



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO.101 OF 2020

BETWEEN

WEST KENYA SUGAR COMPANY LIMITED.....APPLICANT

AND

FREDRICK ODEKE WERE.....RESPONDENT

(An application for extension of time to file and serve notice of appeal out of time in an intended Appeal from the Judgment and Order of the Employment and Labour Relations Court at Bungoma (Nduma, J.) dated 29th January, 2020)

in

E.L.R.C. CAUSE NO. 25 OF 2017

RULING

Background

1. **West Kenya Sugar Company Limited** (the applicant) moved this Court vide an application dated 2nd August, 2020 seeking for extension of time to file and serve a notice of appeal out of time against the judgment of the Employment & Labour Relations Court (at Bungoma), (ELRC) (**Nduma, J.**) delivered on 29th January, 2020. **Fredrick Odeke Were** is the respondent herein.
2. An application seeking leave of the court to file an appeal out of time is made before a single Judge. The applicant has to satisfy the criteria for granting the order and an application for extension of time is governed by **Rule 4** of the Court of Appeal
3. The application is brought under **Rule 4** and **5 (2) (b)** of the **Court of Appeal Rules** as well as section **3A** and **3B** of the **Appellate Jurisdiction Act** and is premised on the grounds that: the applicant was not informed of the delivery of the judgment by its erstwhile advocates; that it took a considerable amount of time for the applicants' current advocates to trace and peruse the Court file to establish the position of the matter owing to the Covid-19 pandemic which had affected the normal running of activities at the Court Registry and that the applicant's current advocates on record only became aware of the judgment on 29th July, 2020.
4. The applicant avers that the intended appeal is arguable and has high chances of success and it would only be fair and just that the extension of time sought is granted. The application was further supported by the supporting affidavit of **Duncan Abwawo** the applicant's Human Resource Manager deponed on 2nd August, 2020 in which he reiterated the aforesaid grounds and further stated that the delay in filing the appeal cannot be attributed to any fault or complacency on the applicant's part.

Submissions

5. The application was dispensed with by way of written submissions. In its written submissions filed by **Messers O&M LAW LLP**, the applicant invoked this Court's discretion by relying on the case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231**. The applicant relied on the case of **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR**

for its proposition that there is no maximum or minimum period of delay set out in law, but the reasons for the delay must be reasonable and plausible.

6. The applicant urged the Court to exercise its discretion and allow the instant application. On the chances of success of the appeal, the applicant submitted that it has an arguable appeal with high chances of success and relied on its draft memorandum of appeal. The applicant further avers that in the event that the instant application is not allowed, it will result in substantial loss to the applicant. There is no replying affidavit or written submissions filed by the respondent on record.

Determination

7. I have considered the application, the grounds in support thereof, the submissions and the law. The issue for determination is whether the application is deserving of the orders sought. 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.”

8. In **Leo Sila Mutiso** (supra) which is the *locus classicus*, laid down the parameters of applications under Rule 4 of this Court’s Rules 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].

9. As regards the length of delay, in **Andrew Kiplagat Chemaringo v. Paul Kipkorir Kibet** [2018] eKLR as was cited by the applicant, this Court stated as follows:

“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.”

10. The impugned judgment was delivered on 29th January, 2020 whereas this instant application was filed on 2nd September, 2020. The delay in filing the present application was therefore approximately eight (8) months. In a bid to explain the delay, the applicant stated that its erstwhile advocates did not inform it of the date when the said judgment was delivered.

11. In **Bi-Mach Engineers Limited v. James Kahoro Mwangi** [2011] eKLR, the Court held inter alia that:

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his former advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”

12. However, the applicant stated that further delay occurred when its current advocates could not trace and peruse the Court file to ascertain the current position of the matter owing to the Covid-19 pandemic. The applicant has not demonstrated the effort made in trying to trace the file from the registry.

13. In **Hamendra Mansukhalal Shah v Alnoor Kara & Another** [2000] eKLR the Court stated as follows:

“I am inclined to agree with Mr. Mwangi that the explanation given for the 47 days delay has not been sufficiently explained to

me. If indeed as claimed by the applicant the fault laid with the registry of the superior court there was nothing to stop the applicant from obtaining even a mere letter from the registry to the effect that the file was missing during the said period and therefore the notice could not be lodged. (Emphasis supplied).

14. Regarding the chances of success of the intended appeal the applicant contends that the intended appeal is arguable as it raises issues for determination *inter alia* whether the respondent was an employee of the applicant only on the basis that the applicant contributed to his National Social Security Fund (NSSF) dues; and whether the respondent was entitled to terminal dues as prayed in the Memorandum of Claim.

15. In **Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015** this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

16. On the degree of prejudice to the respondent, this Court has to balance the competing interests of the parties, that is, the injustice to the applicant, in denying her an extension, against the prejudice to the respondent in granting an extension. There is **no** replying affidavit or written submissions filed by the respondent to show what prejudice he will suffer if the instant application is allowed.

17. From the circumstances of this instant application, the applicant has not demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra). The delay in filing the notice of appeal has not been satisfactorily explained.

18. The upshot is that the applicant’s application dated 2nd August, 2020 has no merit and is dismissed with costs.

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

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR