IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) IN CHAMBERS)

CIVIL APPLICATION NO. 278 OF 2019

BETWEEN

NAPHTALY S. MUYONGA.....APPLICANT

AND

THE PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an application for extension of time to file and serve a record of appeal

from the Judgment of the High Court at Nairobi (Khamoni, J)

dated 19th July 2007

In

H.C.C.C No. 1303 of 2001)

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RULING

By **Rule 75** of the Court of Appeal Rules, a person wishing to appeal a decision of any superior court below to this Court must start by giving a notice of that intention by lodging such a notice with the registrar of the superior court below within 14 days of the date of the decision against which it is desired to appeal. Within sixty days of the date when the notice of appeal was lodged an appeal must be instituted.

These timelines are critical in deciding this application in which the applicant has asked the Court to enlarge the time within which to file and serve the notice of appeal.

The judgment the applicant intends to challenge was rendered on 19th July, 2007 when Khamoni, J dismissed his claim for general and special damages for unlawful termination of his employment with the Government of Kenya in 1998. He was aggrieved by this decision but missed the opportunity to take the first step in challenging it. He did not lodge a notice of appeal, which he ought to have done not later than 2nd August 2007, being 14 days from the date of the impugned judgment.

The rule setting timelines also recognizes that there may well be justifiable reasons that may prevent a party from taking the requisite steps to file an appeal within those timelines. That is what **Rule 4** of the Court of Appeal Rules seeks to address. It provides that;

> **"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".** (My emphasis).

The applicant has now moved the Court by a motion filed on 23rd August, 2019 for leave to lodge and serve both the notice and record of

appeal out of time. What strikes one immediately is the length of delay from July, 2007 when the judgment was rendered and August, 2019 when the instant application was brought, a period of nearly 12 years. I will return to this question shortly.

The words 'such terms as it thinks just' emphasized in **Rule 4** above signify that the single Judge on behalf of the Court in considering whether or not to enlarge time exercises a judicial discretion in order to achieve justice in the circumstances of the case. The rule does not express the specific considerations which the court may take into account in determining whether it is just to extend time. In fact, no limit is placed by the rule on the factors which the court may consider in the exercise of its discretion. It has been left to the courts to determine the appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. For example Lightman J in the case of **Commissioner of Customs and Excise V Eastwood Care Homes (Ilkeston) Ltd. and others** (2000)1WLR 3095, identified the following as the factors to be considered:

> **"In particular, regard must be given, firstly, to the length of the delay; secondly, the explanation for the delay; thirdly, the prejudice occasioned by the delay to the other party; fourthly, the merits of the appeal; fifthly, the effect of the delay on public administration; sixthly, the importance of compliance with time limits, bearing in mind that they are there to be observed; seventhly, (in particular when prejudice is alleged) the resources of the parties".**

When the *locus classicus,* **Leo Sila Mutiso V. Rose Hellen Wangari Mwangi**, (1999) 2 EA 231 was decided in 1997, being a reference to a full bench was decided similar parameters were drawn as follows;

> **" It is now well 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 the 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".**

The policy statement behind **Rule 75** that fixes 14 days as the period for the lodgment of the notice of appeal and sixty days for the filing of the appeal, on the one hand, and on the other hand **Rule 4** that vests in the Court discretionary powers to extend the time limits, is the concern to balance the priorities of compliance with the rules in the interest of the administration of justice and the denial of justice which may result if a defaulting party is refused an extension of time to do whatever is necessary to maintain his appeal. Because of the public interest and in the interest of the parties, **Rule 75** lays emphasis on efficiency and economy in the conduct of litigation by limiting the period within which certain steps must be taken towards appeal.

The guidelines enunciated in the cited cases and those that have been decided subsequently stresses the importance of rules and the necessity of compliance with them. They stress that extension of time is not obtainable as of right; that time limits are not merely targets to be attempted but authoritative statements to be observed. By observing the timelines set by the rules, the rights of the parties and other litigants to have their cases progress according to the periods of time prescribed by the rules are guaranteed. When the period prescribed for filing an appeal has expired the decree-holder obtains a benefit under the law to treat the decree final and beyond challenge, and a legal right accrues to him by lapse of time. He has a legitimate expectation that the decree will not be challenged. Conversely, if satisfactory and acceptable explanation for delay is shown, the Court, in exercise of its absolute discretion may excuse the delay and admit the appeal out of time. But it must be remembered that delay of even a single day, has to be accounted for otherwise there would be no purpose of having rules prescribing periods within which certain steps have to be taken. That is why there must be some material on which the court can exercise its discretion. If there was an acceptable explanation, the Court might still refuse to extend time, if the delay was substantial or if to do so would cause significant prejudice to the respondent. It has been emphasized in many cases including **Allen V. Sir Alfred McAlphine and Son,** (1968) I ALL ER 543 at p. 547, **ET Monks And Company Limited V. Evans** & 3 Others, (1974) eKLR, **Dickson Miriti Kamonde -V- Kenya Commercial Bank** (2006) eKLR, that courts will not tolerate excessive, prolonged, inordinate and gross delays. Though the cases deal with applications for dismissal of suits for want of prosecution, the underlying principle is the need to adhere to timelines and to promote expedition in court actions. For example Lord Denning in **Allen** (supra) explained the fundamental reason behind this edict in this famous passage:

> **"The delay of justice is a denial of justice...**
>
> **To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3, Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, c.1). To put right this wrong, we will in this court do all in our power to enforce expedition.**
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> **... When delay in the conduct of an action is prolonged or inordinate and inexcusable (as per SALMON L. J) the natural interference in the absence of a credible excuse and there is substantial risk by reason of the delay that a fair trial of theissues will no longer be possible or that grave injustice will be done to one party or the other or to both parties the court may in its discretion dismiss the action straight away..."**

Though the respondents, who were duly served with the hearing notice, did not file any response to the application or attend court, the burden remained with the applicant to justify the delay.

The applicant explained that after the delivery of the judgment in question, he filed a notice of appeal but instead opted to petition the High Court for declaratory relief. In the end he withdrew the petition when it became apparent to him that it was *res judicata.* There is no evidence on record that a notice of appeal was ever filed. Indeed if it was, then why has the applicant prayed in this motion for enlargement of time to do so?

His argument, however is that time was consumed by the filing of the petition in the High Court. He has also asked the Court to forgive the

delay, as he had been sick. Before me, Dr. Khaminwa submitted that under the dispensation of the Constitution, 2010, issues of fundamental freedoms and individual rights are so grave that time limitations cannot apply; that further delay was occasioned by attempts at out-of court settlement and the fact that the file had been temporarily misplaced in his chambers.

Two medical reports are attached to the affidavit in support of the application. Only one bears the date when the applicant was examined as 14th May, 2019.

This and the other grounds proffered do not, with respect, explain the delay of up to 12 years. This period, by any and all standards is prolonged and inordinate. It cannot be excused and the applicant must reckon with the consequences of his inaction.

It is the same Constitution that counsel relied to argue that the applicant's rights cannot be stifled by time limits that also demands in **Article 159 (2)(b)** that

" justice shall not be delayed".

I will once again tap from the words of Denning, LJ in **Revici V. Prentice Hall Inc.** (1969) 1 All ER 772, where he was emphatic that;

> **"Nowadays we regard time very differently from the way they did in the 19th century. We insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution when people have not kept to the rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considering whether there should be an appeal or not. (I should imagine it was considered). Moreover (and this is important), not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had three and a half months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time any more"**

Back home, the Supreme Court in **Teachers Service Commission v Simon P. Kamau & 19 others** (2015) eKLR reminds us that;

> **"66] Article 159(2)(b) of the Constitution cautions Courts against permitting injustice through delays, in the following terms:**
>
> > ***'In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***
> >
> > ***(a) ……***
> >
> > ***(b) justice shall not be delayed.'***
>
> **[67] Thus, the standpoint of the Constitution is that, delayed justice amounts to injustice: and the Courts, which are the dedicated mechanism for the delivery of justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time-frame. This is the context in which Article 259(8) of the Constitution is to be seen; it thus prescribes:**
>
> > ***'If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arises."***

A long delay alone, as was the case here, would constitute prejudice and injustice.

When I review the history of this matter, it appears that the applicant has not proceeded with the diligence, enthusiasm and dispatch called for under the present atmosphere of litigation in this country.

There must always be a finality to litigation. For the applicant, I think that time has come.

The application has no merit and is accordingly dismissed. I make no orders as to costs.

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

W. OUKO, (P)

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR