

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAMEJ.A. IN CHAMBERS) CIVIL APPLICATION NO. E530 OF 2020 BETWEEN

UMOJA INVESTMENT LIMITED.....APPLICANT

AND

AFRICAN PROJECT CO-ORDINATION

AGENCY LIMITED..... RESPONDENT

(An application for extension of time to file a notice of appeal, memorandum of appeal and record of appeal against the ruling of the High Court at Nairobi (Lady Justice Odera) dated 21st May, 2020 in Comm. & Tax Division NO. 324 OF 2016)

RULING OF THE COURT

1. In a Notice of Motion dated 21st December 2020 the applicant, **Umoja Investment Limited** has invoked the Court's jurisdiction under **Rule 4** and **5(2)(b)** of the Court of Appeal Rules, 2010 seeking extension of time to file a Notice of Appeal, Memorandum of Appeal and Record of Appeal against the ruling and order of the Commercial & Tax Division at Nairobi (Lady Justice Odera) delivered on 21st May, 2020 which dismissed the applicant's application seeking *inter alia*, to bar two of the respondent's witnesses from testifying on the basis of the existence of a confidentiality relationship; and to stay the proceedings in the High Court pending the hearing and determination of its intended appeal.

2. The reasons for the delay as stated in the notice of motion and reiterated in the supporting affidavit sworn by the applicant's director, **Josephat Mulwa Mukima** is that the impugned ruling was scheduled to be delivered on 27th March 2020, however due to the Covid 19 pandemic the same was not delivered on the scheduled date but with a caveat to delivered on notice to the parties and/or advocates; the advocates diligently followed up with the court on various occasions ; that it was not until 25th August 2020 when they were informed by a court assistant that the ruling had been delivered on 21st May 2020; that they wrote to the Deputy Registrar severally requesting a copy of the ruling but the same was never availed and was also missing in the court file; that the matter was listed for mention before the trial Judge on 14th December 2012 but the court was not sitting compelling its advocates to request the Deputy Registrar to order that it be supplied with certified copies of the ruling and typed proceedings; that its advocates attempts to enforce the order were in vain as the court file could not be traced in the registry ; that they were finally able to obtain a certified copy of the ruling on 17th December 2020 and they immediately filed and served the notice of appeal on the same day; that the delay was unintentional and it is in the interest of justice that the orders sought be allowed. The above is a reflection of the factual position of what transpired.

3. I have considered the application together with all materials placed before me. As indicated in the applicant's written submissions dated 4th January 2021, the only issue for my determination is whether the explanation for delay warrants the exercise of this court's discretion under Rule 4. This court cannot grant the stay of execution orders sought as Rule 53(2) of this Court's rules is blatantly clear that such orders are not within the jurisdiction of a single judge but are the province of a full bench.

4. The discretion of a single judge under Rule 4 is wide and unfettered. The principles that govern the exercise of discretion in an application for extension of time such as this, are well known. They include but are not limited to the length of the delay, the reason for the delay; (possibly) the chances of the appeal succeeding if the application is granted; and, the degree of prejudice to the respondent if the application is not granted (See the case of ***Leo Sila Mutiso v. Rose Hellen Wangari Mwangi (1999) 2***

EA 231).

5. Bearing the above in mind, I am satisfied with the applicant's explanation for the delay. The evidence produced clearly reflects that the applicant made clear and concrete attempts to inquire about the date of delivery of the impugned ruling, that the court did not serve it with a notice of the ruling and that once the applicant discovered the ruling had been delivered, it made attempts through court mentions and numerous letters and requests to the registry to obtain a copy of the ruling. The delay was clearly at the behest of the court. In such circumstances it cannot be said that the applicant played a role or contributed to the delay in the filing of the notice of appeal. This is a clear manifestation that the delay was caused elsewhere and it had no role, hence the satisfactory explanation. Consequently, this is a fit case for the exercise of my discretion and I will grant it. The application is allowed. The applicant has **seven (7)** days from the date hereof to file and serve the Notice of Appeal. The applicant also has **Thirty (30)** days from the date hereof to file and serve the record of appeal.

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

M. WARSAME

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR