



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE J.A (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. E278 OF 2020

BETWEEN

BIDCO AFRICA LIMITED.....APPLICANT

AND

MARTIN WAMAE WANGU & 294 OTHERS.....RESPONDENTS

(An application for extension of time to file the Record of Appeal out of time against the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (M. Onyango, J.) dated 7th November, 2019) in Cause No. 1936 of 2015)

RULING

The applicant, **Bidco Africa Limited** has moved the Court by a Motion dated 12th October 2020, seeking the following orders;

- a) **THAT this Honourable court be pleased to extend time for such period as it may deem fit and proper for the Appellant/Applicant herein to file and serve a Record of Appeal against the Judgment and Decree of the Employment and Labour Relations Court of Kenya sitting at Nairobi delivered by the Hon. Lady Justice Maureen Onyango dated 7th November, 2019 in Employment & Labour Relations Court Cause No. 1936 of 2015**
- b) **THAT upon granting of Prayer 1 above, the Record of Appeal herein filed on 22nd August, 2020 be deemed to have been duly and properly filed and served.**

Being a **Rule 4** application, I shall be guided by the appropriate principles, devised by this Court, to be applied in order to achieve a just decision. In the exercise of my discretion, which is free and unfettered, I am persuaded by the decision in **LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI (1999) 2 EA 231**, the *locus classicus* which laid down the following parameters;

“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.”

The application is founded on 6 grounds on the face of it and supported by an affidavit sworn by **Georgina Ogalo-Omondi**, the applicant’s advocate. She deposed that the initial judgment was delivered in favour of the respondents on 13th July 2018 by Abuodha, J where all the respondents were to receive one month’s salary in lieu of notice, and in lieu of leave for each completed year of service from 2009 to 2013. Another order directed counsel for the parties to liaise and compute what was due to the respondents to enable the court to record a final order.

The parties were unable to agree on what was due to the respondents as directed by the court. Consequently, a judgment on quantum was delivered on 7th November, 2019 by Onyango, J awarding the respondents a total sum of Kshs 22,419,653. Aggrieved by the tabulation of the quantum, the applicant’s advocates filed a notice of appeal on 21st November 2019 and also applied for the typed proceedings. A notification that the typed proceedings were ready was received on 22nd January 2020. Arrangements were made and the typed proceedings were collected on 30th January 2020. A decree was issued on 19th February 2020 and a certificate of delay on 2nd March 2020.

Counsel maintains that they had every intention to file the record of appeal within the requisite timelines when the first case of COVID-19 was reported in the country on 13th March 2020. Due to this, the courts scaled down their operations from 15th March 2020 and suspended

the receipt of physical documents. As a result, they were unable to file the record. Similarly, and in accordance with the Government's directives, the firm scaled down its operations and was only accessible in shifts by a very lean staff so that it was not possible to have the record of appeal prepared and filed during that time.

Additionally, in the month of June, the firm reported four positive cases of COVID-19 which led to closure of the office. The clerk who was instructed to put together the record of appeal was locked out of Nairobi County and remained in Machakos County until the travel ban was lifted on 7th July 2020. As a result, the applicant was only able to file the memorandum and record of appeal on 22nd August 2020 and to serve the respondents on 3rd September 2020.

Counsel urged that the explained delay was occasioned by unprecedented circumstances and the applicant ought not to be penalized for it; the same is not unreasonable; and the respondent will not be prejudiced if the application is allowed.

Although there is no maximum or minimum period of delay set by the law, anyone seeking this ought to offer some explanation for the delay. A plausible and satisfactory explanation is the key that unlocks the Court's flow of discretionary favour See **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR.**

To my mind the reasons proffered by the applicant are neither excusable nor satisfactory. All of them could have been mitigated if counsel and the firm in general were vigilant. I do not dispute that the courts scaled down operations as per the directive of the then Chief Justice Hon. David Maraga. However, the Chief Justice subsequently issued **PRACTICE DIRECTIONS ON ELECTRONIC CASE MANAGEMENT** on 4th April 2020 which provided for e-filing and e-service system to be adopted by courts. Further, Ouko, JA, President of the Court of Appeal (as he was then) issued **PRACTICE NOTES FOR THE CONDUCT OF COURT BUSINESS DURING THE GLOBAL CORONAVIRUS PANDEMIC** on 21st April 2020 which complemented the directions earlier issued by the Chief Justice. They included the e-filing of documents, e-payment and e-service of documents using email and WhatsApp platforms.

The applicant has failed to satisfactorily demonstrate the steps taken to adhere to the rules between the month of April when the practice directions were issued, and June 2020 when the unfortunate COVID cases were reported at the firm. Moreover, after the lockdown was lifted on 7th July 2020 and the clerk was available, it is not explained why it took them six weeks to file the record of appeal.

The Rules of this Court must be adhered to by parties at all times and parties in default should place material before the Judge whose favourable discretion is sought to show that they tried as much as possible to comply with them even when faced with challenges. It is my view that therefore a party who fails to do so makes it impossible for the Judge to extend relief. The discretion is a judicial one, to be exercised on the basis of principle and not whim or sympathy.

In the result, this application fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 4th day of June, 2021.

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR