IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. 168 OF 2019

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED.....APPLICANT

AND

KENNEDY KIMAIYO KIPLAGAT.....RESPONDENT

(*An application for extension of time to file and serve an appeal out of time from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Marete, J.) delivered on 26th July 2018*

in

Cause No. 2309 of 2014)

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RULING

Background

[1] Before me is an application filed on 11th June, 2019 brought under ***Rule 4*** of this Court's Rules and all other enabling provisions of the law. The applicant seeks extension of time to file and serve a record of appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nairobi (ELRC) (**Marete, J.)** delivered on 26th July, 2018.

[2] The application is premised on the grounds that the applicant was dissatisfied by the impugned judgment and lodged a notice of appeal on 1st August, 2018; that the applicant further applied for copies of proceedings vide a letter dated 30th July, 2018 and filed in court on 1st August, 2018 and served on the respondent's advocates on 3rd August, 2018; that the applicant collected copies of proceedings on 19th March, 2019, upon receipt of notification from the registry on 13th March, 2019; that the applicant ought to have filed the record of appeal on or before 13th May, 2019; that the applicant filed the record of appeal on 3rd June, 2019, 22 days after the stipulated timeline; that the delay in filing the record of appeal was occasioned by the fact that the applicant sought to peruse and make copies of the respondent's pleadings to prepare the record of appeal as the copies served upon the applicant were jumbled up and not legible; that the applicant's counsel erroneously computed the days required to file the appeal from the date of the certificate of delay as opposed to the date when the proceedings were collected.

[3] The applicant further contends that it has an arguable appeal; that the instant application has been filed without inordinate delay; that the respondent will not suffer any prejudice if the application is allowed and that any inconvenience suffered thereon can be compensated by way of costs. The application is supported by the affidavit of the applicant's counsel, **William K. Muthee**, in which he reiterated the grounds on the face of the application.

[4] The application was canvassed by way of written submissions. The applicant in its written submissions dated 30th November, 2020 relied on the case of **LSG Lufthansa Service Europa/ Afrika GmBH& another v Eliab Muturi Mwangi (Practicing in the name and style of Muturi Mwangi & Associates Advocates) [2019] eKLR** for the proposition that the mistake of counsel ought not to impede substantive justice.

[5] The applicant further submitted that the respondent has not demonstrated any prejudice likely to be suffered if the application is allowed. The applicant relied on **Patriotic Guards Ltd v James Kipchirchir Samba [2018] eKLR** for the proposition that where no prejudice will be suffered by the opposing party, the court ought to exercise its discretionary powers and grant an extension of time.

[6] In his written submissions the respondent submitted that the proceedings were ready for collection on 26th February, 2019 and that the applicant collected them on 19th March, 2019 but offered no explanation for the 21 days delay in collecting them. The respondent further contended that it was not clear when the applicant requested for, if at all, or when it collected the certificate of delay dated 4th April, 2019.

[7] The respondent further contended that pursuant to **Rule 83 of this Court's Rules**, the applicant is deemed to have withdrawn its notice of appeal. In this regard, the case of **John Mutai Mwangi & 26 others v Mwenja Ngure & 4 Others [2016] eKLR** was cited. It was further submitted that the applicant has not demonstrated that its intended appeal is arguable. The respondent cited the case of **Bhagwaqnji Raja v. Swaran Singh s/o Hari Singh [1962] E.A. 288** where the Court held that an appellate court will not interfere with the court's exercise of discretion unless it is satisfied that the lower court acted on wrong principles. Lastly, it was submitted that the respondent will suffer prejudice if the application is granted as it will prolong judicial time and process and frustrate his right to enjoy the fruits of his judicial labour.

Determination

[8] 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."***

[9] This Court in the *locus classicus* case of **Leo Sila Mutiso v. Hellen Wangari Mwangi** ***[1999] 2 EA 231*** set out the parameters that guide this Court in such an application 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].

[10] The factors that the court may take into consideration are discretionary and non-exhaustive. Accordingly, this Court in **Fakir Mohammed v. Joseph Mugambi & 2 Others (2005) eKLR** held that:-

> ***"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."***

[Emphasis supplied].

[11] In **Muringa Company Ltd v. Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019**this Court held 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].

[12] In considering the delay period, of importance is the reason for the delay. In this regard, this Court in ***Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR*** stated 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."***

[13] Rule 82 of the Court of Appeal, Rules provides that:-

> ***"(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."

[14] In the instant case, the notice of appeal was lodged on **1st August, 2018** and served on the respondent's advocates on **8th August, 2018**. The applicant's counsel issued a letter bespeaking proceedings to the Deputy Registrar of the ELRC at Nairobi on even date. The said letter was served on the respondent's advocates on **3rd August, 2018**.

[15] The applicant's counsel attributes the delay in filing the record of appeal partially to the process of obtaining copies of the respondent's pleadings from the court registry as the copies that they were served with were illegible. He, therefore, sought to peruse the court file and make copies of the said pleadings. I find that in the circumstances of this case, the reason given for the delay is plausible.

[16] In **Belinda Murai & 9 others v Amos Wainaina [1979] eKLR this Court** stated as follows:-

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress."

[17] As regards whether or not the applicant's intended appeal is arguable, I bear in mind this Court's holding in ***Muchugi Kiragu v James Muchugi Kiragu & Another Civil Application No. Nai. 356 of 1996***:-

"Lastly, we would like to observe that the discretion granted under rule 4 of the Rules of this Court to extend the time for lodging an appeal is, as is well known, unfettered and is only subject to it being granted on terms as the Court may think just. Within this context, this Court has on several occasions, granted extension of time, on the basis that an intended appeal is an arguable one and that it would therefore, be wrong to shut an applicant out of Court and deny him the right of appeal unless it can fairly be said that his action was in the circumstances, inexcusable and that his opponent was prejudiced by it."

[Emphasis supplied].

[18] A perusal of the draft memorandum of appeal reveals that the applicant seeks to raise several arguable points including that the learned Judge erred in law and fact in whether the termination of the respondent's employment was unfair, un-procedural, unlawful, unconstitutional and contrary to the rules of natural justice. Without expressing definitive conclusions, I am satisfied that the intended appeal is arguable.

[19] On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, any injustice to the applicant, in denying an extension, against the prejudice to the respondent in granting an extension. The applicant was aggrieved by the impugned judgment and is desirous of appealing against the said judgment out of time.

[20] Conversely, the respondent contended that he will suffer prejudice if the application is granted as it will lengthen judicial time and process and frustrate his right to enjoy the fruits of his judicial labour. In the circumstances of this case, I am of the considered view that an award of costs would adequately compensate the respondent for prejudice, if any.

[21] From the circumstances of the application before me, the applicant has demonstrated the existence of the parameters set out in **Leo Sila Mutiso** (supra). In the premises, I allow the motion dated 10th June, 2019. I extend the time for filing the record of appeal. The appeal filed by the applicants on 3rd June, 2019 is deemed as properly filed and if not served on the respondent, to be served within seven (7) days from the date of this ruling. I grant costs of the motion to the respondent.

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

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR