**IN THE COURT OF APPEAL**

**AT NAIROBI**

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

**CIVIL APPLICATION NO. 67 OF 2020**

**BETWEEN**

**PATRICK MBAU KARANJA.....APPLICANT**

**AND**

**KENYATTA UNIVERSITY.....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 (Abuodha, J.)***

***delivered on 9th August 2018 in E & L Cause No. 1662 of 2013)***

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**RULING**

**Background**

**[1]** Before me is an application dated 9th March, 2020 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 a record of appeal from the judgment of the Employment and Labour Relations Court of Kenya at Nairobi (ELRC) (**Abuodha, J.)** delivered on 9th August, 2018.

**[2]** The application is premised on the grounds that being dissatisfied with the impugned judgment, the applicant filed a notice of appeal on 31st August, 2018; that the applicant applied for copies of proceedings; vide his letter of 5th October, 2018 that there was delay in issuance of the copies of proceedings due to procurement procedures and backlog of cases; that the applicant encountered challenges pursuing the matter at the court level and a personal level; that it is in the interest of justice that this application is allowed as the intended appeal has great chances of success; and that the respondent does not stand to suffer any prejudice if the instant application is allowed. The application is supported by the affidavit of the applicant in which he reiterated the grounds on the face of the application.

**[3]** The application was canvassed through written submissions. The applicant was unrepresented and in his written submissions submitted that the delay in filing the record of appeal was due to the process of procuring the necessary documentation; that he followed up with the court registry after follow-ups with his erstwhile advocates, **Gichahi and Company Advocates**, proved unsuccessful; that he did not have funds to instruct another advocate or to procure the proceedings from the court registry; and that he was verbally informed at the court registry that there was a backlog of applications for proceedings. The applicant 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** where this Court excused delay premised on similar circumstances.

**[4]** The respondent opposed the application and filed a replying affidavit and written submissions. In its replying affidavit which was sworn by **Mr. Aaron Tanui (Mr. Tanui),** the respondent's Senior Legal Officer deponed that the delay in filing the instant application for enlargement of time has not been explained; that there is no Certificate of Delay produced to show that the Court Registry acknowledged the delay; that the applicant has no good and sufficient cause for not filing the record of appeal within time; that there must be an end to litigation; and that the re-opening of this matter after the unexplained delay would be prejudicial to the respondent. The respondent relied on the decision of this Court in ***Fred V. Mwara v Unga Limited [2016] eKLR*** that:-

***"I therefore find that the length of delay was inordinate and no reasonable explanation was advanced. On the arguability of the***

***intended appeal no grounds were placed before me by the applicant to enable me determine the same. I would in the circumstances be disinclined to exercise my discretion in favour of the applicant. There must be an end to litigation and the reopening of this matter after the unexplained delay would be prejudicial to the respondent. The application is accordingly dismissed with costs to the respondent."***

*[Emphasis supplied]*.

**[5] Mr. Tanui** further stated that the Court has not been favoured with a draft memorandum of appeal to gauge the chances of the intended appeal succeeding; and that the instant application amounts to a fishing expedition as the delay of nearly two (2) years is inordinate. The respondent urged that the instant application be dismissed with costs.

**Determination**

**[6]** I have considered the application, the grounds in support thereof, the rival submissions, the authorities cited and the law. The issue for determination is whether the instant 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."***

**[7]** In **Leo Sila Mutiso v. Hellen Wangari Mwangi** ***[1999] 2 EA 231*** this Court aptly 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].

**[8]** The factors that the court can take into consideration are discretionary and non-exhaustive. In **Fakir Mohammed v. Joseph Mugambi & 2 others(2005) eKLR,** this Court found 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].

**[9]** 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].

**[10]** There is no maximum or minimum period of delay set out under the law. Nevertheless, the reason(s) for the delay must be plausible. In this respect, this Court in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** stated:

***"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."***

**[11]** From the record, the impugned judgment was delivered on **9th August 2018**. The notice of appeal dated **17th August 2018** was filed on **31st August 2018**. The instant application was filed on **9th March 2020.** The delay in filing the instant application is approximately 1 year and 7 months. The applicant faults his previous advocates for the delay in filing the record of appeal. The applicant however had the responsibility to follow up on his case even though he was represented by counsel. In **Bi - Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR** this court held that:

> ***"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]** Further, in **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015)] eKLR** the Court held that:-

> ***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel".***

**[13]** The applicant also cited the delay in obtaining typed proceedings. Although he applied for copies of typed proceedings as evidenced by a letter dated 5th October, 2018, the applicant claimed that he was orally informed at the court registry that there was delay in processing applications due to backlog. There was, however, no certificate of delay obtained or exhibited. The applicant had a duty to obtain evidence from the court registry to show that there was a delay in typing of proceedings. 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]** The applicant further attributed the delay to financial constraints. In **Joseph Maina Njoroge & 2 Others v Paul Chege Mutahi [2007] eKLR** this Court held that impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. It was held that:-

> ***"Rule 112 of this Courts Rules is very clear. It provides precisely for a situation such as the applicants alleged they found themselves in. It provides for relief from fees and security in civil appeals and allows any person seeking to appeal in a civil matter to this Court from the decision of superior court who lacks means to pay the required fees or to deposit the security for costs to apply to the court to lodge the same appeal without payment of such fees and security. That explains why Omolo JA stated categorically in the case of Francis Mwai Karani vs. Robert Mwai Karani (Civil Application No. NAI. 246 of 2006) that lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. Such a situation is already provided for in our laws by way of Rule 112 of this Courts Rules. I do not accept the applicants' explanation for delay of one year eleven months in filing the appeal on this matter. I reject it."***

**[15]** I note that the applicant did not address the delay in filing the notice of appeal dated 17th August, 2018 and filed in Court on 31st August, 2018. The notice of appeal ought to have been filed on or before 23rd August, 2018. This Court in **Bi-Mach Engineers Limited v James Kahoro Mwangi (supra)** held that filing a notice of appeal is a simple and mechanical task which could have been done soon after the delivery of the judgment. On the whole, guided by the above-cited authorities, I find that the applicant has not sufficiently explained the delay.

**[16]** On the chances of success of the intended appeal, this Court in **Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015** 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'."***

**[17]** The applicant did not supply the draft memorandum of appeal. In the result, without expressing definitive conclusions, I find that the applicant has failed to demonstrate the likelihood of the intended appeal succeeding.

**[18]** On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying them an extension, against the prejudice to the respondent in granting an extension. The applicant was aggrieved by the judgment of the trial court and is desirous of appealing against the said judgment albeit out of time hence the instant application. On the other hand, the respondent asserts that a delay of about two years in filing the record of appeal is inordinate and that litigation must come to an end.

**[19]** From the circumstances of the application before me, the applicant has failed to demonstrate the existence of the parameters set out in **Leo Sila Mutiso** (supra) The upshot is that I decline to grant the prayer to extend time. The application is accordingly dismissed. I make no orders as to costs.

**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 REGISTAR***