



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: J MOHAMMED, J.A. (IN CHAMBERS))**

**CIVIL APPLICATION NAI. NO. 246 OF 2019**

**BETWEEN**

**WS INSIGHT LIMITED.....APPLICANT**

**AND**

**ADAM MILLER.....RESPONDENT**

*(An application for extension of time to serve notice of appeal from the ruling of the*

*Employment and Labour Relations Court at Nairobi (Onyango, J)*

*dated 26th October, 2018*

**in**

**Employment and Labour Relations Court Cause No 1393 of 2017)**

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**RULING**

**Background**

[1] This is an application under Rule 4 of the Court of Appeal Rules (the Court Rules) for extension of time within which to file an appeal from the ruling and order of the **Employment and Labour Relations Court** (ELRC) (Onyango, J) dated 26th October 2018. The application is supported by an affidavit sworn on 29th July 2019 by **Mr. Sean Omondi**, learned counsel for the applicant.

[2] Following the ruling by the ELRC, the applicant filed a notice of appeal dated 9th November 2018, within the required fourteen (14) days from the date of the ruling. The applicant also applied for typed copies of the proceedings in a letter to the Deputy Registrar dated 14th November 2018. A copy of the letter bespeaking proceedings was served on the respondent's advocates on 14th November 2018. On 7th March 2019, the applicant filed an application in the ELRC seeking orders for stay of proceedings pending the hearing and determination of the applicant's intended appeal against the impugned ruling. The respondent opposed the application on grounds, *inter alia*, that the applicant had not served them with the notice of appeal, contrary to Rule 77 of the Court Rules.

[3] There is no replying affidavit filed by the respondent on record. **Submissions by counsel**

[4] At the hearing of the application, **Ms Akal**, holding brief for **Mr. Omondi**, learned counsel for the applicant submitted that the failure to serve the respondent with the notice of appeal was not intentional; that the error was noted during the proceedings at the ELRC and that once the error was noted, the applicant expeditiously filed the application for extension of time within which to serve the notice of appeal. Counsel averred that the intended appeal has a high chance of success and that granting an extension of time to serve the notice of appeal would not prejudice the respondent in any way.

[5] In opposition, **Mr. Kahura**, holding brief for **Mr. Gachuhi**, learned counsel for the respondent did not dispute that a notice of appeal was filed on 9th November 2018, but argued that the eight (8) month delay between the filing of the notice of appeal and filing the instant application for extension of time was inordinately long.

**Determination**

[6] I have considered the motion, the affidavits, submissions of both counsel, authorities cited and the law. Whether or not the order for extension of time should be granted lies entirely in my unfettered discretion. That discretion must however be judicially exercised and in doing so I recall the guiding principles often cited in **Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported)** as follows:

*“It is now 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 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”.*

[7] As succinctly stated by M’noti, J.A. in **Joseph Wanjohi Njau -vs-Benson Maina Kabau [2013] eKLR** the length of delay must be considered in light of the explanation that has been advanced. It is not in dispute that a notice of appeal was filed on 9th November 2018 within the fourteen (14) days from the date of the ruling delivered on 26th October 2018. A letter bespeaking the proceedings dated 12th November, 2018 was copied to counsel for the respondent in accordance with rule 82 of the Court Rules. Counsel for the applicant has explained that the failure to serve counsel for the respondent with the notice of appeal was an inadvertent error, which only came to their attention when the respondent opposed the application for stay of proceedings, and which the applicant sought to rectify by expeditiously filing the instant application.

[8] I have taken into account all the factors indicated above, and I find that the delay in bringing this application is not inordinate and is well explained. The applicant sought to remedy the error by filing the instant application for extension of time on 29th July 2019.

[9] The applicant contends that it has an arguable appeal. I have perused the draft Memorandum of Appeal and find that the intended appeal is not frivolous as it raises issues for determination *inter alia*, the jurisdiction of the ELRC where the parties were not in an employer – employee relationship as contemplated under **Section 12(1)(a) of Employment and Labour Relations Court Act**. As this Court stated in **Wasike vs. Swala [1984] KLR 591**, an arguable appeal does not necessarily mean one which will succeed.

[10] On the issue of whether the respondent will be prejudiced if the application is granted, the Court has to balance the competing interests of the applicant with those of the respondent. I am satisfied that an expedited hearing of the appeal, once filed, would ameliorate the prejudice to the respondent.

[11] Accordingly, I hereby allow the application, and order that the Notice of Appeal shall be served upon the respondent within seven (7) days from the date of delivery of this ruling. The applicant shall file and serve the Memorandum and Record of Appeal within forty five (45) days from the date of delivery of this ruling.

[12] The costs of the application shall abide by the outcome of the intended appeal.

**Dated and delivered at Nairobi this 24th day of January, 2020.**

**J. MOHAMMED**

.....

**JUDGE OF APPEAL**

*I certify that this is a true Copy of the original*

**DEPUTY REGISTRAR**