



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, KIAGE, SICHALE, J.J.A)

CIVIL APPLICATION NO. 123 OF 2019

BETWEEN

PHILOMENA MWONGELI NICHOLAS.....APPELLANT/APPLICANT

AND

NATIONAL POLICE SERVICE COMMISSION.....RESPONDENT

(In the Matter of the Reference on the Ruling dated 3rd April 2020 on the Single Judge's Ruling dated 3rd April 2020

(Justice Asike-Makhandia, JA in the Application dated 4th October 2019

RULING OF THE COURT

This is a ruling on a Reference to the full Bench of the Ruling of **Asike-Makhandia, JA**, dated **3rd April 2020** dismissing an application by **Philomena Mwangeli Nicholas** (referred to hereinafter as the Applicant) for extension of time in which to file and serve the record of Appeal from the decision of the Employment and Labour Relations Court at Kisumu (**Nduma Nderi J.**) dated **7th March 2019**.

The Reference is made under **Rule 55 (1)** of the **Court of Appeal Rules** (the Rules). The applicant's action leading to the motion before us was commenced by a letter dated **6th April 2020** wherein, the applicant wrote to the Registrar expressing dissatisfaction with the decision of a single judge (**Asike-Makhandia, JA**) and seeking that the application be placed before a full bench for hearing and determination.

The grounds upon which the applicant sought extension of time were mainly that: firstly, the delay was on account of her facing financial difficulties and secondly, that there had been an earlier application dated **14th June, 2019** and filed on **27th June 2019** which was however withdrawn on **23rd September 2019** when her Counsel noticed that it was fatally defective.

In response, the Respondent filed Grounds of Opposition dated **2nd December 2019** in which they opposed the application on the grounds that it was an abuse of the Court process since a similar application (Civil Application No. 67 of 2019) was withdrawn on **23rd September 2019** and that there was no justification for the delay in filing the record of Appeal. **Makhandia, JA** considered the single judge application and came to the conclusion that:

“...the delay was approximately 90 days. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained hence a plausible and satisfactory explanation for the delay is the key that unlocks the Court's flow of discretionary favour...the Applicant stated that the delay was occasioned by financial constraints; I am inclined to reject this explanation for the simple reason that it is not sufficient. In doing so, I am guided by this Court's decision in the case of Joseph Maina Njoroge & 2 others v Paul Chege Muhahi [2007] eKLR...”

I therefore find that the Applicant's impecuniosity cannot be reason enough for me to exercise my discretion in her favour. The Applicant should have invoked Rule 115 (1) of this Court's Rules which allows a party who has demonstrated lack of means to pay the required fees to lodge the appeal without payment of the requisite fees. Given the foregoing, I have come to the inevitable conclusion that the reason for the delay has not been sufficiently explained and the application must therefore fail. The Application is dismissed with costs to the Respondent.”

The Motion came up for hearing before us on **2nd March, 2021**. The Applicant's counsel submitted that the intended impugned judgment was delivered on **7th March 2019** and the Notice of Appeal was lodged on the **19th March 2019**; that certified copies of the judgment and proceedings were obtained on **1st April 2019**; that due to financial hardship, on **20th June 2019**, the applicant lodged the application dated

14th June 2019, seeking extension of time. However, this motion was withdrawn on 23rd September 2019 and that the current application, lodged on 7th October 2019, (approximately 3 months and 32 days later) was not inordinately late.

On the question of reason for the delay, the Applicant's Counsel submitted that the Applicant was facing financial hardship coupled with her having a seriously ailing mother who subsequently succumbed to the illness. Counsel submitted that more time was consumed by the pendency of the earlier application which was withdrawn after defects were noted. Counsel further submitted that the mistake of counsel should not be visited on parties and in support of that proposition, he made reference to the case of *Belinda Muras & 6 others v Amos Wainaina (1978) KLR* cited with approval in *Bank of Africa Kenya Limitec v Put Sarajevo General engineering CO. Ltd & 2 others [2018] eKLR*. On the question of whether the appeal was merited, it was submitted on behalf of the applicant that, the Appeal was to challenge the applicant's dismissal from employment as the vetting process was not conducted in accordance with national values and principles, equality and freedom from discrimination and fair administrative action or fair trial. On the question of prejudice likely to be suffered by the respondent if extension was granted, it was submitted on behalf of the applicant that the respondent would not suffer any substantial prejudice that could not be adequately be compensated by costs while the applicant would suffer financial loss, loss of office, loss of social status and public humiliation if the application was not allowed as there will be no avenue to challenge the applicant's dismissal from employment.

In his submissions in opposition to the reference, the respondent's counsel contended that the applicant had failed to tender any justification for the more than 7 months' delay in filing her record of Appeal after the Employment & Labour Relations Court (ELRC) had supplied proceedings to aid in filing of the Record of Appeal. The respondent took issue with the argument by the applicant that her Counsel was still perusing the file in order to advise her and that no proper explanation for the delay had been provided. Reliance was placed on the case of *Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR* the gist of the finding therein being that:

"The order to grant extension of time is discretionary and should be exercised judicially...for the latter to be granted the order, they must explain why there was inordinate delay".

Further to that, it was submitted that the Applicant had filed a similar application being No. 67 of 2019 which application was withdrawn on the date of hearing and no reason was given for the withdrawal. Counsel concluded that the Applicant was not honest and candid and that she was undeserving of the Court's discretion and urged the Court to hold that the inordinate delay of more than 2 months in filing the record of appeal was unsatisfactorily explained.

We have considered the applicant's submissions dated 5th November 2019 and the respondent submissions dated 9th November 2020.

By Rule 55 (1) (b) of this Court's Rules:

“

(1) Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge—

(b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, he may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter”.

As stated earlier, the applicant has made this reference as provided by Rule 55 (1) of this Court's Rules. However, the principles which guide the Court in exercise of discretion in an application for extension of time are well settled and need no repetition. The discretion though unfettered should be exercised judicially.

In considering whether or not the exercise of judicial discretion by the single Judge should be interfered with, the Court to which the Reference is made does not substitute its discretion for that of the judge who exercised the discretion in a certain way, but has to consider whether that discretion was exercised judicially.

In the case of *Fakir Mohammed vs. Joseph Mugambi & 2 Others [2005] eKLR* it was held that:

"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path..... 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, (possible) 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 factor."

Similarly, in the decision of *Muringa Company Ltd vs. Archdiocese of Nairobi Registered Trustees, Civil Application No. 190 of 2019*, as was cited in the case of *Omar Shurie vs. Marian Rashe Yafar [2020] eKLR*, in which it was stated that:

"Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity."

In our view, the learned judge took into consideration the length of the delay, the reasons advanced for the delay and properly exercised his discretion in disallowing the application. In particular, the judge was of the view that:

“The Applicant should have invoked Rule 115 (1) of this Court’s Rules which allows a party who has demonstrated lack of means to pay the required fees to lodge the appeal without payment of the requisite fees.”

It is in view of the above that we find no merit in the motion. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR