



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P) (IN CHAMBERS))

CIVIL APPLICATION NO. 158 OF 2019

BETWEEN

ROADS AND CIVIL ENGINEERING

CONTRACTORS ASSOCIATION (RACEDA)..... APPLICANT

AND

KENYA BUILDING, CONSTRUCTION, TIMBER

AND FURNITURE INDUSTRIES

EMPLOYEES UNION.....RESPONDENT

*(An application for extension of time within which to file and serve a Notice of Appeal against the judgment and order of the Environment and Labour Relations Court at Nairobi (O. Maureen, J.) dated and delivered on 12<sup>th</sup> November, 2018*

*in*

*ELRC Cause No. 648 of 2018)*

\*\*\*\*\*

**RULING**

The disagreement between the parties herein is simply the effective date for the commencement of a Collective Bargaining Agreement (CBA), whether it is 1<sup>st</sup> January, 2017 or 1<sup>st</sup> January, 2018. The dispute was reported to the Minister for conciliation and a conciliator appointed to resolve the disagreement. The applicant was not satisfied with the determination and moved to the Employment and Labour Relations Court.

On 12<sup>th</sup> October, 2018 (erroneously and variously indicated in the application as 12<sup>th</sup> November, 2018 and sometimes 8<sup>th</sup> February, 2019), M. Onyango, J dismissed the applicant's claim and ordered;

**“1. That the effective date of the CBA is 1st January 2017.**

**2. That the respondent's representatives are directed to sign the revised CBA for the period 2017 – 2018 within 14 days from the date of judgment.**

**3. That the respondent is directed to fully participate in the registration process of the CBA.**

**4. That the case be mentioned on 12th November 2018 to confirm compliance.**

**5. There shall be no orders for costs”.**

The applicant was once more aggrieved and took out an application for the setting aside of the judgment before M. Onyango, J. That application was rejected on 8<sup>th</sup> February, 2019. It now wishes to challenge in this Court the decision of 12<sup>th</sup> October, 2018. But because it

was expected, in order to appeal that decision, to file the notice of appeal within 14 days of the decision but failed, it now applies in this motion for time to be extended to it to lodge the notice of appeal.

The applicant has attributed the delay to the respondent's action in renegeing on the understanding that between the parties that the judgment of the court would not be applicable to members of respondent whose staff are neither the respondent's union members nor whose staff do not meet the requisite threshold for membership to a union; and that the applicant's intended appeal is arguable.

The respondent has opposed the application stating that the delay is inordinate; that the reasons proffered are insufficient; and that the intended appeal stands no chance of success.

Though under **rule 4** of the Court's rules, the single Judge has wide and unfettered discretion, such discretion, like all judicial discretions must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment.

Some of the factors to be considered before time can be extended include the length of the delay, the reason(s) for the delay, the possible prejudice that each party stands to suffer; and whether, *prima facie*, the appeal or intended appeal has chances of success or is a mere frivolity. See **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi**, (1999) 2 EA 231.

The judgment intended to be challenged was rendered on 12<sup>th</sup> October, 2018. This application was filed on 24<sup>th</sup> May, 2019. The notice of appeal ought to have been filed not later than 1<sup>st</sup> November, 2018, being 14 days from the date of the judgment. Discounting Christmas recess, the delay in bringing this application is in excess of six months. That is inordinate, taking into account that the period permitted is 14 days.

The reason for that delay has not been satisfactorily explained. All the things the applicant was engaged in after the judgment, including negotiating with3 the respondent did not stop it from filing the notice of appeal. Time never stops to run for such things.

CBAs are time bound. For instance the one in question was to run for 2 years, either from 2017 or 2018, depending on the party. Further delay will be prejudicial to the respondent.

The application, for these reasons, is lacking in merit and is accordingly dismissed with costs.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of May, 2020.**

**W. OUKO, (P)**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**