IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NAMBUYE, J.A – IN CHAMBERS)

MISC. CIVIL APPLICATION NO. 90 OF 2020

IN THE MATTER OF AN INTENDED APPEAL

BETWEEN

THE ATTORNEY GENERAL.....APPLICANT/INTENDED APPELLANT

AND

CHARLES OTOK OLIECH.....RESPONDENT/INTENDED RESPONDENT

(Being an application seeking extension of time to file an appeal

of the judgment of the Employment and Labour Relations Court

(M. N. Nduma, J.) dated 9th October, 2019 in Kisumu ELRC Petition No. 62 of 2018)

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RULING OF THE COURT

Before me is an application dated 10th August, 2020 substantively under **Rule 4** of the **Court of Appeal Rules 2010**, seeking leave of the Court to file an appeal to the Court of Appeal out of time against the decision of **M. N. Nduma, J.** made on 9th October, 2019, and an attendant order for costs of the application to be provided for.

It is supported by grounds on its body, a supporting affidavit of **Alice Mate** together with annextures thereto and written submissions. It has been opposed by a replying affidavit sworn by **Charles Otok Oliech**, the respondent together with annextures thereto. It was canvassed through rival pleadings, and applicant's written submissions and principles of case law relied upon by the applicant in support of the application without oral highlighting.

Supporting the application, it is the applicant's assertion that they were party to the Constitutional Petition No. 62 of 2018 filed against them by the respondent. Instructions were given to the office of the Attorney General to appoint counsel to conduct proceedings therein on their behalf. The counsel tasked by the Attorney General's Office subsequently took maternity leave without proper handing over of the brief to another counsel. Inquiries with the registrar of the constitutional court on the progress of the matter is what led to the discovery that the matter had long been transferred to the Employment and Labour Relations Court (ELRC) for hearing and disposal. They took up the issue with the ELRC Court as advised, traced the file after a long time and upon perusal of the file is when they stumbled on the respondents notice of motion dated 26th May, 2020 seeking to enforce a judgment delivered in his favour by the ELRC on 9th October, 2019 hence the filing of the application under consideration seeking the reliefs prayed for therein.

In light of all the above, the applicant contends that the delay in initiating the intended appellate process to address their grievance arising from the above mentioned judgment was not deliberate but due to inadvertence on the part of counsel then tasked to prosecute the matter on their behalf both in the Constitutional Court and subsequently in the ELRC. They have a draft notice of appeal ready for filing as soon as capacitated. Request for proceedings was made immediately they learned of the entry of judgment against them in favour of the respondent. The appeal not only has high chances of success, but it also concerns a matter of public interest. Ends of justice to both parties would therefore demand that issues intended to be raised in the intended appeal be ventilated on merit. They, therefore pray that the relief sought be granted especially when no prejudice will be suffered by the respondent if the reliefs sought were granted as prayed.

To buttress the above submissions, the applicant relies on the case of **LSG Lufthansa Service Europa/Africa GMBH & Another vs. Liab Muturi Mwangi practicing in the name and style of Muturi Mwangi & Associates Advocates [2019]eKLR**; **Richard Muchai Njoroge**

& Another vs. Susan Muthoni Gaciri & Harry Mwangi [2000]eKLR and **Stanley Kaiyongi Mwenda vs. Cyprian Kubai [2000]eKLR** all for the threshold for granting relief under **Rule 4** of the **Court of Appeal Rules**; in support of their submission that since default in complying with the prerequisites within the rules herein is attributed to the advocate then on record for the applicant, it should not be visited against the applicant as in their opinion such an action would not only be unfair but also highly punitive of the applicant who in their opinion is an innocent party. Second, it is now trite that it is only in exceptional circumstances that an applicant would be denied an opportunity to exercise his/her statutory right to be heard on appeal.

In rebuttal, the respondent avers that he filed his constitutional petition against the applicant seeking various reliefs. It was defended by a replying affidavit deposed on behalf of the applicant by **Colonel Joseph Karbuali Koseu** dated 27th June, 2010. The petition was disposed of through viva voce evidence tendered by the rival parties. On 4th October, 2018, **J. W. Cherere, J**. gave directions for the matter to be transferred to the High Court ELRC Division for hearing and disposal. These were duly served on both parties who subsequently appeared before **M. N. Nderi, J.** on 17th January, 2019 for further directions during which proceedings applicant's counsel successfully sought and was granted leave to file written submissions which they did file on 18th March, 2019. It is, therefore not correct as erroneously averred by the applicant that they were not aware of the transfer of the matter from the High Court constitutional division to the ELRC and that they only came to learn of the change in the court handling the matter after they were informed of the same by the Deputy Registrar of the Constitutional Court. Further, that contrary to applicant's assertions, applicant's advocates were in court on 9th September, 2019 when the judgment was delivered. The application under consideration is, therefore, an afterthought made in bad faith with the sole aim of denying him fruits of his judgment, opines respondent.

It is further his averment that to his knowledge State Counsel, **Grace Esendi** who allegedly failed to brief the applicant on the progress in the proceedings during the trial was never in conduct of the said proceedings. According to him, proceedings at the trial were conducted by learned counsel, **Sara Alingo** who has not sworn any affidavit to confirm applicant's allegations that they were never given updates on the progress of the proceedings during the trial. That allegation is therefore baseless and it should be ignored. It is also his assertion that the facts displayed on the record indicate clearly that there is no logical or plausible explanation or cogent reason as to why the applicant did not file the notice of appeal and seek certified copies of proceedings timeously. Neither is there any explanation as to why the application under consideration was filed one year later after judgment nor why upon changing advocates in June, 2020 it took them close to two months to present the application under consideration. On that account, prayed for the application to be dismissed with costs to him.

My invitation to intervene on behalf of the applicant has substantively been invoked under **Rule 4** of the **Court of Appeal Rules**. The principles that guide the Court in the exercise of its mandate under the said rule and which I fully adopt for purposes of determination of this application have been crystallized by case law. See **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2E A 231**, and **Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014]eKLR**; also among numerous others. The principles distilled from the numerous case law mentioned above may be enumerated *inter alia* as follows: *The mandate under **Rule 4** of the Court of Appeal Rules is discretionary and unfettered. Factors for exercise of the Court's unfettered discretion under the said Rule include but are limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding if the application was granted; the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; orders under **Rule 4** of the Court of Appeal Rules should be granted liberally and on terms that are just; determination of the degree of prejudice to the respondent entails balancing the injustice to the applicant in denying him/her an extension against the prejudice to the respondent in granting an extension; the conduct of the parties, public interest issues implicated in the appeal or intended appeal also fall for consideration; 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 a delay is the key that unlocks the court's flow of discretionary power; there has to be valid and clear reason upon which discretion can be favourably exercised; failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable; an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court; the right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law.*

The above principles were restated by the Supreme Court of Kenya **(M.K. Ibrahim & S.C. Wanjala SCJJ)** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013]Eklr** as follows:- *extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time.*

I have considered the record in light of rival pleadings, applicant's sole submissions, and legal authorities relied upon by the applicant in support of the application. Factors that fall for consideration in deciding either way are those set out in the crystallized principles highlighted above namely, the length of the delay, reasons for the delay, arguability of the intended appeal and, lastly, any prejudice likely to be suffered by the respondent if the reliefs sought were granted.

On delay, it is common ground that the judgment was delivered on 9th October, 2019. The application under consideration is dated 10th August, 2020 a period of about ten (10) months and four (4) days.

In **George Mwende Muthoni vs. Mama Day Nursery and Primary School, Nyeri C.A No. 4 of 2014 (UR)**, extension of time was declined on account of the applicant's failure to explain a delay of twenty (20) months, while in **Aviation Cargo Support Limited vs. St. Marks Freight Services Limited [2014]eKLR**, the relief for extension of time was declined for the applicant's failure to explain why the appeal was not filed within sixty (60) days stipulated for within the rules after obtaining a certified copy of the proceedings within time and, second, for taking six (6) months to seek extension of time within which to comply.

I have applied the thresholds in **George Mwende Muthoni** [supra] and **Aviation Cargo Support Limited** cases [supra] both highlighted above to the rival positions herein. It is my view that the length of delay involved herein is not one such delay that would disentitle a deserving applicant of relief under the said rule. It is, therefore, excusable.

On the reason for the delay, blame has been laid on counsel then on record for the applicant during the trial. However, as pointed out by the respondent in his averments no effort was made by the applicant to seek confirmation from the said counsel if at all their assertions are genuine. Neither was any effort made by them to address this concern in rebuttal through an affidavit. Blame for failure to controvert respondent's averments on this issue lies with counsel currently on record for the applicant and who should have found it imperative on them to controvert those averments. The position in law is that where there is sufficient demonstration on record that it is the advocate on record for a party who is responsible for the defaulted process, such default should not be visited on an innocent client as it would be not only highly punitive but also prejudicial to the innocent client. See the case of **Owino Ger vs. Marmanet Forest Co-Operative Credit Society Ltd [1987]eKLR**; among numerous others, in which the Court variously declined to visit wrongs of advocates against their clients where there was sufficient demonstration that instructions for the defaulted process had timeously been given to the advocate and that it was the advocate's fault that the procedural steps sought to be cured had occurred. I, therefore decline to visit that default on to the applicant.

On arguability of the intended appeal, the draft memorandum of appeal is annexed. Applicant intends to fault the learned trial Judge for: failing to consider and determine whether a human rights petition should be filed within a reasonable time and whether the delay in the circumstances herein was reasonable; finding that the respondent suffered violation of fundamental freedoms which included torture whereas there was no medical evidence to prove the same; awarding a global and excessive damages; and, lastly, awarding damages for lost benefits without specifying the type of benefits allowed and/or amounts due to the petitioner in respect of those benefits.

My take on all of the above proposed grounds of appeal is that they are all arguable especially when in law an arguable appeal is not one that must necessarily succeed, but one that is not frivolous. One that will invite a response from the opposite party and interrogation by a court of law. I entertain no doubt in my mind that all the above proposed grounds of appeal will invite a response from the respondent and merit interrogation by a Court of law. I, therefore, reiterate they are arguable.

As for prejudice likely to be suffered by the respondent if the relief sought were granted, I find none. Reason is that going by the respondent's own averments, he is yet to compute the amounts payable to him for lost benefits, tax costs, apply for warrants for execution, a process which is ongoing and which according to him triggered the application under consideration. The effect of orders sought if granted is not to halt the process the respondent has embarked on but to capacitate the applicant to initiate its intended appellate process.

As mentioned above, also falling for consideration is the right of access to appeal justice. In **Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR**; **Mbaki & Others vs. Macharia & Another [2005] 2EA 206;** and the Tanzanian case of **Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003;** in which it was variously held *inter alia* that: *the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.*

In light of the above crystallized positions, I am of the view that the circumstances prevailing herein do not operate to warrant curtailing applicants intended appellate right especially after ruling above that the intended appeal is arguable. Second, their assertion that the intended appeal is a matter of public interest has not been controverted by the respondent. It is, therefore, only fair and just that the issues intended to be raised on appeal be interrogated on merit of the appeal in the interest of justice to both parties.

The upshot of the above assessment and reasoning is that the application has merit. It is allowed on the following terms:

1) Applicant has fourteen (14) days of the date of the ruling to file and serve a notice of appeal.

2) They have sixty (60) days from the date of the lodging of the notice of appeal to file an appeal.

3) In default of any of item 1 and 2 above leave granted to stand lapsed.

4) Costs to abide the outcome of the intended appeal.

DATED and DELIVERED at NAIROBI this 5th day of March, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR