



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE J.A IN CHAMBERS]

CIVIL APPLICATION NO. 315 OF 2019

BETWEEN

SUNRIPE (1976) LIMITED.....APPLICANT

AND

KENYA SHIPPING,

CLEARING AND WAREHOUSES WORKERS UNION.....RESPONDENT

(Being an application for extension of time to file and serve the Notice of Appeal and Record of Appeal

in an intended appeal against the ruling of the Employment & Labour Relations Court

at Nairobi (Lady Justice Maureen Onyango.) dated 26th July, 2019

IN

ELRC No. 2324 of 2017)

RULING

By a Notice of Motion dated 25th September, 2019, the applicant **Sunripe (1976) Limited** seeks extension of time within which to lodge a notice of appeal and record of appeal against the ruling of the Employment & Labour Relations Court (**Onyango, J.**) delivered on 26th July, 2019 in favour of the respondent- **Kenya Shipping, Clearing and Warehouses Workers Union**. The applicant was ordered to pay terminal dues to 103 employees as enumerated by the Court after the parties failed to agree on the list and amount payable pursuant to the court's Judgment dated 17th August 2018.

The grounds for seeking the extension are stated on the face of the application as follows:

- a) *the court delivered its judgment on 17th August 2018.*
- b) *The parties were directed to come up with the amount payable in line with payments made to an earlier lot of 71 employees and to report back in 30 days.*
- c) *The parties failed to agree and the respondent filed a subsequent application before the ELRC seeking amendment of the judgment by deletion of the words "in line with the payments made to 71 employees".*
- d) *In a ruling delivered on 29th July 2019, the Court noting that parties had failed to agree as directed outlined the terms of payment and directed any dispute on figures to the Labour office.*
- e) *The time for filing the notice of appeal has since lapsed.*

- f) *The applicant has an arguable appeal against the ruling.*
- g) *The delay in lodging the notice of appeal was not intentional.*
- h) *The respondent will not suffer any prejudice if the application is allowed.*

The reason for failing to file the notice of appeal on time is explained in an affidavit dated **26th September 2019** and sworn by **Chris Kaluku**- the Human Resource Manager of the applicant. He states that:

- a) *At the time of the delivery of the ruling the applicant was engaging the respondent in confirming the correct list of all the affected employees since it was discovered that some of the employees contained in the list of the 103 employees presented by the respondents were contained in the list of 71 employees.*
- b) *The applicant computed the amount payable to the 103 employees and was waiting for confirmation of the computed amount from the respondent.*
- c) *The applicant and the respondent were engaged in talks seeking to resolve the issue of the 103 employees.*
- d) *The applicant's chairman fell sick and eventually passed on and the applicant's board was not properly constituted for purposes of passing resolutions relating to the applicant including appointment of advocates and issuing instruction on appeal.*

The application is opposed by the respondent in an affidavit in reply dated **6th March 2020**, sworn by **James Tongai**, the General Secretary of the respondent. The gist of opposition is that the application is incompetent as it is brought under **Rule 84** of this Court's Rules; that the applicant has not shown that a board resolution was required in filing a notice of appeal and lastly that the implementation of the impugned ruling was already underway in ensuring the employees get their dues.

At the hearing of the application, the applicant was represented by learned counsel, **Mr. Kariuki** while the respondent was represented by **Mr. Ongera**- the industrial relations officer of the respondent.

In explaining the reason for the delay, counsel for the applicant submitted that the parties were to go to the Labour office for purposes of identifying the claimants so as to comply with the ruling and this took a lot of time. Furthermore, the death of the respondent's Chairman in **August of 2019** resulted in a stagnation of its activities. He further submitted that he filed the present application immediately he was instructed. On the application being brought under the wrong provisions of the law he conceded that it ought to be under **Rule 4**.

While urging the court to dismiss the application, **Mr Ongera** argued that there was no evidence of the Chairman's death. He emphasized that the respondents would suffer great prejudice if the application was allowed as it would deny the respondent's former employees the fruits of their judgment. He confirmed that the matter was still before the Labour office and that the applicant was fully participating in the process of implementing the Court's ruling and it had had even asked that the award be implemented in phases.

I have carefully considered the application, the affidavits on record and the submissions of counsel. There is no doubt that the discretion I have to exercise under **Rule 4** of the **Court of Appeal Rules 2010** is unfettered. Logically, each case, must be determined on its own unique circumstances given that the courts cannot set out an exhaustive criterion of factors upon which the discretion of the judge should be exercised. In **Fakir Mohamed vs. Joseph Mugambi & two others, Civil Application No. Nai. 332/04** this Court stated thus:

“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, (possibly) 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”

The period of delay that the applicant needs to explain to my satisfaction is from **26th July 2019** when the ruling was delivered to **25th September 2019** when the instant application was filed which is a period of 61 days. What explanation does the applicant offer for this delay? First, the applicant explains that at the time of the delivery of the ruling, the parties were in the process of confirming the correct list of all the affected employees and it was awaiting confirmation of the computed amount payable to the 103 employees from the respondent.

The second explanation for the delay is the death of the Chairman of the applicant which resulted in inactivity in the applicant's operations. Consequently, the applicant could not make a resolution to appoint advocates to act in the matter. The respondent, has dismissed these allegations on account that the applicant has tendered no evidence of the death of the Chairman.

In my view, the death of the applicant's Chairman may be a plausible explanation for the delay and this may have affected the decision of the applicant as regards the way forward as relates to the ruling of **Onyango, J** delivered on **26th July 2019**. As to whether the applicant has an arguable appeal, I have perused the draft memorandum of appeal attached and it is clear that the substratum of the intended appeal questions the effect of the ruling of **26th July 2019** and whether it changes the substance of the Court's earlier Judgment of **7th August 2018**. I am of the view that these points merit consideration. The applicant's willingness to pay its former employees has been demonstrated by their previous payment of 71 former employees and their cooperation in ascertaining the list of employees to be paid and in tabulating the amount to be paid. It is my considered view that the interest of justice in the circumstances before me would demand that the applicant be allowed an

opportunity to exercise its right of appeal in order to ascertain the amount owed to the 103 employees. Furthermore, the delay is not inordinate taking into account that the parties have been in correspondence with the Labour office in trying to implement the ruling of the court.

Lastly with regard to the motion being brought under the wrong provisions, I have considered the overriding objective principles that bind this Court and that the 2010 Constitution of Kenya requires this Court to administer justice without undue regard to technicalities.

In the result, I am inclined to exercise my discretion in favour of granting leave to file the Notice of Appeal and record of appeal out of time. The Notice of Appeal shall be filed and served within seven (7) days of this ruling and the record of appeal shall be filed and served within forty-five (45) days of filing the Notice of Appeal. Failure to comply with any of the time limits stipulated heretofore, the Notice of Motion application dated **25th September, 2019**, shall stand dismissed with costs.

Dated and delivered at Nairobi this 8th day of May, 2020.

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR