



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
TRADE DISPUTE NO 77(N) OF 2009

**KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL INSTITUTIONS,
HOSPITALS & ALLIED WORKERS (KUDHEIHA).....CLAIMANT**

VERSUS

NAIROBI CLUB.....RESPONDENT

RULING

1. This is a Notice of Motion filed by the claimant and dated 17th September 2013 under the provisions of section 7 of the Appellate Jurisdiction Act, section 1A and 1B of the Civil Procedure Act and Order 50, rule 1 of the Civil Procedure Rules. The application is supported by the annexed affidavit of Dennis Muriithi and George Chesire. The application is seeking for orders that;

a. The honourable court be pleased to grant leave to the Applicant to file a Notice of Appeal and Record of Appeal out of time against the Ruling delivered on 10th May 2013 by honourable Lady Justice Monica Mbaru

b. The Notice of Appeal filed on 6th June 2013 be deemed to have been filed within the time such extended

2. The respondent filed their Grounds of Opposition.

3. The application is based on the grounds that the Notice of Appeal filed on 6th June 2013 was filed outside the time mandated by law for filing a Notice of Appeal, the error was only discovered by the applicant's advocates at the time of preparing the Record of Appeal after typed proceedings were ready for collection for purposes of the appeal, the file was exclusively been handled by an advocate who has since left the applicant's firm of advocates and thus the error was not intentional and not occasioned by the applicant. The applicant is desirous of appealing the said judgment which has high chances of success as the back wages claim is over 46 months of salaries which totals to over KShs.50 million and unless leave is granted the applicant's intended appeal will be rendered nugatory and the applicant will suffer substantial loss and their claim will be defeated out of an error that can be cured by way of costs.

4. In the affidavit of George Chesire, he states that the claimants were being handled by Dennis Mosotah Advocate from the firm of Ahmednasir, Abdikadir & Company Advocates and immediately upon the ruling herein on 10th May 2013 the claimants instructed the advocate to file a Notice of Appeal. A letter seeking proceedings was filed but no Notice of Appeal was filed. The claimants visited the advocate

severally to follow on the same but only on 6th June 2013 were the Notice of Appeal filed. The claimants are desirous of filing an appeal which has high chances of success and the right of appeal will be prejudiced if time is not extended to file the Notice of Appeal out of time. The deponent was in court on 4th September 2013 when the issue of the Notice of Appeal having been filed out of time was raised. That the respondent will not suffer any prejudice.

5. On the other hand Dennis Muriithi depones that he is now in conduct of this matter for the claimants from the firm of Ahmednasir, Abdikadir & Company Advocates. His former colleague Dennis Mosotah was personally handling the matter but has since left the firm on 30th June 2013. He took over the day to day handling of the file and had not been able to know the ongoing of the file before. By then the respondent had filed an application for review which was heard and ruling delivered on 10th May 2013. On 6th June 2013, the claimants filed Notice of Appeal which was out of time occasioned by the previous advocate on record. The error was only discovered when the claimants were preparing the record of appeal on 10th September 2013 and after obtaining the proceedings herein. The extension of time will not prejudice the respondent.

6. The respondent in the grounds of opposition state that the court has no jurisdiction to grant the prayers sought by the applicant, the jurisdiction to extend time within which to file a Notice of Appeal and Record of Appeal out of time is vested in the Court of Appeal and that the claimant has no arguable appeal to warrant the extension of time to file the Notice of Appeal and thus the application is an abuse of the court process.

7. In submissions the claimant advocate stated that under section 7 of the Appellate Jurisdiction Act the Court may extend time to give Notice of Appeal from a judgment of the High Court and thus the Industrial Court has jurisdiction to grant as prayed in the application of the claimant. In the case of *USIU versus the Attorney General [2012] eKLR* the court held that the Industrial Court has the powers of the High Court to determine matters relating to employment and labour relations.

8. In this case the delay and failure to file the Notice of Appeal on time was not inordinate and only 13 days had passed and this technicality should not be applied as the court should be guided by Article 159 of the Constitution and consider the overriding objective of the law. The delay was also occasioned by the departure of the claimant's advocate who failed to file the Notice of Appeal as instructed. The claimant relied on the case of *Murai versus Wainaina [No. 4] [1982] KLR 38* where the Court extended time after a mistake was committed by the advocate. Further that the court should exercise its discretion in favour of the claimant as there are valid reasons in seeking for extension of time. The court should look at the prejudice to be suffered by an applicant as held in *Njau versus Highview Farm Limited [2009] 2EA 329*. The claimant will suffer irreparable loss if extension is not granted whereas the respondent will suffer no damage. There is an arguable appeal with high chances of success which can only be determined by the Court of Appeal.

9. The respondent on the other hand submitted that the legal provisions under which the claimant has submitted the application herein do not give the Industrial Court powers as the jurisdiction to extend time to file Notice of Appeal is vested in the Court of Appeal. Section 7 of the appellate Jurisdiction Act and Order 50 rule 1 of the Civil Procedure Rules give jurisdiction to the High Court and not the Industrial Court to extent time for purposes of filing a Notice of Appeal. The Industrial Court is not a High Court, it has its own Rules of procedure and therefore the procedure applicable before the High Court should not apply with regard to the Industrial Court. The respondent relied on the decision of *Standard Chartered Bank Ltd & Another versus Abok & Another [2005] 1 EA 373*.

10. There respondent also submitted that there is no merit in the intended appeal as parties were offered a chance to review the judgment herein, the claimant submitted to this process and cannot now be found to say that there were legal issues not settled. The intended appeal will therefore be an abuse of the court process. The respondent has been in court since 2009 and more protracted court process will prejudice them.

What is the application law before the Industrial Court in seeking for extension of time to file a Notice of Appeal out of time?

Whether the orders sought by the claimant as applicant should be granted

11. On the question of jurisdiction of the Industrial Court to grant extension of time within which a party may file a Notice of Appeal, the rules applicable to the High Court with regard to the provisions outlined in the Appellate Jurisdiction Act and the Rules thereto similarly apply to the Industrial Court where there is not specific application of similar provisions under the Industrial Court Procedure Rules. The Industrial Court a superior Court of Record is for all intents and purposes a High Court as outlined under Sub Article 162 (2) (a) of the Constitution provides that the Labour Relations Court is established as a court with the status of the High Court to hear and determine disputes relating to employment and labour relations. The fact that employment and labour relations matters are filed before this court, it remains a High Court and any appeals from orders and decisions of the Court lie at the Court of Appeal and not before the High Court as it were as that would be to file an appeal before a court with similar powers just like this Court, the Labour Relations Court.

12. Therefore in the application of the provisions outlined under section 7 of the Appellate Jurisdiction Act with regard to extension of time within which a party may file a Notice of Appeal, this Court has the jurisdiction to hear and determine such a matter. Where the Rules of the industrial Court do not speak to such a procedure directly, the rules as relates to proceedings before the High Court are applicable. There is no lacuna in this regard.

13. Before an application for extension of time to appeal can be allowed it has to be shown that there was a sufficient reason for failing to do what ought to reasonably to have been done. Prudence and vigilance should have alerted the learned Advocate, and ordinary diligence should have made him seek confirmation from the Court immediately the ruling subsection herein was delivered. The advocate for the claimant continued to make appearance of subsequent dates to confirm compliance by computation of the outstanding dues without any indication that there was Notice of Appeal to be filed. This was in consequence of the ruling with regard to the application for review that had been lodged by the respondent. If the advocates had been less indolent and defervescent he would have easily discovered that true position and avoided the unhappy delay. As it is time having expired, the successful party must have assumed that the fight was over and unless sufficient reason is shown, which it has not been, it would be unfair to dislodge him from his seat of victory. This position is reaffirmed in the decision in *Tanzania Tailors versus Keshavji Lalji Dar-es-Salaam High Court, Civil Appeal No.4 of 1969*.

14. The Appellate Jurisdiction Act provides that the high Court and where appeal lies from may extend time for giving notice of intention to appeal from a judgement of the High Court notwithstanding that the time for making such an application has already expired. This power is to be exercised for sufficient reason to extend time for making an application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in connection with any appeal, notwithstanding that the time limit thereof may have expired, and whether the time limited for such purpose was so limited by order of the Court or by any other written law. There must be a sufficient reason for the extension of time.

15. In this case, the claimants state that they were unable to file the Notice of Appeal as their advocate on record left the current firm of advocate's employment. It has however not been indicated when this advocate left the current law firm of advocates for the claimants. Lack of diligence and error on the part of the advocates on record is quite different from lack of diligence. The only difficulty is that the claimant's firm of advocates failed to take leave to appeal or file the Notice of Appeal as the advocate in conduct of the matter for the claimant had left the employ of the firm of advocates, on ascertaining this mistake, the claimant's firm of advocates brought this application. However the appeal or the filing of the Notice of Appeal does not relate to the advocate margin appearance, rather this is due to the instructions given by the claimants. The ruling of the court where Notice of Appeal is stated to relate to this application was delivered on 10th May 2013. It is important herein to state the following;

On 13th June 2013 both parties were in court to confirm the schedule of payment

where Muriithi Advocate appeared for the claimant;

On 22nd June 2013 both parties were in court as a follow up on the dues payable to the claimants and Muriithi Advocate was in court for the claimants;

On 17th September 2013 both parties were in court to confirm the tabulation of dues to the claimant and Muriithi Advocate was in court for the claimants;

On 18th October 2013 Muriithi Advocate was in court with the current application seeking to file record and Notice of Appeal out of time, he was in court for the claimants;

On 26th September 2013 when the claimant's application was to come for hearing, both parties were absent;

On 26th November 2013 the Notice of Motion dated 17th September 2013 came for hearing and parties agreed to proceed by way of written submissions, Wambugu Advocate held Muriithi Advocates' brief on this day; and

On 10th December 2013 the matter was before court, no submissions had been filed and the claimant's advocates were absent.

16. From the foregoing, Muriithi Advocates has consistently appeared for the claimants and or another advocate held his brief for the claimants. The advocate said to have left the employ of the firm of advocates representing the claimants is Dennis Mosotah. From the affidavits in support of the application, this advocate left the claimants advocate law firm on 30th June 2013 after the court ruling date on 10th May 2013. Muriithi advocate has since made several appearances before court with regard to computation and or tabulation of dues owed to the claimants. When parties come to court, they are deemed to come to this court with clean hands, the orders sought being discretionary, the conduct of the parties becomes imperative to consider. Apart from what is stated in the affidavits in support of the application before court, there are no draft memoranda of appeal or an appeal filed since 10th May 2013 when the court made a ruling.

This claim was lodged by the claimant's way back in 2009; the same was referred to the Court of Appeal and back to this Court. There is a judgement of this court and a ruling on a review application commenced by the respondent and the claimants made their responses therein and have since appeared in court in seeking to enforce this ruling with an indication that they are indeed consulting on the tabulation of the dues owing to the claimants. The orders herein sought will therefore be declined and application dated 17th September 2013 is hereby dismissed. Costs to the respondent.

Delivered in open Court this 17th day of **March 2013.**

M. Mbaru

Judge

In the presence of:

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