



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) (IN CHAMBERS))

CIVIL APPLICATION NO. E357 OF 2020

BETWEEN

REGIONAL CENTRE ON SMALL ARMS IN
THE GREAT LAKES REGION, THE HORN OF AFRICA AND
BORDERING STATES (RECSA).....APPLICANT

AND

MARIE CLAIRE BISAMAZA.....RESPONDENT

*(An application for extension of time to file and serve record of appeal
from the decision of the High Court of Kenya at Nairobi (Justice Hellen*

Wasilwa, J.) dated 12th March, 2020 in E&L Relations Cause No. 1267 of 2017)

RULING

On 12th March, 2020 Wasilwa, J. found that the dismissal of the respondent by the applicant from its service was unfair and unjustified. She went on to award her the following reliefs:-

“1. Payment of her salary for May = 8000 Euros

2. 1 month salary in lieu of notice = 8000 Euros

3. Prorata leave for 10 months at 2.5 days per month

= $25/30 \times 8000 \times 10 = 6667$ Euros

4. 8 months' salary as compensation for unfair termination

= $8 \times 8000 = 64,000$

TOTAL = Euros 86,667

Less statutory deductions.”

Upon the action being filed and served, the applicant's advocates filed a notice of appointment and memorandum of appearance. However, the defence, though prepared, it is the applicant's case that it was inadvertently not filed within the stipulated timelines.

Consequently, the court below proceeded *ex parte* to formal proof stage and subsequently made the summary judgment in question.

The applicant's application for review and setting aside of the *ex parte* proceedings and the above orders as well as for leave to file the defence was dismissed. In the ruling, the Judge found that the applicant had failed to give a plausible reason for failing to file the defence; and that it was not enough to merely say, "we forgot".

In an omnibus application the applicant has taken out a motion under, among other **rules, 4 and 5(2)(b)** of the Rules of the Court of Appeal to stay the execution of the decree of the court below and also to extend time for it to file the appeal in order to challenge the judgment out of time.

Obviously, the first thing the applicant ought to have done was to apply for extension of time before seeking stay because the two prayers cannot both be heard at the same time, as one is for a single Judge in chambers and the other for a full bench.

Accordingly, the former application was listed before me in chambers. To begin with, in their submissions, counsel for both sides have concentrated arguments on the prayer for stay of execution. Not much was said about the issue raised in the prayer for extension of time.

It is quite apparent that the notice of appeal was filed either late or not filed at all. The one on record shows, *ex facie*, that it was dated on 1st October, 2020. It is unclear whether what the applicant ought to ask for is the enlargement of time to file and serve the notice of appeal or to file and serve the record of appeal. The two are sequential. The applicant can only seek leave to file the record out of time if a valid notice of appeal was filed. The respondent is categorical that the notice was filed out of time. If that be the case, and I believe it is, the applicant ought, in the first instance to have asked the single judge to consider extending time for the filing of the notice of appeal.

By **Rule 75** of the Court's Rules, the applicant had 14 days of the date of the decision of the court below to lodge the notice of appeal. Considering that the decision sought to be challenged was made on 12th March, 2020, the notice on record, which only has the date of 1st October, 2020, is clearly out of the 14 prescribed days by many months. But that is not all I am required to bear in mind when considering an application for extension of time.

Yes, the length of the delay involved is a consideration. But also, of significance are, the reason(s) for the delay, the possible prejudice, if any, and whether, *prima facie*, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. See **Karny Zaharya & Another V. Shalom Levi**. C. Appl. No. 80 of 2018.

I have already said that no justification for the delay has been presented to me. It is not for me to decide on the merit of the appeal the applicant is intending to bring because I have no basis. The applicant has not indicated any, save to say they ought to have been heard before the decision in question was made. The exercise of judicial discretion by the Judge, in my view, does not appear improper.

Secondly, having approached the trial court to review its decision, it is doubtful if the option of an appeal will be available.

Finally, it will be prejudicial to the respondent if the clock was to be rolled back, nearly one year after the decision in question.

The application, for all these reasons lacks merit and is accordingly dismissed with costs.

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

W. OUKO, (P)

.....

JUDGE OF APPEAL

I certify that this is a true

copy of original.

Signed

DEPUTY REGISTRAR