



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: SICHALE J.A IN CHAMBERS]

CIVIL APPLICATION NO. 285 OF 2019

BETWEEN

TOBIAS APOLLO AWUOR.....APPLICANT

AND

TELEPOSTA CO-OPERATIVE SACCO

SOCIETY LIMITED.....1<sup>ST</sup> RESPONDENT

SACCO SOCIETY REGULATORY

AUTHORITY.....2<sup>ND</sup> RESPONDENT

(An application for extension of time to file and serve the Notice of Appeal and Record of Appeal in an intended appeal against the judgment of the Employment and Labour Relations Court at Nairobi (Abuodha J.) dated 24<sup>th</sup> May, 2019

IN

Petition No. 109 of 2017)

\*\*\*\*\*

RULING

Before me is an application dated 28<sup>th</sup> August, 2019, lodged by the applicant, Tobias Apollo Awuor, pursuant to Rule 4 of the Court of Appeal Rules. The applicant seeks leave to lodge and serve a notice of appeal and record of appeal out of time in respect of an intended appeal against the judgment of the Employment and Labour Relations Court (Abuodha, J.) dated 24<sup>th</sup> May, 2019.

The application is supported by the applicant’s affidavit dated 28<sup>th</sup> August, 2019 where he deponed that Judgment in the superior court was delivered on 24<sup>th</sup> May, 2019; that his former advocates took time to extract the judgment and notify him of its existence; that when he was eventually informed of the judgment, time was running out to lodge an appeal; that by the time he sought the services of his current advocates on 22<sup>nd</sup> August, 2019, the statutory time of filing an appeal had lapsed. Lastly, he deponed that the delay in lodging a notice and record of appeal was caused by lack of communication by his former advocates and was not intentional.

The 1<sup>st</sup> respondent filed a replying affidavit dated 6<sup>th</sup> March, 2020 sworn by its Chief Executive Officer- Maryanne Ndekei. She deponed that the delay was inordinate and unacceptable; that the applicant’s affidavit indicates that he was made aware of the decision of the High Court in time to lodge the notice of appeal; that if the applicant’s claim was mistake of counsel, he had recourse against the advocate and that the 1<sup>st</sup> respondent stands to suffer prejudice if the application is allowed.

When the application came up for hearing on 10<sup>th</sup> March 2020, learned counsel, Mr. Awiti appeared for the applicant, learned counsel, Miss Thuku held brief for Mr. Kabungu for the 1<sup>st</sup> respondent and learned counsel, Miss Mubangi appeared for the 2<sup>nd</sup> respondent.

Counsel for the applicant submitted that the delay in filing the application was occasioned by the fact that he took over the conduct of the matter on 22<sup>nd</sup> August, 2019 while judgment had been delivered on 24<sup>th</sup> May, 2019. Nonetheless, he maintained that the

intended appeal was merited and urged the court to consider that the respondents would not suffer any prejudice if the application was allowed.

Counsel for the 1<sup>st</sup> respondent, relied on their replying affidavit in opposing the instant application. She submitted that there was an inordinate delay of 10 months in filing the notice and that no plausible explanation for the delay had been advanced. She also pointed out that although the application was dated **28<sup>th</sup> August, 2019**, it was served upon them on **4<sup>th</sup> March, 2020**. In her opinion, the application was not merited and she urged this court to dismiss it. Counsel for the 2<sup>nd</sup> respondent echoed the complaint that they were served with the application on the day of the hearing, despite the fact that it was prepared on **28<sup>th</sup> August, 2019**. It was counsel's position that the application lacked merit as no justifiable explanation had been given to persuade the court to exercise its discretion in favour of the applicant. She pointed out that the applicant had also failed to attach a draft notice of appeal and a draft memorandum of appeal to the motion.

I have considered the application, the affidavits on record, submissions by counsel, and the law. **Rule 4** of this Court's Rules, calls upon a single Judge to exercise unfettered discretion in considering an application for extension of time. The principles that the Court must take into account in considering an application as the one before me include; the length of the delay, the reasons for the delay, to some extent, the chances of success of the intended appeal and the degree of prejudice that may be occasioned to the respondent if the application is granted. (See **Mwangi vs. Kenya Airways Ltd [2003] KLR 486.**)

In the instant application, the issue for my consideration is whether there are any extenuating circumstances that sufficiently explain the delay between **24<sup>th</sup> May, 2019**, when the impugned judgment was delivered and **2<sup>nd</sup> September, 2019** when the application for extension of time was filed.

The applicant has laid the blame squarely at the feet of his previous advocates. He has urged that the said advocates failed to promptly notify him of the delivery of the judgment. I have considered the explanation by the applicant. The supporting affidavit does not indicate the date when the applicant's previous advocate informed him the outcome of the impugned judgment. However, para 8 of the supporting affidavit states:

***"8. that when I was eventually given a copy of the judgment time was running out to lodge an appeal."***

One can therefore infer that when the applicant was notified of the judgment, the 14 day period to file a notice of appeal under **Rule 75(2)** of the rules of this Court had not lapsed. Moreover, the 1<sup>st</sup> and 2<sup>nd</sup> respondents complained that although the motion is dated **28<sup>th</sup> August, 2019**, they were both served on the hearing date, that is **10<sup>th</sup> March, 2020**. This is of course conduct not expected of counsel as he/she cannot ambush his colleagues at the eleventh hour. However, be that as it may, there are a number of decisions of this court stressing that delays resulting from mistakes of advocates should not always lead to dismissal of applications for extension of time. It would appear that the applicant's former advocate failed the applicant in several respects. I also note that the delay cannot be considered inordinate.

On the question of whether the intended appeal is merited, **Miss Mubangi** submitted, that the applicant had failed to annex a draft of the intended appeal.

The purpose of filing a draft memorandum of appeal is to enable the court to ascertain whether or not a refusal of the application would appear to cause injustice or would be prejudicial. (See **Pollok House Ltd v Nairobi Wholesalers Ltd [1972] EA 172; 2**)

However, I am of the persuasion and I am in agreement with the dicta in **Paul Wanjohi Mathenge versus Duncan Gichane Mathenge [2013] eKLR**, wherein **Odek, J.A.** held that failure to attach a draft memorandum of appeal is not fatal to an application under **Rule 4** of the Rules of the Court.

In the end, I allow the application and direct that the Notice of Appeal be filed and served within 7 days of the delivery of this ruling and the record of appeal be filed and served within 45 days of filing of the Notice of Appeal.

Failure to comply with any of the above timelines, the Notice of Motion application dated **25<sup>th</sup> September, 2019** shall stand dismissed.

Costs shall be in the intended appeal.

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

***F. SICHALE***

.....

***JUDGE OF APPEAL***

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

***Signed***

**DEPUTY REGISTRAR**