



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: J. MOHAMMED, J.A. (IN CHAMBERS))**

**CIVIL APPEAL (APPLICATION) NO. 539 OF 2019**

**BETWEEN**

**NJOROGE SERAH WAHU AND 88 OTHERS**

**All suing as former members of the BARCLAYS BANK OF**

**KENYA PENSION FUND.....APPLICANTS**

**AND**

**THE TRUSTEES BARCLAYS BANK OF**

**KENYA PENSION FUND.....1ST RESPONDENT**

**BARCLAYS BANK OF KENYA.....2ND RESPONDENT**

**THE RETIREMENT BENEFITS AUTHORITY.....3RD RESPONDENT**

**THE RETIREMENT BENEFITS**

**APPEALS TRIBUNAL.....4TH RESPONDENT**

**THE ATTORNEY GENERAL.....5TH 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 (O. Makau, J.) delivered on 26th October, 2018 in E & L Cause No. 98 of 2017)*

\*\*\*\*\*

**RULING**

**Background**

[1] This is an application brought under **Rule 4** of this Court’s Rules and all other enabling provisions of the law. **Njoroge Serah Wahu and 88 Others (All suing as former members of the Barclays Bank of Kenya Pension Fund)** (the applicants) seek extension of time to file and serve a record of appeal from the Employment and Labour Relations Court (ELRC) at Nairobi (Makau, J.) delivered on 26th October, 2018 in **E & L Cause No. 98 of 2017**. **The Trustees Barclays Bank of Kenya Pension Fund, Barclays Bank of Kenya, The Retirement Benefits Authority, The Retirement Benefits Appeals Tribunal and The Attorney General** are the 1st, 2nd, 3rd, 4th & 5th respondents respectively.

[2] The application is premised on the grounds that the applicants were dissatisfied with the impugned judgment which was made in favour of the 1st and 2nd respondents; that the notice of appeal and letter bespeaking typed proceedings were filed and served within the stipulated time; that the typed proceedings were only availed to the applicants on 24th October, 2019, after the 60 day period for filing the appeal; that

the intended appeal is not frivolous and raises substantial matters of law which should be canvassed in this Court and if the extension sought is not granted, the applicant will suffer substantial loss and damages; that the applicants have a strong arguable appeal with great probability of success as indicated in the Memorandum of Appeal; that the appeal has been brought without delay; that from the time the ruling was delivered on 26th October, 2018 to the time of filing of this application and record of appeal is about 13 months which is not inordinate delay considering that the certificate of delay was issued on 24th October, 2019; and that no prejudice will be suffered by the respondents since the delay in typing the proceedings was well beyond the control of the applicants. The application is supported by the applicants' affidavit in which the grounds on the face of the application were reiterated.

[3] Opposing the application, the 1st and 2nd respondents filed a replying affidavit sworn by **Mercy Ngura**, the Head of Pension and Benefits for the 2nd respondent and a trustee of the 1st respondent, dated 24th February, 2020. She deposed that the intended appeal concerns a matter that is *res judicata* and on which this Court has already pronounced itself in **Civil Appeal No. 162 of 2016- Sarah Wahu Njoroge v the Trustees, Barclays Bank of Kenya Pension Scheme and 2 Others**; that being dissatisfied with the decision of this Court; the applicants filed **E & L Cause No. 98 of 2017** in an attempt to re-litigate the matters decided by this Court; that the petition, being *res judicata*, was rightfully dismissed; that the intended appeal is yet another attempt to re-litigate a decided appeal which ought not to be countenanced by this Court; and that granting the application would not be in the interests of justice and would be a misuse of this Court's time.

#### **Determination**

[4] I have considered the application, the grounds in support thereof, the replying affidavit filed by the 1st and 2nd respondents, the authorities cited and the law. 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.”*

[5] The principles that guide this Court in determining such an application were well stated by this Court in the case of **Leo Sila Mutiso v. Hellen Wangari Mwangi [1999] 2 EA 231** 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]

[6] Notably, this Court in **Fakir Mohammed v. Joseph Mugambi & 2 others (2005) eKLR**, held 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.”*

[7] Further, in **Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees**, Civil Application No. 190 of 2019 this Court elaborated 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].

[8] As regards the period of delay, of more concern is that the reason given for the delay is reasonable. In this respect, this Court in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** expounded that:

*“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.”*

[9] 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.”*

[10] Accordingly, a record of appeal should be filed within 60 days of the lodging of the notice of appeal. However, where a party files and serves an application for typed proceedings, the time taken to assemble the proceedings is exempted in the computation of the 60 days. Thereafter, 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 in computing time.

[11] In the instant matter, the notice of appeal was lodged on **30<sup>th</sup> October, 2010**, 6 days after the delivery of the impugned judgment. The applicants applied for typed proceedings on even date. This was within the stipulated 30 day period from the date of the impugned judgment.

[12] According to the Certificate of Delay issued by the Deputy Registrar of the ELRC at Nairobi on 24th October, 2019, a period of 351 days was taken to compile the proceedings, from 30th October, 2018 to 15th October 2019. Given that **rule 82** excludes the period of preparation of proceedings, the appeal ought to have been filed on or before 14th December, 2019. The appeal was filed on 8<sup>th</sup> November, 2019 while this instant application was filed on 25th November, 2019 which was well within the period specified for filing. Faced with similar circumstances, this Court in **Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2016] eKLR, Civil Application No. 22 of 2016**, allowed an application for extension of time upon finding that the appeal was filed within time.

[13] Consequently, I allow the application dated 25th November, 2019. I find that in the circumstances, the record of appeal filed on 8th November, 2019 was filed within time and as such this application for extension of time is unwarranted.

[14] I direct that the record of appeal be served on the respondents (if it has not already been served on them) within fourteen (14) days of delivery of this ruling.

[15] The costs of the application shall abide by the outcome of the appeal. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**