



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, JA – IN CHAMBERS)

CIVIL APPLICATION NO. 388 OF 2019

**IRENE WAIRIMU GACHIE.....APPLICANT/APPELLANT**

**VERSUS**

**JETLAK FOODS LIMITED..... RESPONDENT**

*(Being an application for extension of time to file the record of appeal against the judgment of the Employment and Labour Relations Court (S. Radido, J.) dated 16th November, 2018*

*in*

*Nairobi ELRC Cause No. 1540 of 2013*

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**RULING OF THE COURT**

Before me is a notice of motion dated 13th December, 2019 under **Rules 4 and 82** of the **Court of Appeal Rules**, substantively seeking leave of the Court to file the record of appeal out of time against part of the judgment of **S. Radido, J.** delivered and dated on 16th November, 2018; that upon grant of the extension of time sought, the record of appeal annexed to the application be deemed as properly filed and that costs of the application be in the cause.

The application is supported by grounds on its body and a supporting affidavit sworn by **Irene Wairimu Gachie**, together with annexures thereto. It has not been opposed. It was canvassed through the applicant's sole pleadings without oral highlighting.

Supporting the application, the applicant avers that she was aggrieved by the trial court's judgement delivered on 16th November, 2010 in Nairobi Employment and Labour Relations Court to (ELRC) Cause No. 1540 of 2013 on 19th November, 2018. Simultaneously, lodged a notice of appeal and also applied for a certified copy of proceedings. Thereafter, visited the registry on several occasions, the last being the month of August 2019, in a bid to get typed proceedings to progress her timeously initiated appellate process only to be told that the same were not ready. On 19th September, 2019, she got a call from the ELRC registry to the effect that the typed proceedings were ready for collection upon payment of fees which she promptly paid and applied for a certificate of delay, signed on 31st October, 2019. It is in light of the totality of the above that the applicant avers that the application is well founded.

My invitation to intervene on behalf of the applicant has been invoked under the provisions of law cited above. **Rule 4** of the **Court of Appeal Rules** provides 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.”**

The principles that guide the court in the exercise of its mandate under the said Rule have been crystalized by case law.

I take it from the Supreme Court of Kenya (**M.K. Ibrahim & S.C. Wanjala SCJJ**) decision 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.

**Rule 82** the **Court of Appeal Rules** on the other hand provides as follows:

**(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 –**

**(a) a memorandum of appeal, in quadruplicate;**

**(b) the record of appeal, in quadruplicate;**

**(c) the prescribed fee; and**

**(d) 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.**

**(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.**

**(3) .....**

The Court in the case of **Charles Wanjohi Wathuku vs. Githinji Ngure & Another [2016] eKLR**, reiterated the position taken in the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others [2016] eKLR** on the intent and purport of **Rule 82** of the Court's rules as follows:

**“That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner. The rule recognizes, however, that there could be delays in the typing and availing of the proceedings at the High Court necessary for the preparation of the record of appeal. The proviso to the rule accordingly provides that where an appellant has bespoken the proceedings within thirty days and served the letter upon the respondent, then the time taken to prepare the copy of the proceedings, duly certified by the registrar of the High Court, shall be excluded in the computation of the 60-day period. A certificate of delay therefore suffices to exclude any delay beyond the prescribed 60 days.”**

I have considered the record in light of the above threshold. The factors I am obligated to take into consideration in determining this application as crystallized by the above distilled principles/propositions are but not limited to the period of delay, reasons for delay, arguability of the intended appeal and any prejudice likely to be suffered by the respondent if the Court were to exercise its discretionary mandate in favour of the applicant.

On the period of and reason for delay, judgment was delivered on 16th November, 2018. The application under consideration is dated 13th December, 2019 a period of one year and about twenty-eight (28) days.

On the reason for the delay, applicant blames ELRC Registry for the delay in supplying the timeously applied for proceedings to capacitate her progress her timeously initiated appellate process. In support thereof, applicant has annexed to the supporting affidavit a letter bespeaking proceedings dated and received by the ELRC Registry on the 19th November, 2018. Another letter dated 19th September, 2019 seeking for a certificate of delay. The certificate of delay annexed is dated 31st October, 2019. A perusal of the contents reveals that proceedings were indeed timeously applied for on 19th November, 2018, the registry notified applicant under a letter dated 19th June, 2019 that they were ready, these were paid for on 19th September, 2019 a period of three months. The application was filed on 13th December, 2019 a period of two months and twenty-five (25) days.

In **George Mwendu 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.

Applying the above threshold to the uncontested position herein, I am of the view that the period of delay involved is such that will not disentitle the applicant to the exercise of discretion to validate her timeously initiated appellate process. The reason given for the delay is also plausible.

On arguability of the intended appeal, the applicant relies on twelve (12) proposed grounds of appeal which may be paraphrased albeit in summary form that the learned Judge erred both in law and fact by: failing to address and consider the issue of leave allowance, failing to consider the applicant's testimony that she was never allowed to proceed on leave for the entire seven (7) years she worked for the respondent, failing to award the applicant a sum of Kshs. 23,106/= as pension despite the applicant's evidence on the same, compensating the applicant general damages for wrongful termination based on only four (4) months wages instead of the years the applicant was supposed to

work until retirement age which general damages was low and quite minimal in the circumstances, failing to award service pay as provided for and for the reason that the applicant did not provide any contractual or legal basis for the same, awarding the applicant a minimal cost of Kshs. 5000/= for the claim without any reasonable backing at all, failing to consider the evidence in the applicant's submissions and drifting away from the issues for determination thus limiting his ability to fairly adjudicate over the dispute.

The position in law is that an arguable appeal need not be one that must succeed, but one that warrants not only an invitation of the opposite party to respond thereto, but one that also warrants the Court's interrogation. See the case of **Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 Others, Civil Application No. 124 of 2008**. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See the case of **Damji Pragji Mandavia vs. Sara Lee Household & Body Care (K) Ltd, Civil Application No. Nai 345 of 2004**.

Applying the above threshold to the above set out proposed grounds of appeal which the applicant intends to raise on appeal, I have no doubt they would all warrant the respondent's response thereto as well as the Court's interrogation. They are therefore arguable.

On prejudice, the respondent has not opposed the application. There is therefore no prejudice that is likely to be suffered by the respondent should the relief sought be granted.

In the result and on the basis of the above assessment and reasoning, I find merit in the applicant's application and proceed to make orders as follows:

- 1) **The applicant has thirty (30) days from the date of the delivery of the ruling to lodge and serve the record of appeal within the requisite timeline stipulated in the Rules for such service.**
- 2) **Costs of the application to abide the outcome of the intended appeal.**

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 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**