IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: DR. K. I. LAIBUTA, J.A. (IN CHAMBERS)

CIVIL APPLICATION NO. NAI. E017 OF 2021

BETWEEN

ANNA GICHIMO ..... APPLICANT

AND

KENYA ORDINANCE FACTORIES CORPORATION.....RESPONDENT

(Being an application for extension of time to file an Appeal out of time, from the Judgment of Lady Justice Hellen Wasilwa, dated 26th October 2018

in

Nairobi Employment and Labour Relations Court Case No. 1353 of 2014)

****

RULING

Background

Before me is a Notice of Motion dated 27th January 2021 made under Rule 4 of the Court of Appeal Rules in which the Applicant, Anne Gichimu, seeks extension of time to file and serve a Record of Appeal from the Ruling of Hon. Lady Justice Hellen Wasilwa delivered on 26th October 2018 in Nairobi Employment and Labour Relations Court Case No. 1353 of 2014. The application has been duly served on the Respondent and is opposed as appears from the replying affidavit of Colonel Julius Mutugi Ngatia sworn on 3rd March 2021.

The application is made on 9 grounds set out on the face of the Motion, which I need not recite. A summary thereof would suffice to guide the exercise of my discretion in determination of the application. Briefly stated, the salient grounds are that –

(a) the Applicant filed her Notice of Appeal on 5th November 2018 following the delivery of judgment in question on 26th October 2018;

(b) the clerk in the office of counsel for the Applicant collected typed copies of the proceedings in the cause on 5th November 2019 and filed them away;

(c) counsel for the Applicant was at all times unaware that their clerk had collected the proceedings and put them on file and only discovered them on 4th May 2020;

(d) the Applicant filed her Notice of Motion herein on 28th May 2020 by sending them to kenjeff2012@gmail.com;

(e) the application was not received in the Court of Appeal registry;

(f) the advocate's mistake in not filing the record of appeal within the prescribed period should not be visited upon the Applicant;

(g) failure to file the record of appeal within the prescribed timelines was inadvertent; and

(h) the Applicant's intended appeal has a high possibility of success.

The Applicant's Notice of Motion is supported by her annexed affidavit and that of her counsel, Vincent Anyona, sworn on 27th January 2021. In their supporting affidavits, the Applicant and her counsel explain the delay in filing the requisite Record of Appeal and restate the grounds set out on the face of the Motion. In addition thereto, counsel for the Applicant admits mistake on his part for "not following up the matter" after sending the communication to the Court of Appeal. They urge me to grant the application "so as not to punish the Applicant" for the mistake of her advocate.

In his replying affidavit, Colonel Ngatia requests me to dismiss the Applicant's Motion. However, he concedes that the Applicant's Notice of Appeal was filed in good time on 2nd November 2018, 7 days after delivery of the judgment in question, and applied for the proceedings by her counsel's letter of 2nd November 2018 received in the superior court on 5th November 2018. According to him, counsel for the Applicant did not act with due diligence for a period of two years. He argues that it is a party's duty to prosecute their case, and that the Applicant is guilty of indolence. He concludes by observing that equity does not aid the indolent and, therefore, this Court should not come to the Applicant's rescue.

In paragraph 12 of his replying affidavit, Col. Ngatia contends that the Applicant's delay of 729 days up to the date of the application is inordinate and inexcusable. According to him, there is no Certificate of Delay on record, and neither has the Applicant supplied the application of 28th May 2020 alleged not to have been received in this Court, or the Certificate of Authenticity required under Section 106B of the Evidence Act. He asks me to direct that the Applicant's Notice of Appeal dated 2nd November 2018 be deemed withdrawn in accordance with Rule 83 of the Court of Appeal Rules, 2010.

Submissions by Counsel

In their written submissions dated 16th March 2021 and made in support of the Applicant's Motion, counsel for the Applicant, M/s. Muma and Kanjama, address themselves to the factual background leading to the delay in issue and invited me to determine three issues relating to –

(a) the length and reasons for the delay;

(b) the chances of success of the intended appeal; and

(c) prejudice to the parties.

Counsel rely on the authority of *Landbank Real Estate Investment Trust Limited v Standard Chartered Bank Kenya Limited* [2019] eKLR and *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR.

In their undated submissions, counsel for the Respondent oppose the Applicant's Motion and rely on the authority of *John Murage Mbogo v Chief of Defence Forces and another* [2020] eKLR, *Gerald Kithu Muchanje v Catherine Muthoni Ngare and another* [2020] eKLR, and *J. G. Builders v Plan International* [2015] eKLR.

Determination

The Respondent's request that the Applicant's Notice of Appeal be deemed as withdrawn by virtue of Rule 83 of the Court of Appeal Rules is beyond my jurisdiction to consider. That is a matter for a three-judge bench to determine, either of its own motion or on application by any of the parties. Accordingly, I confine my decision to the factors on the basis of which time may be extended to appeal out of time.

Rule 4 of the Court of Appeal Rules gives the Court unfettered discretion to "… 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 …," on such terms as it thinks just.

The Court of Appeal in *Leo Sila Mutiso v Helen Wangari Mwangi* [1999] 2 EA p231 set out the principles to be applied in exercise of its discretion in determination of any application under Rule 4. The Court held that:

> "the decision whether or not to extend time is discretional. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, 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 case of *Fakir Mohammed v Joseph Mugambi and two others* [2005] eKLR lends clarity to the issue of the Court's jurisdiction in determination of applications made under Rule 4. The discretion is unfettered. In its decision, the Court observed:

> "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, 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 factors."

In addition to the foregoing, I have considered the decision in *Pothiwalla v Kidogo Basi Housing Cooperative Society Ltd and 31 others* [2005] eKLR where the Court, at p.733, called to mind the criteria applied by the Court in exercise of its unfettered discretion in determination of an application under Rule 4, a criteria more succinctly settled in *Wasike v Swala* [1984] KLR p591 where this Court stated:

> "As Rule 4 now provides that the Court may extend the time on such terms as it thinks just, an applicant must now show, in descending scale of importance, the following factors:
>
> (a) that there is merit in his appeal;
>
> (b) that the extension of time to institute and file the appeal will not cause undue prejudice to the respondent; and
>
> (c) that the delay has not been inordinate."

With regard to the merit of the appeal, it is sufficient for the Applicant to demonstrate that he or she has an arguable appeal with the likelihood of success. I am not satisfied that the grounds set out in the Applicant's draft Memorandum of Appeal dated 27th January 2021 are arguable with the possibility of success. In my considered view, it is not any ground advanced by an applicant is arguable, otherwise the Rules could have stated so in all simplicity. Indeed, the Court has to test the possibility of success of the grounds advanced in the Memorandum of Appeal, and that cannot be an idol task to be discharged by a presumption that such grounds are likely to succeed. That would be tantamount to allowing an applicant to approach this Court with untested reasons for doing so.

Turning to the grounds of the intended appeal, I take note of the fact that her dismissal on 7th December 2011 was the subject of the constitutional reference in Nairobi JR Misc. Civil Application No. 330 of 2011 as well as in the Nairobi ELRC Case No. 1353 of 2014. The first case focused on a claim for breach of the right to fair hearing before dismissal. The second was founded on allegations of unfair dismissal, defamation and sexual harassment on the basis of which the Applicant sought "general and aggravated damages".

To my mind, the two cases were closely intertwined with reference to the main complaint of unfair dismissal in the backdrop of complaints of defamation and sexual harassment whose determination was unfavourable to the Applicant. The Applicant's contention that the superior court failed to address her claim for defamation and sexual harassment is not persuasive. It is notable that the claim for defamation was brought in her Memorandum of Claim in the superior court almost three years after the letter of 7th December 2011, Cap.22, whose contents were alleged to be defamatory. I need not go to the substance of that that letter of dismissal, or to the provisions of Section 4 of the Limitation of Action Act, save to state that the accusation on the basis of which the Applicant was dismissed constituted part of the pleading and evidence presented for consideration by the superior court.

Secondly, there is nothing on the record before me to suggest that the claim for sexual harassment had been reported for trial in criminal proceedings and found for the Applicant, in which case a claim for damages in a civil suit would have availed to her. In any event, the alleged allegations of sexual harassment are still open to pursuit by the Applicant in criminal proceedings and, accordingly, need not be retried in the intended appeal.

I am not persuaded that the application before me satisfies the test applied in *Joseph Wanjohi Njau v Benson Maina Kabau*, Civil Application No. 97 of 2012 (Unreported), where the Hon. Mr. Justice Kathurima M'Inoti held that:

> "the Court of Appeal has observed that an arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before the Court."

By so determining, I am guided by this Court's decision in *Athuman Nusura Juma v Afwa Mohamed Ramadhan*, CA No. 227 of 2015 (Unreported), where the Court had this to say:

> "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"".

I am also guided by the authority of *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR, the Court held that:

> "This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would therefore be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be said that his action was, in the circumstances, inexcusable and that his opponent was prejudiced by it."

In the absence of a Certificate of Delay, it is difficult to ascertain the real reasons for the delay in obtaining copies of the proceedings to facilitate filing of the record of appeal. Even after collection on 5th November 2019, the proceedings were placed on file and forgotten for a period of seven months. Granted that this constitutes mistake on the part of counsel for the Applicant, the decision in *Landbank Real Estate Investment Trust Limited v Standard Chartered Bank Kenya Limited* [2019] eKLR cannot be a licence for laxity. In *John Murage Mbogo v Chief of Defence Forces and another* [2020] eKLR, Hon. Mr. Justice Kiage had this to say:

> "I cannot fathom how it took counsel over one and a half years to discover the omission on the notice, considering that this is an active matter. Due diligence requires that matters actively pending before the courts are regularly appraised in order to ascertain their status."

It is inexcusable that the Applicant took so long to take the necessary steps to lodge her intended appeal. The delay, in my considered view, is inordinate in the circumstances of this case. In view of the foregoing observations, the matter stands settled, and I need not go into the issue as to what prejudice would be suffered by the Respondent if time to appeal were enlarged as sought. To do so would be merely academic.

Having carefully considered the contents of the Applicant's Notice of Motion and the supporting affidavits, the replying affidavit, the submissions by counsel for the Applicant and counsel for the Respondent, and all documents accompanying the application, I find that the Applicant's Notice of Motion dated 27th January 2021 fails. The same is hereby dismissed with costs to the Respondent.

Dated and Delivered at Nairobi this 9th day of July 2021

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR