IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, J.A - IN CHAMBERS)

CIVIL APPLICATION NO. 76 OF 2020

BETWEEN

CHASE BANK LIMITED.....APPLICANT

AND

DIANA MORAA ABUTA.....RESPONDENT

(Being an appeal for extension of time within which to file

and serve the Notice of Appeal and Record of Appeal out of time

against the judgment and decree of the Employment and Labour Relations

Court (Hon. M. N. Nduma, J.) dated 19th September 2019bin Kisumu ELRC Cause No. 98 of 2015)

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RULING OF THE COURT

Before me is a Notice of Motion dated 23rd June, 2020 under **section 3(1)** of the **Appellate Jurisdiction Act**, **Cap 9** of the Laws of Kenya, **Rules 4, 41, 42, 43** and **49** of the **Court of Appeal Rules, 2010** and all other enabling provisions of the law. It seeks prayers as follows:

> **"1. That the applicant be granted leave to file and serve Memorandum of Appeal and Record of Appeal out of time against the whole judgment of the Hon. Justice Nduma Nderi in Kisumu ELRC No. 98 of 2015 Diana Moraa Abuta vs. Chase bank Kenya Limited delivered on the 19th day of September at Kisumu.**
>
> **2. That the time limited for the applicant to file and serve the respondent with the Notice of Appeal, Memorandum of Appeal and Record of Appeal be enlarged or extended to allow the filing and serving of the same within such time as the Honourable Court may deem fit.**
>
> **3. That the Notice of Appeal and Memorandum of Appeal annexed hereto be deemed as duly filed and served.**
>
> **4. That the costs of and incidental to this application abide the result of the intended appeal."**

It is supported by grounds on its body and a supporting affidavit sworn by **Fredrick Opas** together with annextures thereto. It has been opposed through the respondent's written submissions dated 25th January 2021.

Supporting the application, the applicant contends *inter alia* that it was placed under receivership sometime in April, 2016 due to financial management issues, necessitating 75 percent of the value of deposits under moratorium, all staff and branches to be acquired by SBM Holdings Limited, a process concluded in April, 2019 a few months before the delivery of the judgment on 19th September 2019. The transitional exercise needed a lot of time hence slowing down the execution of corporate duties by them resulting in inability on their part to issue appropriate instructions to their advocate to timeously initiate the intended appellate process on their behalf.

Upon receipt of the requisite instructions to initiate the appellate process on their behalf, their advocate applied for certified copies of the judgment and proceedings which have not been supplied to date. Applicant therefore contends that on the basis of the above assertions it has

sufficiently explained the nine (9) months, 4 days' period of delay in seeking the Court's intervention to resuscitate their appellate process, which in their opinion are not only plausible but also excusable.

They rely on the case of **Wasike vs. Swala** [**1984**] **KLR 591** cited with approval in the case of **Divya J. Patel vs. Guardian Bank Limited [2020]eKLR**, **Kuwinda Rurinja Co. Ltd vs. Kuwinda Holdings Ltd & 13 Others [2010]eKLR** in support of their submissions that all grounds of appeal raised in the draft memorandum of appeal are all arguable; and, lastly, that no prejudice is likely to be suffered by the respondent, if the relief sought was granted in their favour.

In rebuttal, the respondent relying on her written submission submits that the application under consideration is an aggravated abuse of the Court process as counsel currently on record for the applicant is the same counsel who was on record for them during the trial in the Superior Court. He was therefore not only conversant with the facts of the case but also the timelines set in the court of appeal rules for timeous initiation of an appellate process. It is, therefore, not correct as erroneously contended by the applicant that other considerations of events that transpired after the delivery of the judgment fell for consideration by the said advocate before initiating the intended appellate process on their behalf.

On delay, the respondent contends that there has been inordinate delay on the part of the applicant in seeking the Court's intervention to validate their intended appellate process. The applicant's advocates pegging of the reason for delay in the timeous initiation of the appellate process on alleged restructuring and reorganization of the administrative structures within the applicant should be frowned upon for failure to substantiate alleged contributing factors.

On the notice of appeal dated 5th May, 2020 and filed on 13th May, 2020, the respondent submits that considering that the same was purportedly filed in respect of a judgment dated 19th September, 2019; it is hopelessly, defective, as it offends **Rule 75(1)** and **(2)** of the **Rules** of the Court of Appeal and does not in the circumstances qualify to be considered as a mere technicality under **Article 159(2)(d)** of the Constitution of Kenya. In her opinion, it is a fundamental omission which goes to the root of the application and cannot therefore be ignored.

On arquability, she contends that the intended appeal is not arguable as in her opinion the cogent judgment delivered by the trial court is incapable of being assailed on appeal.

On prejudice, she submits that the applicant stands to suffer no prejudice if the judgment delivered on 19th September, 2019 were implemented as delivered in her favour. Instead, it is her who stands to suffer great prejudice the trial court having ruled in her favour that there were no valid reasons for terminating her employment with the applicant and also that the process leading to termination was also unfair. She therefore, prayed for the application to be dismissed with costs to her.

My invitation to intervene on behalf of the applicant has been invoked under the provisions of law cited in the heading of the application. **Section 3(1)** of the **Appellate Jurisdiction Act**, **Cap 9** of the Laws of Kenya donates the statutory mandate of the Court. It provides:

> **"On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such directions as may be appropriate, or to order a new trial, and to make any necessary incidental or consequential orders, including orders as to costs."**

Rules 41, 42, 43 and **4** of the **Court of Appeal Rules, 2010** are merely procedural and need no further interrogation. The substantive value for accessing the relief sought falling for my interrogation is **Rule 4**. It provides:

> **"The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."**

The principles that guide the Court in the exercise of its mandate under the said rule have now been crystallized by case law. See **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231**, among numerous others. See also **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014]eKLR**; also among numerous others. The principles distilled from the above case law may be enumerated *inter alia* as follows: *The mandate under Rule 4 is discretionary, unfettered, and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the Court's unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application was granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance; orders under Rule 4 of the Court of Appeal Rules should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the court or that the court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one; the discretion under Rule 4 of the Court of Appeal Rules must be exercised judicially considering that it is wide and unfettered; as the jurisdiction is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant; the degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension against the prejudice to the respondent in granting an extension; the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity; whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word* ***"possibly"****; the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for a delay is the key that unlocks the court's flow of discretionary power. There has to be valid and clear reason upon which discretion can be favourably exercised; failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable; an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court; the right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.*

The above principles were restated by the Supreme Court of Kenya **(M.K. Ibrahim & S.C. Wanjala SCJJ)** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013]eKLR** as follows:- *extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.*

I have considered the record in light of the above highlighted rival positon. The factors I am enjoined in law to take into consideration when determining an application of this nature are as crystallized by the above highlighted case law, namely, the length of the delay, reasons for the delay, arguability of the intended appeal/appeal and prejudice likely to be suffered by the opposite party should the relief sought be granted in favour of an applicant.

On the length of the delay, it is not disputed that judgment was delivered on 19th September, 2019. The application under consideration is dated 23rd June, 2020 a period of nine (9) months and four (4) days. In **George Mwende Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)**, extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in **Aviation Cargo Support Limited vs. St. Marks Freight Services Limited [2014]eKLR**, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six months to seek extension of time within which to comply.

Applying the threshold in the above two quoted cases to the rival positions herein, I find that the period of delay of nine (9) months and about four (4) days is not so inordinate so as to warrant a denial of exercise of the Court's discretion in favour of the applicant. I must however state from the outset that a finding on this element, **"the delay"** to seek the Court's intervention to validate the intended appellate process "perse" is not sufficient to automatically warrant relief to an applicant in an application of this nature as I find nothing in the principles that guide the Court in the exercise of its mandate under the **Rule 4** of the **Court of Appeal Procedures** highlighted above that says that establishment of one factor is sufficient to warrant granting relief under the said rule. It has to be considered in conjunction with other factors required to be met under this rule to warrant the exercise of the Court's discretion in favour of a deserving party.

On the reasons for the delay, reasons advanced by the applicant are as already highlighted above. I therefore find no reason to rehash them. It is sufficient for me to state that I have borne them in mind in the determination of this application. **Rule 75(1) & (2**) required the applicant to timeously serve the notice of appeal within fourteen (14) days.

Rule 75(1) & (2 provides:

> **"(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**
>
> **(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal".**

While **Rule 77(1)** required such notice to be served within 7 days,

> **"An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal".**

The proviso to **Rule 82(1)** of the **Court of Appeal Rules** required the applicant to apply for and serve the letter bespeaking proceedings on to the opposite party within thirty (30) days of the decision appealed against, which was 19th September, 2019. The letter bespeaking proceedings is dated 23rd October, 2019, a period of thirty-four (34) days from the date of the decision. It was served on 5th November, 2019, a period of forty-seven (47) days from the date of the decision. Both periods are therefore outside the period stipulated in **Rule 82(1)** and **(2)** of the **Court of Appeal Rules.**

Turning to the length of time the restructuring process took in contributing towards applicant's inability to initiate and progress its intended appellate process timeously, no documentary proof has been exhibited to confirm applicant's averments on this issue. They therefore remain unsubstantiated. Neither is there any documentation to show when instructions were given to the advocate to commence the appellate process. It is therefore my finding that on the totality of the above assessment and reasoning on this factor, I am satisfied that no plausible reason has been proferred by the applicant for the delay in timeously initiating the intended appellate process.

On the purported notice of appeal dated 5th May, 2020, filed on 13th May, 2020, it is my view that its existence on record does not also aid the cause of the applicant's appellate process as it was lodged and served in contravention of **Rules 75(1)** and **(2)** of the **Court of Appeal Rules** set out above. It was required to be filed within fourteen (14) days from 19th September 2020 which fell on 2nd November, 2019. It was therefore lodged 6 months, three days out of time. Neither was it served within the seven (7) days stipulated for in Rule **77(1)** of the **Court of Appeal Rules** as there is no indication on the record that it was ever served.

On arguability, the applicant relies on the annexed draft memorandum of appeal. They intend to fault the learned Judge for failure to: find that the respondent had not proved her claim to the required threshold, holding that the applicant should reengage the respondent, in contravention of the statutory period of three (3) years within which an employee should be reengaged had long lapsed; in directing the applicant to reengage the respondent well knowing that the legal status of the applicant had changed upon acquisition of 75 percent of its deposits on moratorium, staff and branches by SBM Holdings Limited who were also required to have a say before any such action could be

taken, disregarding evidence adduced by the applicant, failing to apply the principle of equity that equity sees as done what ought to be done, on the one hand and that equity looks at the intent rather than form on the other hand hence failing to come to a conclusion that the respondent lacked a cause of action against the applicant, and, lastly, failing to consider the applicants evidence, submissions and issues raised for determination, all of which in my view are arguable notwithstanding that they may not ultimately succeed. In law, an arguable appeal as borne out by principles distilled above is one that must not necessarily succeed but one that warrants a response from the opposite party and interrogation by the Court, a thresh hold I find all the above intended grounds meet, save to add that success on this ground alone does not of itself guarantee the applicant success herein. This factor has to be considered in conjunction with the other relevant factors.

On the last ingredient of prejudice to be suffered by the opposite party, the respondent has cited prejudice in being withheld from the enjoyment of the fruits of the judgment delivered in her favour which I find plausible especially taking into account the clandestine manner in which the applicant has handled its intended appellate process as demonstrated above.

In light of the totality of the above assessment and reasoning, I am not satisfied that the applicant's application has merit. It is accordingly dismissed with costs to the respondent.

DATED and DELIVERED at NAIROBI this 19th day of February, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR