



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 731 OF 2012

1. JOHN MIUMU
2. CHARLES GITAU MUKURIA
3. JOHN N. NG'ANG'A
4. DAVID MUGO NGUGI
5. THOMAS WACHIRA NJAU
6. CECILIA WANJIKU NJOROGE
7. MARY WANGUI MUCHUHA
8. GLADYS WARIGIA GITONGA
9. TERESIA WANGECHI GATOTO
10. PETERSON MURAGE MURANGU
11. CHRISTOPHER O. BABU
12. MARY KIKAU
13. ROBERT GAITHO KARIRO
14. MICHAEL A. NGESA
15. WILSON N. WAKASIKA
16. SAMUEL MWANGI GITHUI
17. JACINTA NYOKABI
18. SAMUEL GACHERU MWAURA
19. SAMUEL SUGE.....CLAIMANTS

VERSUS

JOMO KENYATTA UNIVERSITY OF
AGRICULTURE & TECHNOLOGY.....RESPONDENT

RULING

1. The Claimants/Applicants sought through a notice of motion application dated 28th June 2014 and filed on 24th July 2014 orders under Section 20 of the Industrial Court Act, Rule 16 of the Industrial Court (Procedure) Rules 2010 and Article 159 of the Constitution of Kenya. The application prayed for the following orders:-
 1. The firm of Kiruki & Kayika Advocates be granted leave to come on record in place of Juma Kiplenge & Co. Advocates for the Nine applicants herein
 2. The Applicant's be granted leave to file their Notice of Appeal out of time.
 3. The Notice of Appeal filed be deemed to have been filed out of time.
 4. The Applicants be granted leave to file their appeal out of time.
 5. Any other orders this Honourable Court deems fit to grant
 6. The costs of the application be in the cause.

2. The application was premised on grounds on the face of it and was supported by the affidavits of Michael Abucheri Ngesa and Beatrice Jebichi Lamaon. In brief, the grounds for the application were that the Claimants were not in Court when the judgment was delivered by Rika J. on 13th June 2013 and that they became aware of the judgment about one month after it was delivered. The affidavits confirmed this position and in the case of Beatrice Lamaon she deponed that she was the widow of Samuel Suge (deceased) and that she had obtained a limited grant of letters of administration in respect of the deceased 19th Claimant. She deponed that she was not advised that the suit had been abated in 2012. The grounds as well as the two deponents asserted that the Applicants had an appeal that had overwhelming chances of success and thus sought the grant of the orders.
3. The Respondent was opposed and filed a Replying Affidavit sworn by Prof. Victoria Wambui Ngumi on 23rd January 2015. In the replying affidavit, the deponent stated that the Claimants case had commenced at the High Court of Kenya in case number 608 of 2000 and was transferred to this Court and registered as Cause No. 731 of 2012 and was heard in December 2012 by Rika J. She deponed that Rika J. delivered an award in the case in June 2013 and after delivery of judgment the advocate for the Claimants computed each Claimant's award and forwarded the schedule for settlement by the Respondent. She deponed that though the Respondent was dissatisfied with part of the award the Respondent nevertheless opted to settle the award fully. She deposed that the advocates for the Respondent and Claimants executed and filed a consent marking the matter as fully settled. She deposed that the application was an abuse of the process of the Court. She deponed that she had been advised by her counsel that appeals from this Court only lie on matters of law.
4. The parties offered to dispose of the matter by filing submissions in support and opposition to permit the Court make a determination. The Court agreed to the proposal and the Applicants filed their submissions on 1st April 2015 while the Respondent filed its submissions on 15th April 2015.
5. The Applicants submitted that the main order sought by the applicants is an order to file an appeal out of time. The Applicants confirmed that the suit was filed in the High Court as HCCC 608 of 2000 and was transferred to this Court and registered as Cause No. 731 of 2012. The Applicants submitted that the judgment was delivered by Rika J. in the absence of both parties. The Applicants submitted that they had very convincing reasons for their failure to file a notice of appeal and an appeal within the stipulated time. They submitted that they were never informed of the judgment by either the advocates then on record or their colleagues tasked with liaising with the advocates for the Claimants. The Applicants submitted that in the absence of knowledge of the judgment date the applicants could not reasonably be expected to know when to initiate a notice of appeal once the award had been delivered. The Applicants submitted that the failure to file the notice on time was due to the failure of the advocates then on record for them advising of the delivery of the award. The Applicants relied on the case of **Eres N.V & Another v Murage & Co. Advocates [2013] eKLR** where Shah JA cited with approval the case of Michael Njoroge 'b' & Others v Civent Kimani Chege and stated that professional standards must be maintained at their highest but when a lawyer errs and the error is remediable his client ought to be given a chance to be heard. The Applicants submitted that the record was uncontested that the award was delivered in absence of both parties and their advocates and the time for filing a notice of appeal started without the knowledge of the Applicants. By the time the Applicants were notified of the award the time to file a notice of appeal had lapsed. The Applicants submitted that they had good grounds of appeal and that the appeal had overwhelming chances of success. The Applicants submitted that this Court has jurisdiction under the Appellate Jurisdiction Act Section 7 to extend time within which to file an appeal. The Applicants relied on the case of **Mohamed & Another v Munguti & 9 Others [2014] eKLR** and the case of **Patrick Onguso Nasibi v National Water Conservation & Another [2014] eKLR** where Onyango J. held that this Court is empowered to grant an extension of time of the period for giving an intention to appeal from a judgment or for making an application for leave to appeal. The Applicants thus asked the Court to grant the prayers sought.

6. The Respondent on its part submitted that the parameters for the grant of orders sought were set out in numerous judicial decisions. The Respondent cited the Court of Appeal decision in **Githiaka v Nduriri [2004] 2 KLR 67** and submitted that the Applicants application must be assessed within these parameters in order to determine whether it is meritorious or not. The Respondent submitted that the Applicants had stated through the depositions of Michael Abucheri Ngesa that they were informed of the award of the Court in July 2013 and the application was filed on 24th July 2014. The Respondent submitted that no explanation whatsoever was given as to why it took the Applicants more than one year to file the application. The Respondent relied on the Court of Appeal decision in the case of **Wambugu, Motende & Co. Advocates v Kajulu Holdings Limited & 3 Others Civil Appl. No. Nai 282 of 2014**. The Respondent submitted that under Section 17(2) of the Industrial Court Act an appeal from a judgment, award, decision, decree or order of this Court can only lie on matters of law. The Respondent also submitted that there was a consent on record and the application had the legal effect of asking the Court to set aside the consent of parties and reopen the dispute. The Respondent referred to Section 22 of the Industrial Court and submitted that the consent could not be varied or set aside unless it was obtained by fraud. Reliance was placed on the case of **Samuel Wambugu Mwangi v Othaya Boys High School Nyeri Civil Appeal No. 7 of 2004** and **Brooke Bond Liebig (T) Limited v Maliya [1975] E.A. 266**. The Respondent submitted that the Applicants were represented by counsel and have not alleged fraud, collusion or any of the other reasons that can justify the setting aside of the consent order made on 17th September 2013. The Respondent thus urged the Court to dismiss the application with costs to the Respondent.

7. The first step in determining this issue is whether this Court has the jurisdiction to extend time within which to file a notice of appeal and the like. Section 7 of the Appellate Jurisdiction Act provides as follows:-

7. The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

8. The issue has been subject of decisions of this Court. My sister Onyango J. held in the case of **Nasibi v National Water Conservation** as follows:-

Section 7 of the Appellate Jurisdiction Act empowers the High Court to extend time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal even after the time for giving such notice or making such appeal has already lapsed.

From the foregoing, both this Court and the Court of Appeal have jurisdiction to grant the orders sought by the applicant.

9. I couldn't agree more. The Applicants thus have not picked the wrong forum for the application. The matters to consider in an application of this nature are subject of a number of decisions of the Court of Appeal. In the case of **Githiaka v Nduriri** Ringera Ag. JA (as he then was) in customary eloquence gave an exposition of the factors to consider when determining the merits of an application for extension of time. The learned judge rendered himself thus:-

Under rule 4 the Court is perfectly invested with a clear and unfettered discretion to extend the time limited by the Rules or its own decisions. Such a discretion, like all judicial discretions, is to be exercised judicially, that is to say on sound reason rather than whim, caprice, or sympathy. In exercising the discretion the Court's primary concern should be to do justice to the parties. In considering which way the scales of justice tilt, the Court

should among other things consider the length of the delay in lodging the notice and record of appeal and, where applicable, the delay in lodging the application for extension of time, as well as the explanation therefore; whether or not the intended appeal is arguable; and the public importance, if any, of the matter, and generally the requirements of the interest of justice in the case.

10. The learned judge cited with approval the unreported decision in **Leo Sila Mutiso v Rose Hellen Wangari (Civil Application No. Nai 251 of 1997)** where it was stated as follows:-

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant the extension of time are first the length of the delay, secondly the reason given for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted, and fourthly the degree of prejudice to the respondent if the application is granted”

11. The application must thus be viewed through the prism of precedent. The Applicants made the instant application on 24th July 2014 and assert the delay was due to the failure by their counsel to advise them of the decision in time. The decision of my brother Rika J. was delivered on 13th June 2013. It was deposed by the Applicants that they became aware of the decision sometime in July 2013. The filing thus was one year after the decision was in their knowledge. The reason advanced for the delay is that the counsel then on record for the Claimants did not inform the Applicants of the delivery of the judgment and secondly even the Claimants tasked with keeping the rest abreast did not inform them of the same. I have scoured through the affidavits of Michael Ngesa and Beatrice Lamaon. None of them make any reference to a reason for the delay from July 2013 to 24th July 2014. The intended appeal though touted as substantial is from a cursory look one that does not fit within the remit of Section 17(2). The appeal is not on matters of the law. The appeal seeks to even disturb the discretion of Rika J. in granting 6 months compensation. That surely cannot be the remit of an appeal from this Court.

12. The length of delay was inordinate, no reason has been given for the delay and the fact that the appeal is not on matters of law, I decline to exercise discretion to extend the time. Application is dismissed with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 21st day of **May** 2015

Nzioki wa Makau

JUDGE