



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE JA: (IN CHAMBERS)]

CIVIL APPLICATION NO. E328 OF 2020

BETWEEN

WASHINGTON ODERA SIREKA.....APPLICANT

VERSUS

SCANIA EAST AFRICA LIMITED.....RESPONDENT

(Being an Application for Extension of Time to file an Appeal out of time against the

Judgment and Decree of Radido J dated 17th January 2020 in Nairobi ELRC Cause No. 196 of 2015)

RULING OF THE COURT

Before me is a motion dated **19th October 2020** and brought pursuant to the provisions of **Rule 4, 42 &43 (1) of the Court of Appeal Rules, and Section 3A of the Appellate Jurisdiction Act** and all other enabling provisions of the Law in which **Washington Odera Sireka (the applicant herein)** seeks the following orders:

“1. That this honourable court be pleased to grant leave to the Applicant to appeal out of time against the Judgment and decree of Justice Stephen Radido, Judge of the Employment and Labour Relations Court in Cause No. 196 of 2015 at the Employment and Labour Relations Court of Kenya in Nairobi delivered on 17th day of January 2020.

2. That the costs of this application be in the cause.”

The motion is supported on the grounds on the face of the motion and an affidavit sworn by **Washington Odera Sireka** who deponed *inter alia* that he was dissatisfied and aggrieved by a judgment delivered by Radido, J on **17th January 2020**, in Nairobi Employment and Labour Relation Cause No. 196 of 2015, pursuant to which he instructed his advocates to file a **Notice of Appeal on 20th January, 2020**, which was within the stipulated 14 days from the date of the judgment. That, his advocates applied for a copy of typed proceedings and judgment on **20th January, 2020** and the proceedings were not availed to them until **10th June 2020** whereupon they requested for a certificate of delay through the court’s registry email on **11th June, 2020** which certificate of delay was only issued to them on **21st August, 2020** but only released by the court registry to his advocates on **31st August, 2020**.

He further deponed that his advocates applied for a copy of the decree on **31st August, 2020**, which was only issued on **23rd September, 2020** and that the time for lodging the appeal lapsed on **7th August, 2020** before they received the certificate of delay and the decree on **31st August, 2020** and **23rd September, 2020** respectively. That, his advocates could not lodge the appeal without the certificate of delay and the decree and the delay in issuing and collecting these crucial documents was due to disruptions brought about by Covid-19 pandemic and that the delay in lodging the appeal therefore was for reasons outside his advocates control.

He further deponed that the intended appeal was arguable with high chances of success and would suffer prejudice if not granted leave to appeal out of time.

It was submitted for the applicant that the Court has the discretion to grant extension of time for filing the record of appeal pursuant to Rule 4 of this Court’s Rules and that even though the Rule does not lay specific guidelines on what considerations the court ought to make while exercising this discretion, courts have followed certain considerations as set in the case of **Thuita Mwangi v Kenya Airways Limited [2003]**

eKLR, including; the length of the delay, the reason of the delay; (possibility) chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted.

With regard to the first issue namely; the length of the delay it was submitted that the delay herein of two (2) months was not inordinate and that the reasons for the delay were attributable to the delay in issuing the certificate of delay and certified copy of the decree by the superior court coupled with the difficulties in obtaining the said physical documents after issue from the said registry due to Covid- 19 restrictions in place and that the said reasons were enough to warrant the exercise of this court's discretion. On the chances of the appeal succeeding, it was submitted that the grounds raised in the memorandum of appeal were arguable with a high chances of success. Finally, on degree of prejudice to the respondent, it was submitted that the respondent will not suffer much prejudice compared to the applicant who will be denied the opportunity to file his record of appeal which may amount to a denial of the applicant's rights to be heard.

The respondents did not file any documents pursuant to the directions issued by the Deputy Registrar of this Court on **29th April, 2021**.

I have carefully considered the motion, the grounds thereof, the supporting affidavit, the applicant's submissions, the cited authorities and the law.

The applicant's motion is brought *inter alia* under **Rule 4** of this Court's Rules. The said Rule provides:

"4.

Extension of time

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 upon which this court exercises its discretion under Rule 4 are firmly settled. The court has wide unfettered discretion whether to extend time or not. However, in exercising its discretion the court should do so judiciously, and in accordance with the principles set out in **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi – Civil Application No. Nai 251 of 1997** where the court stated;

"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated 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 reasons 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."

In the instant case there has been a delay of about two months in bringing the instant application. In my considered opinion, the delay is not inordinate.

With regard to the reasons for the delay, the applicant contended that the delay was attributable to issuance of the certificate of delay and the certified copy of the decree by the superior court coupled with the difficulties in obtaining the said physical documents occasioned by the Covid-19 restrictions that were in place. In my considered opinion, the reasons advanced by the applicant for the delay are enough and sufficient to warrant the exercise of this court's discretion in his favour. Indeed, this court takes judicial notice of the court disruptions that have been brought up by Covid-19 pandemic since the first case was reported in Kenya in **March, 2020**. With regard to the chances of the appeal possibly succeeding, I have looked at the annexed draft memorandum of appeal and I am satisfied that the applicant has an arguable appeal. Lastly as regards prejudice, I am satisfied the applicant will suffer much prejudice as opposed to the respondent as his right to be heard on appeal will have been completely shut out if the instant application is not allowed.

Taking into totality all the circumstances in this case, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration by the Court, in the exercise of my unfettered discretion under Rule 4 of the Court as laid out in **Leo Sila Mutiso case (supra)**, for extension of time to file the intended appeal out of time.

Accordingly, I find the applicant's motion dated **19th October 2020**, to be merited and I allow the same as prayed. The applicant will file and serve the record of appeal within 60 days from the date of this ruling, failure to which this orders shall stand vacated.

The costs of this motion shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR