



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: J. MOHAMMED, J.A.)

CIVIL APPEAL (APPLICATION) NO. 563 OF 2019

BETWEEN

LIBERATO KIVANGA MANGA.....APPLICANT

AND

PRIME BANK LIMITED.....RESPONDENT

(An application for extension of time to file and serve a record of appeal out of time from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (S. Radido, J.) delivered on 30th November, 2018

in

E & L Cause No. 1208 of 2014)

RULING

Background

[1] This is an application brought under **rules 4 and 42** of this Court's Rules and all other enabling provisions of the law. The applicants seek extension of time to file a record of appeal from the judgment of the Employment and Labour Relations Court at Nairobi (ELRC)(S. Radido, J.) delivered on 30th November, 2018.

[2] The application is premised on the grounds that the applicant was dissatisfied with the impugned judgment which was made in favour of the respondent; that the applicant lodged a notice of appeal against the impugned judgment; that the delay in filing the record of appeal was occasioned by an inadvertent error in the computation of time on the part of counsel; that the applicant has already filed and served a record of appeal against the said judgment albeit out of time; that the delay in filing the appeal is not inordinate; the appeal has overwhelming chances of success; that the appeal raises serious and weighty issues of public interest and issues on the jurisdiction of the Employment and Labour Relations Court and that the respondent does not stand to suffer any prejudice should the application be granted. The application is supported by the affidavit of the applicant in which he reiterated the grounds on the face of the application.

[3] The applicant in his written submissions filed by his counsel on record, submitted that the period of delay was short and was adequately explained to be due to an inadvertent error by the applicant's counsel in computing time when the record of appeal was due for filing. The applicant's counsel computed time from the date of the certificate of delay, **12th September 2019** instead of the date of collection of proceedings, **21st August 2019**. Contending that the reason for the delay was plausible, he relied on the cases of **LSG Lufthansa Service Europa/Afrika GmBH & another v Eliab Muturi Mwangi (Practicing in the name and style of Muturi Mwangi & Associates Advocates) [2019] eKLR** and **Sultan Hasham Lalji v Diamond Hasham Lalji & 2 Others [2019] eKLR** where this Court excused delay in filing a record of appeal out of time due to an inadvertent error in

computing time and a similar period of delay.

[4] It was also submitted that the chances of success of the intended appeal are high in that the intended appeal seeks to challenge the jurisdiction of the ELRC to hear the respondent's claim for loss of money through fraud and that the respondent's claim was not proved to the required standard.

[5] The respondent filed a replying affidavit sworn by **Josephine Macharia (Ms. Macharia)**, the Senior Manager, Human Resources, on 11th March 2020. She deposed that stating that the applicant's advocates collected the typed proceedings on 21st August 2019 and thus the period of 60 days envisaged for filing of record of appeal lapsed on 21st October 2019; that the record was filed on 19th November 2019 about 60 days from the 21st October 2019; that the period of about 60 days is inordinate and the reason given for the delay is not plausible for this Honourable Court to exercise its discretion in favour of the applicant; and that the respondent will be prejudiced if the instant application is allowed as the applicant has not furnished security for the due performance of the partial decree.

Determination

[6] I have considered the application, the grounds in support thereof, the replying affidavit filed by the respondent and the law. The issue for determination is whether the application is deserving of the orders sought. The discretion that I am called to exercise in the determination of this application is provided under **Rule 4 of the Court of Appeal Rules** as follows:

“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.”

[7] In **Leo Sila Mutiso v. Hellen Wangari Mwangi [1999] 2 EA 231** this Court set out the principles that guide this Court in such an

application as follows:

“It is now well 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 an extension of time are: first the length of the delay, secondly, the reason 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.” [Emphasis supplied].

[8] In **Fakir Mohammed v. Joseph Mugambi & 2 others (2005) eKLR**, this Court found that the factors that the court can take into consideration are discretionary and non-exhaustive;

“The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, 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 the delay, (possible) the chances of the 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 factor.” [Emphasis supplied].

[9] Further, in **Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees**, Civil Application No. 190 of 2019 this Court expounded that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, 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 a 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.” [Emphasis supplied].

[10] Although there is no maximum or minimum period of delay set out under the law, the reason(s) for the delay must be plausible. To this effect, this Court in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** stated:

“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 delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."

[11] Rule 82 of the Court of Appeal Rules provides:-

"(1) Subject to Rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged-

(i) a memorandum of appeal, in quadruplicate

(ii) the record of appeal, in quadruplicate

(iii) the prescribed fee, and

(iv) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy."

[12] In effect, a record of appeal should be filed within 60 days of the lodging of the notice of appeal. However, where a party makes an application for typed proceedings, the time taken to assemble the proceedings is exempted in the computation of the 60 days. The Deputy Registrar of the relevant court issues a certificate of delay for verification of the period to be excluded by the court and the parties.

[13] In the instant case the notice of appeal was lodged on **15th January 2019**. The applicant's counsel issued a letter to the Deputy Registrar of the ELRC at Nairobi bespeaking proceedings on 10th December 2018. The said letter was served on the respondent's advocates on 13th December, 2018. This was within the stipulated 30 day period from the date of the impugned judgment.

[14] According to the Certificate of Delay issued by the Deputy Registrar of the ELRC at Nairobi on 12th September 2019, a period of 259 days was taken to compile the proceedings from 10th

December 2018 to 21st August 2019.

[15] The appellant's counsel readily admitted that the delay in filing the record of appeal was due to an error on his part in computing the time when the appeal was due for filing based on the date of the Certificate of Delay instead of the date of collection of the proceedings which was **21st August 2019**. The record of appeal was filed on **19th November 2019**, yet the appeal ought to have been filed before **21st October 2019**. Therefore, I find that the period of delay in filing the record was 29 days which in the circumstances is not inordinate and is well explained.

[16] The applicant contended that he has an arguable appeal as his intended appeal seeks to *inter alia* challenge the jurisdiction of the ELRC to hear the respondent's claim for loss of money through fraud and that the respondent's claim was not proved to the required standard. Without going into the merits of the appeal as this will be determined by the full bench which will be seized of this appeal, I am satisfied that the intended appeal is arguable. In **Muchugi Kiragu v James Muchugi Kiragu & another Civil Application No. NAI. 356 of 1996**, this Court had the following to say as regards this Court's discretion under **Rule 4**:

"Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it."
(Emphasis supplied).

[17] On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice to the respondent in granting an extension. The applicant is aggrieved by the judgment of the ELRC and is desirous of appealing against the said judgment out of time.

[18] On the other hand, the respondent filed a replying affidavit opposing the application for extension of time and contended that the applicant has not deposited the decretal sums in a joint account as security. However, the applicant has already filed and served the record of appeal, albeit out of time. Hence, I am of the considered view that an expedited hearing of the appeal would ameliorate the prejudice to the respondent.

[19] From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra). The upshot is that the application is accordingly allowed. Accordingly, I make the following orders:

- a) That leave is hereby granted to the applicant to file and serve a record of appeal out of time against the judgment and decree of the ELRC at Nairobi (Radido, J.) in Cause No 208 of 2014;
- b) That the record of appeal filed and lodged on 19th November, 2019 is hereby deemed as duly filed;
- c) Costs of this application to the respondent

Dated and delivered at Nairobi this 5th day of February, 2021.

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR