



IN THE COURT OF APPEAL

NAIROBI

(CORAM: MURGOR, JA – IN CHAMBERS)

CIVIL APPLICATION NO. E 296 OF 2020

BETWEEN

SHIELD ASSURANCE COMPANY LIMITEDAPPLICANT

AND

RAHAB WOTHAYA ESIROMO..... 1ST RESPONDENT

RUOYA JOSEPH KAMAU.....2ND RESPONDENT

SIMON MAINA CHEGE3RD RESPONDENT

RABAN MWANGI CHEGE.....4TH RESPONDENT

DAVID MUIRU NJOROGE.....5TH RESPONDENT

MICHAEL GIKONYO KINYANJUI.....6TH RESPONDENT

NOBERT OMANYO WABWIRE.....7TH RESPONDENT

(Being an application for extension of time to file and serve a Record of Appeal out of time from the Ruling of the Employment Court of Kenya at Nairobi by (Nduma Nderi, J) delivered on 9th December, 2016 in Employment and Labour Relations Court Cause NO. 1488 of 2010.)

RULING OF THE COURT

The applicant, Shield Assurance Company Limited has brought this Notice of motion, dated 16th September, 2020 seeking for leave for time to be extended to file and serve a Record of appeal out of time against the ruling of the Employment and Labour Relations Court of 9th December, 2016. The Motion was premised on grounds that being aggrieved by the trial court's dismissal of the applicant's application for stay of execution, it lodged a Notice of appeal on 15th December, 2016 and concurrently made inquiries on availability of the typed copies of the proceedings. It was stated that the certified copy of proceedings were supplied to it on 26th February, 2020 and a certificate of delay was thereafter issued on 4th March, 2020.

It was further stated that following the outbreak of the Covid- 19 pandemic, court operations were significantly impacted and the applicant was unable to file its Record of appeal on or before 4th May, 2020; that in addition, the Court's Registry declined to accept hand delivered documents which occasioned a further delay; that the online filing platform was only introduced on 1st July, 2020, and by this time, the prescribed period for filing the record had already lapsed.

It was also stated that the applicant's advocates closed their offices from 25th March, 2020 in compliance with the Ministry of Health Containment directives. The applicant went on to assert that the appeal raised arguable points of law and that it stood to suffer immense prejudice should the application be dismissed. The affidavit in support of the application was sworn by Peter Gachuhi, the applicant's counsel which to a large extent reiterated the contents of the motion.

In a replying affidavit sworn by **Karimi David** on behalf of the respondents on 26th April, 2021, it was deponed that there had been inordinate delay in filing the application with respect to the appeal, that the applicant took over four years to have a few pages of the typed

proceedings prepared; that the applicant has not adequately explained the delay in filing the Record of appeal. It was further deponed that the Covid- 19 pandemic which occurred in March, 2020 and resulted in a closure of the courts did not affect filings as the registry continued to receive records online; that the application was unmerited and a waste of the Court’s time; that if allowed the respondents would be seriously prejudiced as their employment was terminated over ten years ago and they continue to await payment of the balance of their terminal dues.

Under **Rule 4** of this Court’s Rules, it is settled that, the Court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not whimsically having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent would suffer prejudice if the extension sought was granted. See the case of **Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997.**

The judgment of the trial court was delivered on 9th December 2016 whereupon the applicant filed a Notice of appeal on 15th December, 2016.

Though it was stated that a request was made to be supplied with the proceedings, such request was not enclosed in the application which has rendered it impossible to ascertain whether the request was copied to the respondents. Also not attached is the certificate of delay.

Rule 82 specifies that once an appellant has requested for proceedings and served the relevant notification on the respondent, the registrar of the High Court should certify the time taken for the preparation and delivery of the proceedings to the appellant, which period is then excluded when computing delay. **Sub rule (2)** is explicit that;

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

Since there is nothing to show that the respondent was copied with the request, period specified by **rule 82(1)** becomes applicable, so that the applicant was required to file the record of appeal 60 days after lodging the Notice of appeal. Hence, the period of delay that required to be explained would be 60 days from the 15th December 2016 to the date of this application which is a total of 45 months (or three years and 9 months). Besides the explanation that there was a delay caused by the closure of the Court’s registry due to the Covid- 19 Pandemic in March 2020, which hampered the applicant’s ability to file the Record of appeal, the delay in the period prior to this, which was prolonged and therefore inordinate has not been explained in any way.

As concerns the other factors, I find that the information on the record is inadequate to determine whether the appeal has any chance of success. And given the inordinate delay in filing this application, there is no doubt that the respondents continue to be subjected to immense prejudice.

For the reasons above, I decline to allow the application, and hereby order that the Notice of Motion dated 19th September 2020 be and is hereby dismissed with costs to the respondents.

It is so ordered.

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

A.K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR