No. 7177 of 2004 in October 2008. That upon discovery that the Claimant's case was dismissed in October 2008, he applied for certified copies of proceedings and judgment for purpose of appeal. He was furnished with proceedings, judgment, and a Certificate of Delay in March 2011.

5. He then filed an Application in High Court on 24/11/2011 for leave to file an appeal out of time. The Application was heard and allowed by Judge Ang'awa on 27/7/2011 and they were given 30 days within which to appeal.

6. He then proceeded to file a Memorandum of Appeal. He avers that the appeal could not be filed, as he could not extract the order granting leave to appeal out of time. He contends that the Court file went missing and he wrote to Court on several time and was informed that Judge

Ang'awa may have misplaced the file when she left the judiciary.

7. He referred to copies of the letter written to the Deputy Registrar dated 25/8/2011 seeking for the order granting leave to appeal out of time. However, there is a copy of the said order filed by the Applicant as Appendix JE6 and signed off on 10.10.2011, which was definitely after the 30 days granted for leave to file the appeal out of time.

8. The Respondent opposed this Application. They filed their Grounds of Opposition on 16/3/2018 as follows:-

1. That the substance of the instant Application is based on unsubstantiated claims that the Judge who granted the subject leave to file appeal out of time did not return the Court file to the Court Registry hence the unavailability of Court file.

2. That equity aids the vigilant and not the indolent, the Applicant herein failed to pursue his rights vigorously as demonstrated by his conduct in that he wrote Only ONE letter in a period spanning 4 years addressed to the Deputy Registrar querying the status of the H.C Misc. App No. 233 of 2011 contrary to what is alleged by the Claimant in his Application that he sent "several letters" to the Deputy Registrar.

3. That the Applicant herein has not demonstrated sufficiently the probability of success of the intended Appeal since success of Court matters differs from suit to suit based on different surrounding facts.

4. That the Respondent's right of a fair hearing stand to be prejudiced by the unwarranted indolence on the part of the Applicant especially the right to have a trial begin and conclude without unreasonable delay as stipulated in the Constitution of Kenya Article 50(2) (E).

5. That the Claimant's application is frivolous and vexatious thus an abuse of the Court process thus should be dismissed with costs to the Respondent.

9. The Parties agreed to dispose of this Application by way of written submissions.

10. I have considered the submissions of the Parties. I note the inordinate delay in seeking to file an Appeal since judgement was delivered in 2007 11 years ago. The Applicant aver that they learnt of the judgement in 2008 a year after its delivery which points to indolence. The Applicant wrote to the Deputy Registrar on 25/8/2011 asking for the Court order but there is no indication that the Court file was missing. The contention that Judge Ang'awa misplaced the file is also a matter of hearsay.

11. I however note that leave to appeal was given by Honourable Judge Ang'awa on 27.7.2011. The order for the same was only signed by the Deputy Registrar on 10.10.2011 after the 30 days period had expired. There was some delay on the Court's part in availing the Court order which may have led to the delay in filing the leave intended. In the circumstances, I will grant leave to the Applicant to appeal as sought and this to be effected within 30 days.

Dated and delivered in open Court this 26th day of September, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kioko for the Respondent - Present

Claimant – Absent