



IN THE COURT OF APPEAL

AT NYERI

(CORAM: ASIKE MAKHANDIA, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 135 OF 2017

BETWEEN

ELKANA KIPRUTO TALLAM.....APPLICANT

AND

MOI UNIVERSITY.....RESPONDENT

(An application for extension of time to file and serve record of appeal

from the decision of the Employment and Labour Relations Court

at Kericho (, J.) dated 26th April, 2017) in ELRC CAUSE NO. 11 OF 2016)

RULING

This is an application dated 7th November, 2017 by which the applicant seeks leave to pursue the appeal as a pauper and extension of time within which he should file his record of appeal against the judgment of the Employment and Labour Relations Court, (ELRC) delivered on 26th April, 2017.

The application is brought under Rule 4 of the Court of Appeal Rules. The application is premised on the grounds that; upon delivery of the judgment the applicant successfully lodged a Notice of Appeal but he was unable to file the record of appeal on time due to a delay in obtaining the Judgment and decree. By the time he obtained the said documents on 14th July, 2017, the period for filing the record had lapsed. He further states that he was never accorded a hearing before the trial court and the proceedings leading to the impugned judgment were null and void as such. He also cited unemployment and lack of financial means to file an appeal and projected court fees to likely exceed Kshs. 100,000/- an amount he was unable to raise, hence the prayer that he be allowed to file and prosecute his appeal as a pauper. He maintains that no prejudice will be suffered by the respondent should the prayers sought be granted and that the application was filed without unreasonable delay. The motion was further supported by the applicant's affidavit of the same date which merely reiterates and expounds on the foregoing grounds.

The application was opposed by a replying affidavit sworn by Petrolina Chepkwony, the respondent's Legal Officer. She deposed that the application was incompetent, fatally defective and ought to be dismissed with costs. That the applicant has never sought typed proceedings and judgment. That the time for filing the appeal expired on 24th June, 2017 and the present application though brought 6 months later, no explanation for the delay has been proffered. She further asserted that the applicant had not given reasons as to why the decree was not collected on time having been issued on 13th June, 2017 which was well within the 60 days period provided for by the law. That the applicant was guilty of laches and therefore undeserving of the orders sought; nor has he satisfied the requirements for the grant of such orders. That the applicant had not complied with Rule 115 of the Court of Appeal Rules in pursuing the intended appeal as a pauper. That the appeal had no chance of success as it was the applicant who sought to have the case heard by way of written submissions on 25th January, 2017. That the application is an afterthought and intended to put the court to test. Furthermore, the applicant had failed to demonstrate that he is financially incapacitated as demonstrated by his representation by counsel in this application.

The application was dispensed with by way of written submissions. In the written submissions filed by his advocates on record, **Messrs Anassi Momanyi & Co. Advocates**, the applicant submitted that he was employed by the respondent as a clerical officer until he was relieved of his duties in February 2015 and has remained unemployed ever since. He is not gainfully employed and has no investments or savings to enable him pay the requisite court fees and his advocates on record are assisting him as a way of giving back to the society. He maintained that he was only able to file the present application after struggling to raise the requisite court fees. That the delay was not

inordinate and it has been satisfactorily explained. He reiterated that he was not given an opportunity to be heard before the trial court and that it is arguable whether the applicant's termination was fair and justifiable. Lastly, the applicant emphasized that no prejudice will befall the respondent if the application was allowed.

In the written submissions filed by its advocates on record, **Messrs Nyairo & Company Advocates**, the respondent pointed out that the applicant had not given reason(s) why he failed to obtain a certified copy of the decree and proceedings within good time. The respondent contended that no evidence had been presented to show that the applicant had requested for typed proceedings and judgment as provided for by Rule 82(1) of this Court's Rules neither had he presented a draft decree before court for approval. That no plausible explanation has been given for the delay as the delay was solely caused by the applicant who failed to collect the proceedings and decree on time hence he should not benefit from this court's discretion. The respondent submitted that the applicant's claim that he could not raise money to file an appeal was an afterthought having realized that he had been caught up with time. Further, the applicant had not given any reason why he failed to file the present application upon collecting the proceedings and decree and had to wait another 5 months to do so. That the applicant was thus indolent and undeserving of my intercession. The respondent relied on the case for this submissions **Aviation Cargo Support Limited v St. Mark Freight Services Limited (2015) eKLR.**

As regards the prayer to pursue the appeal as a pauper, the respondent submitted that the applicant had only relied on Rule 4 of this Court's Rules in his application which is not applicable to this prayer hence this court's jurisdiction to entertain the said prayer has not properly been invoked. That the applicant had not demonstrated his lack of financial ability to pursue the appeal as no evidence was tendered to show his financial capability or otherwise. Lastly, the respondent submitted that the applicant had failed to meet the conditions set out in Rule 115 (2) that requires the input of the Deputy Registrar before the court can entertain such an application. (See: **Thomas Joseph O. Onyango v Attorney General & Ano. [2016] eKLR.**)

I have considered the application, grounds in support thereof, the respondent's replying affidavit, the submissions as well as the law. The issues for determination are whether the applicant should be allowed to appeal as a pauper and whether the application has met the threshold for enlargement of time.

The law for relief from fees and security is found under Rule 115 of the Court of Appeal rules which provides that:

"115.(1) If in any appeal from a superior court, in its original or appellate jurisdiction in any civil case the Court is satisfied on the application of an appellant that he lacks the means to pay the required fees or to deposit the security for costs and that the appeal is not without reasonable possibility of success, the Court may by order direct that the appeal may be lodged-

(a) without prior payment of fees of Court, or on payment of any specified amount less than the required fees;

(b) without security for costs being lodged, or on lodging of any specified sum less than the amount fixed by rule 107, and may order that the record of appeal be prepared by the registrar of the superior court without payment therefor or on payment of any specified sum less than the fee set out in the Second Schedule, conditionally on the intended appellant undertaking to pay the fees or the balance of the fees out of any money or property he may recover in or consequence of the appeal.

(2) The Registrar shall be entitled to be heard on any such application.

(3) No fee shall be payable on the lodging of any such application.

(4) The Registrar shall have power to take such action as he may think necessary to enforce any undertaking given in accordance with sub-rule

(1)". Emphasis added.

The respondent correctly pointed out that the applicant did not rely on this provision of the law in his prayers I have therefore not been properly moved. That notwithstanding, I could still not render myself on the said prayer before the registrar of the Court of Appeal has carried out an inquiry in accordance with the Rules and filed a status report on the application. (See: **Rose Wangui Karuga v Kenya Railways Corporation [2014] eKLR** and **Francis Egosangwa Kaguli v Barusi Kaguli [2014] eKLR**). For all the foregoing reasons that prayer is not available to the applicant and it is accordingly disallowed.

Turning on the prayer for extension of time, Rule 4 of the Court of Appeal Rules do not provide for factors the court should consider in an application for extension of time but courts have generally devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of **Leo Sila Mutiso v Hellen Wangari Mwangi [1999] 2 EA 231** which is the *locus classicus*, laid down the parameters 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 issues I am called upon to consider are both discretionary and non-exhaustive as was explained in the case of **Fakir Mohammed v Joseph Mugambi & 2 Others [2005] eKLR** where the court rendered itself thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path……. 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, (possible) 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 factor.”

This was reiterated further in the case of **Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees**, Civil Application No. **190 of 2019** where it was explained that:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

There is no maximum or minimum period of delay set out under the law. However, a prolonged and inordinate delay is more likely than not to disentitle the applicant the leave sought. Likewise, the reason or reasons for the delay must be plausible. In **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR** as was cited by the applicant, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

The delay in filing the instant application and intended appeal was approximately 6 months. The applicant cited delay in obtaining the decree and financial constraints as the reason for the said delay. It is not in dispute that the decree was certified within the 60 days period within which the applicant was to file his record of appeal. However, he collected the said decree after the 60 days. He has not given any reasons on why he did not collect the decree once it was ready. Upon obtaining the decree, the applicant again waited another 5 months to file the present application, this time citing financial difficulties. I am inclined to reject this explanation for the simple reason that it is not sufficient. In the case of **Francis Mwai Karani vs. Robert Mwai Karani Civil Application No. NAI. 246 of 2006** Omolo, J.A held:

“That lack of money or impecuniosity on the part of an applicant cannot and has never been accepted as a valid reason for extending time to lodge an appeal. Such a situation is already provided for in our laws by way of Rule 112 of this Courts Rules. I do not accept the applicants’ explanation for delay of one year eleven months in filing the appeal on this matter. I reject it.”

Given the foregoing, I find that the applicant’s impoverishment cannot be reason enough for me to exercise my discretion in his favour.

As regards the chances of success of the intended appeal, it is not my role to determine definitively the merits of the intended appeal. That is for the full court if and when it is ultimately presented with the appeal. In **Athuman Nusura Juma v Afwa Mohamed Ramadhan, CA No. 227 of 2015** this Court stated as follows:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly.”

On the degree of prejudice to the respondents, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension of time against the prejudice that may be caused to the respondent in granting an extension. The applicant was aggrieved by the judgment of the trial court and is desirous of appealing against the said judgment albeit out of time. The respondent contends that the applicant failed to comply with Rules 82 and 115 of the court of appeal rules and therefore his application should be dismissed.

From the circumstances of the application before me, the applicant has failed to demonstrate the existence of the parameters set out in **Leo Sila Mutiso** (supra) and other decisions of this Court.

In the result, I decline to exercise my discretion in favour of the applicant either to pursue the appeal as a pauper or to extend time. The application is dismissed in its entirety with no order as to costs.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR