



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL 7 OF 2014

(FORMERLY CA 478 OF 2012)

LAXMANBHAI CONSTRUCTION COMPANY LIMITED.....CLAIMANT

VERSUS

FILMONI MBAYAGI KEDOGO.....RESPONDENT

Mr. Sifuna for respondent/applicant

Mr. Oonge for appellant/respondent

RULING

1. By an application dated 26th September 2016 and filed on 27th September 2016 the applicant seeks the court to enlarge time within which to appeal against judgment of the court dated 15th January 2016.
2. The respondent received a letter dated 27th July 2016 from the court inviting the respondent to collect certified copies of judgment, decree and typed proceedings of the case for purposes of filing the appeal.
3. The advocate for the respondent pleads inadvertence in filing this application more than nine (9) months from the date of judgment and in not filing the appeal on time.
4. This is a second appeal from a judgment of the Principal Magistrate Nditika delivered on 30th August 2012.
5. In terms of the Court of Appeal rules, notice of appeal ought to be filed within fourteen (14) days of the judgment of the court. Enlargement of time is in the discretion of court.
6. The Court of Appeal in **Civil Application No. Nai 332 of 2004, Fakir Mohammed Vs. Joseph Mugambi & 2 others** while commenting of judicial discretion stated:-

“the exercise of this court’s discretion under Rule 4 has [follows] a well beaten path ... there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for delay, (possibly) the chances of appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive

factors”

7. It is submitted that these factors apply equally to the discretion of the court under Employment and Labour Relations Court (procedure) Rules 2016.

8. It is submitted that the delay is not inordinate and the reason given for the delay is simply oversight by the advocate.

9. The application is opposed by the respondent giving the long history of the case in **Nairobi CMCC No. 3930 of 2006**, in which, he was awarded Kshs.401,163. The award was appealed successfully in this court and judgment given in favour of the respondent on 15th January 2016.

10. In terms of order 43 rule 2, of the Civil Procedure Rules, an appeal in the nature of the intended appeal shall lie with leave of court.

11. An application for such leave shall be made either orally at the time of making of order to be appealed from or within fourteen (14) days from the date of such order. The law is crafted in mandatory terms.

12. The respondent states that the delay in bringing this application is inordinate and the reason given not sufficient. That there is no requirement for typed proceedings prior to seeking leave to appeal and the reason for the delay given by Mr. Daniel Sitati Sifuna is disingenuous. That there is nothing on record to show that any such leave was sought orally by the applicant.

13. That in **Nicholas Kiptoo Arap Korir Salat Vs. IEBC & 7 others [2014] eKLR**, the Supreme court expressed itself thus;

“although this court’s discretion in extending time is unfettered an applicant must explain the reasons for the delay in making the application for extension and whether there were extenuating circumstances that could enable the court to exercise its discretion in favour of the applicant.”

14. In the circumstances of this case, where judgment was delivered in January, certified proceedings provided in July and application for leave to file appeal out of time made in September, the court is not persuaded that there is sufficient reason for the glaring delay so as to exercise its discretion judiciously.

15. It is in the interest of justice and fair play that this matter does not remain hovering over the head of the respondent for inordinately long time without adequate justification especially because same had been settled by a labour officer and terminal benefits paid accordingly.

16. Accordingly, the application for leave to appeal out of time is refused.

Dated, signed and delivered at Nairobi this 24th day of November 2017

MATHEWS NDERI NDUMA

JUDGE