



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, JA (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. E276 OF 2020

BETWEEN

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY.....APPLICANT

AND

ERASTUS GITONGA.....1ST RESPONDENT

EDWARD K WABWOTO.....2ND RESPONDENT

CECILIA W. GITHAIGA.....3RD RESPONDENT

JUDITH N. KITHINJI.....4TH RESPONDENT

SIMON NGAIRA.....5TH RESPONDENT

AND

LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY

THE ATTORNEY GENERAL.....2ND INTERESTED PARTY

(Being an application under section 3A, 3B and 4 of the Appellate Jurisdiction Act, Rule 4 & 82 of the Court of Appeal Rules 2010, and Article 159 of the Constitution of Kenya 2010 and all other enabling provisions, for extension of time to lodge and appeal against the Judgment of ELRC (Bryam Ongaya, J) delivered on 10th April, 2019. in ELRC No. 547 of 2018).

RULING

[1] On 10th April, 2019 the Employment & Labour Relations Court (ELRC) (**Ongaya, J**) delivered a judgment in ELRC No. 547 of 2018. The applicant who was the respondent in the suit and who was aggrieved by the judgment, filed a notice of appeal and immediately applied for copies of proceedings and judgment.

[2] By a letter dated 25th February 2020, which was received by the applicant's advocate on 12th March, 2020, the court informed the applicant that the proceedings were partially ready for collection. However, before the proceedings could be collected, the Chief Justice issued directives on 15th March, 2020 scaling down court activities due to the Covid-19 pandemic. The applicant also scaled down its activities and closed its office, allowing its staff to either proceed on leave or work from home, due to the directives issued by the Ministry of Health.

[3] It was not until 14th September, 2020 that the applicant was able to file the current application using the e-portal that was introduced by the Judiciary. This was after the applicant's advocate collecting the proceedings on 3rd August, 2020 and the decree on 25th August, 2020. The applicant explains that the delay in filing its application was caused by the unusual circumstances arising from the Covid-19 pandemic, and the delay in obtaining the proceedings from the court; that it has an arguable appeal which has high chances of success; and that the appeal raises issues of great jurisprudential and national importance. The applicant therefore pleads with the Court to extend time to enable it file its appeal.

[4] The applicant has filed written submissions in which it reiterates that: the delay was caused by circumstances beyond its control; the intended appeal is not frivolous but raises issues of public interest; and the respondents will not suffer any prejudice as the applicant has already deposited the decretal sum in a joint account.

[5] The applicant urged the Court to invoke Article 159 (2)(d) of the Constitution, and sections 3A and 3B of the Appellate Jurisdiction Act, and in the interest of justice, disregard the technicalities regarding the delay in filing the appeal. In support of its submissions, the applicant relied on **Daniel Nkirimpa Monirei v Sayialele ole Koilel & 4 Others [2016] eKLR.**

[6] In opposing the applicant's motion, the respondents have filed a replying affidavit sworn by Erastus K. Gitonga who is the 1st respondent. They have also filed written submissions. The respondents maintain that the applicant is not deserving of the exercise of the Court's discretion because the applicant has failed to comply with the conditional order of stay of execution that required it to deposit the full decretal sum and interest. The respondents further argue that the typing of proceedings and judgment was completed by 27th February 2020; that the applicant did not lodge its appeal until 31st August 2020; and that the delay was therefore inordinate. The respondents submit that the applicant is indolent and cannot be aided by the law.

[8] In addition, the respondents argue that the applicant filed its appeal out of time without leave of the court and therefore, it was presumptive for it to seek extension of time after filing the appeal without leave. Relying on **Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR,** the respondents maintain that the applicant has not met the criteria for extension of time, and that they (respondents) were suffering prejudice due to the delay in accessing the fruits of their judgment.

[9] In **County Executive of Kisumu v County Government of Kisumu & 8 Others, [2017] eKLR,** the Supreme Court reiterated that extension of time was an exercise of discretion, and identified the following as the principles that a court should take into account in exercising such discretion.

“1. 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;

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases like election petitions, public interest should be a consideration for extending time.”

[10] It is not disputed that the judgment, subject of the appeal, was delivered on 10th April, 2019, and that the applicant filed a notice of appeal on 23rd April, 2019. The applicant had also by a letter dated 17th April 2019, requested for typed copies of the proceedings and judgment, and these were only ready on 25th February, 2020 when communication was forwarded to the applicant, which communication the applicant contends it only received on 12th March, 2020.

[11] It is common knowledge that from mid March 2020, the Covid-19 pandemic interfered with normal operations in all spheres in this country, including the operations of the courts. The applicant's explanation that its advocate was not able to collect the proceedings and judgment due to the Covid-19 pandemic is not therefore a mere excuse. The applicant has stated that on 1st July, 2020 the Judiciary lodged the judiciary e-portal.

[12] The applicant's Director General Mamo Buru Mamo, who swore the affidavit in support explained that the advocate collected the proceedings on 3rd August, 2020 and the decree on 25th August, 2020. This is confirmed by an affidavit sworn by **John Kilonzo Matayo,** a clerk for litigation in the advocate's firm. The clerk has also deposed to the difficulties experienced in obtaining the proceedings from the court. Although there is no certificate of delay signed by the Registrar of the court, I have no doubt that the circumstances in which the applicant found itself were unusual circumstances.

[13] Whereas the appeal could have been filed through the judiciary e-portal in July 2020, I cannot ignore the fact that the technology was new to most advocates and even the court staff experienced problems. In the circumstances, the delay between July and August, 2020 was not inordinate.

[14] Under Rule 4 of this Court's rules, the Court has powers to extend time:

“For the doing of any act authorized or required by these rules whether before or after the doing of the act.”

[15] This means that time can be extended even after the filing of the record of appeal. The fact that the applicant filed the record of appeal before extension of time is therefore inconsequential as this can be regularized by the Court subsequently granting extension of time. I also note that the applicant has annexed a memorandum of appeal, and I am satisfied that it raises issues that need to be resolved.

[16] For the aforesaid reasons, I find that this is an appropriate case in which I should exercise my discretion in the applicant's favour.

Accordingly, I allow the applicant's motion for extension of time, and deem the record of appeal filed on 31st August, 2020 as properly filed. I make no orders as to costs.

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

HANNAH OKWENGU

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR