



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPLICATION NO. E031 OF 2020

BETWEEN

H. YOUNG EAST AFRICA COMPANY LIMITED...APPLICANT

AND

JUSTUS MUIA KIOKO.....RESPONDENT

(An application for extension of time to file the memorandum of appeal & record of appeal out of time and stay of execution of in an intended appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Ongaya, J.) delivered on 29th May, 2020

in

ELRC Cause No. 2087 of 2016)

RULING

Following the termination of the respondent's services by the applicant, the respondent filed a claim of wrongful termination in the Employment and Labour Relations Court (ELRC), being ELRC Cause No. 2087 of 2016. He sought amongst other orders, payment of his terminal dues.

Ongaya, J. in a judgment dated 29th May, 2020 found in favour of the respondent despite of a discharge agreement he had executed after his termination. The applicant believed that the discharge released it from any further claim by the respondent in respect of his employment, hence, it was aggrieved by the said decision.

Consequently, the applicant instructed its then advocates on record, M/s Adede & Company Advocates to lodge an appeal against the impugned judgment. According to the applicant, its former advocates filed a notice of appeal and requested for certified proceedings of the ELRC; that, before the intended appeal could be filed, it fell out with the said advocates and swiftly engaged M/s Maina & Onsare Partners Advocates to take over the matter; that nonetheless, its current advocates have been experiencing challenges in obtaining pleadings from its former advocates and following up the certified proceedings, since they are not properly on record; that in turn, the above state of affairs hindered its current advocates from compiling and filing the record of appeal within the stipulated time frame.

It is on account of the foregoing that the applicant has brought an omnibus application before this Court seeking leave for its current advocates to come on record in place of its former advocates; extension of time within which it can file and serve the memorandum and record of appeal; and stay of execution of the impugned judgment.

This Court has on numerous occasions pointed out the possible challenges an omnibus application may pose especially since its jurisdiction is exercised on two levels, either by a single Judge on behalf of the entire Court under **Rule 53** of this Court's Rules or by a fully constituted Bench.

By dint of the scope of my jurisdiction as a single Judge, I can only consider the prayers for leave of the applicant's counsel to come on record and extension of time.

Towards that end, the respondent, who opposed the motion, expressed his doubt as to whether the notice of appeal on record was lodged since there was nothing to suggest the same, coupled with the fact that it was never served upon his advocates. He argued that the reasons

advanced for the delay did not have any weight; and that the intended appeal was not arguable since the ELRC held that the discharge was invalid on account of his wrongful termination.

Beginning with the leave to come on record, **Rule 23** of this Court's Rules is quite clear that all the applicant's current advocate had to do was file a notice of change of advocates in this Court and serve the same upon the respondent. There was no requirement for leave.

In considering an application for extension of time under **Rule 4** of this Court's Rules, a single Judge exercises unfettered discretion, which must however be exercised judiciously. In doing so, I have to take into account, among other factors, the length of the delay; the reasons for the delay; the degree of prejudice to the respondents if the application is granted, and, possibly, the chances of the success of the intended appeal, should the application be granted. See **Karny Zahrya & Another vs. Shalom Levi** [2018] eKLR.

The respondent is right in stating that it is not clear from the notice of appeal on record whether or when the same was lodged or served upon the respondent. Be that as it may, I do not find the reasons advanced for the delay in filing the intended appeal plausible. This is because, as I have expressed above, there was no need for leave for the applicant's current advocates to come on record. There is a notice of change of advocates dated 14th August, 2020 on record. Equally, there was nothing to substantiate the alleged difficulties in obtaining the certified proceedings of the ELRC and lodging the appeal on time. As such, I find that the delay of 42 days was inordinate.

Though it is not my place in this current application to determine the merit of the intended appeal, I am not convinced of its chances of success.

For the aforesaid reasons, the application lacks merit and is accordingly dismissed with costs.

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

W. OUKO, (P)

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR