



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. E218 OF 2020

BETWEEN

KENYATTA UNIVERSITY.....APPLICANT

AND

ESTHER NJERI MAINA.....RESPONDENT

(Appellant's Notice of Motion under Sections 3, 3A and 3B of the Appellant Jurisdiction Act Rules 4 and 77 (1) of the Court of Appeal Rules, 2010 seeking extension of time within which to serve Notice of Appeal from the decision of the Employment and Labour Relations Court of Kenya at Nairobi (Lady Justice Wasilwa, J.) dated and delivered on 15th April, 2020

in

Milimani ELRC Petition No. 133 of 2018)

RULING

On 15th April, 2020 H. Wasilwa, J. gave judgment for the respondent against the applicant and declared that the former's right to fair labour practices had been infringed; and that with effect from the date of the judgment, her employment with the applicant ceased to be casual or temporary but became permanent and pensionable. Pursuant to this, the applicant was directed to henceforth issue the respondent with a contract detailing the nature of this contract in accordance with the law and "in tandem with other permanent and pensionable employees who are permanent and pensionable on her grade".

The applicant was ordered to pay to the respondent costs of the claim.

The applicant has been aggrieved and has challenged that decision in this Court's Civil Appeal No. 261 of 2020.

However, due to the usual technological hitches, the notice of appeal was not served upon the respondent within the time prescribed in **Rule 77** of the Court of Appeal Rules, hence this application for enlargement of time to deem it as having been served and regularly on record.

The applicant has sworn that the notice and record of appeal were lodged in accordance with the Rules. However, after electronically lodging the notice of appeal with the registry, the registry was not able to immediately email it back with an acknowledgment of receipt. It was finally receipted on 20th May, 2020, on which date it was served on the respondent. At this point, the period within which it was required to be served had already lapsed.

The respondent, who is self representing, has filed two affidavits in response to the application and in objection to the two supplementary affidavits filed by the applicant. She has also filed written submission, the combined effect of which is that the application is intended to delay her from benefiting from the fruits of the judgment; that a delay of 3 months is inordinate; that no plausible explanation has been offered for the delay; that the appeal has no chances of success; and finally, that any further delay will be prejudicial to her. The rest of the averments deal largely with the merits of the claim and the weaknesses of the appeal.

Rule 75(1) of the Rules gives any person who desires to appeal to this Court from the decision of any of the courts immediately below it, to give notice of that intention in writing, and lodging it within fourteen days of the date of the decision intended to be challenged.

Further, by **Rule 77**, the intended appellant must, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal.

Finally, after the above steps have been taken, the intended appellant must, by **Rule 82**, ensure that an appeal is instituted within sixty days of the date when the notice of appeal was lodged.

Sitting as a single judge, all I am required to consider, in exercising my discretion, is the length of the delay; the reason for the delay; the degree of prejudice to the respondent if the application is granted, and, possibly, the chances of the appeal succeeding should the application be granted. See **Habo Agencies Limited vs. Wilfred Odhiambo Musingo** [2015] eKLR.

Judgment having been entered on 15th April, 2020, the applicant was obliged to file the notice of appeal on or before 29th April, 2020, being 14 days from the date of the judgment. I am satisfied from a copy of the email sent to the registry on 27th April, 2020, the date stamp by the registry, banking slip and fees assessment, that the notice of appeal was indeed lodged on 29th April, 2020 and not 30th April, 2020, as suggested by the respondent.

Within 7 days from that date, the same ought to have been served on the respondent. But it was not until 20th May, 2020 that the registry acknowledged receipt of the notice of appeal. The delay was for a period of only two weeks and not 3 months as alleged. A delay of two weeks, sufficiently explained on the technological challenges, is excusable.

The respondent stands to suffer no prejudice by deeming as served on her, a notice of appeal, already filed. It is my view, taking everything into account, including the fact that this was the advent of Covid-19, that the applicant was vigilant. Apart from failure to serve the notice of appeal, all the other documents, including the record, were lodged within time.

On the success of the appeal, I cannot say that the issues intended to be raised on appeal are hopeless.

For these reasons, there is merit in this application. I accordingly allow it and declare that the notice of appeal and the appeal were regularly lodged and served.

Dated and delivered at Nairobi this 19th day of March, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR