IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OKWENGU, KIAGE & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 62 OF 2017

BETWEEN

KENYA CHEMICAL & ALLIED WORKERSUNION..APPLICANT

AND

ERNST & YOUNG LIQUIDATORS

FOR COATES BROTHERS E.A LIMITED..RESPONDENT

(An application for extension of time to file the record of appeal from the Judgement and Decree of the

Employment and Labour Relations Court at Nairobi (Nzioka wa Makau, J.) dated 16th March, 2015)

in

Cause No. 1078 of 2014)

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RULING OF THE COURT

By a Notice of Motion dated 28th March 2017, the applicant moved the Court under **rule 4** of the **Court of Appeal Rules**, **Section 3 (2**), **3A** & **3B** of the **Appellate Jurisdiction Act** seeking time extension to file, lodge and serve the Record of Appeal out of time. The application is premised on six grounds that are set out on the face of it.

The application was initially heard by a single Judge of this Court (Gatembu, J.) who dismissed the application with costs to the respondent. Hence, what is before this Court is a reference under **rule 55 (1) (b)** of this Court's rules. The applicant has invited this Court to interfere with the exercise of discretion bestowed on a single Judge under **rule 4** of its rules. This Court has on many occasions pronounced itself on the guiding principles to be adhered to warrant such interference. In **DONALD O. RABALLA V JUDICIAL SERVICE COMMISSION & ANOTHER [2018] eKLR**; it stated;

> ***"These in substance are that the single Judge took into account an irrelevant factor which he ought not to have taken into account or that he failed to take into account a relevant factor which he ought to have taken into account; that he misapprehended or not properly appreciated some point of law or fact applicable to the issues at hand; or that the decision on the available evidence and law is plainly wrong. The onus of demonstrating the breach of any or all such principles is on the applicant."***

The application is supported by the affidavit sworn by one Justin Kahindi Katoi, a former employee of Coates Brothers Limited which was put under receivership and the respondent appointed its the liquidator. He deposed that the respondent reneged on an agreement entered into concerning the employees' terminal dues. This necessitated the applicant, on behalf of its members to file Cause No. 1078 of 2014 at the Employment and Labour Relations Court seeking that court's intervention to resolve the dispute. Similarly, the respondent filed Cause No. 1310 of 2014 before the same court. Since the matters were related, they were consolidated under Cause No. 1078 of 2014. The matter was heard by Nzioka wa Makau, J who delivered a judgment on 16th March 2015 and dismissed the case.

The applicant and its members were understandably aggrieved by the decision and immediately instructed Mr. Alfred Nyakundi of Nyabena Nyakundi Advocates to appeal the decision. Mr Nyakundi subsequently filed a Notice of Appeal on 27th March 2015, which was within the prescribed time under the rules and proceeded to apply for certified copies of proceedings. However, the said Mr Nyakundi failed to file the

record of appeal after a considerable period of time.

It was further deposed that Mr Nyakundi's failure forced the applicant to instruct Mr Wesonga of Wesonga, Mutembei & Kigen Advocates, on 14th February 2017 to pursue the appeal on its behalf. By the time that firm came on record the time required to file the appeal had already lapsed, necessitating this application.

In opposition, the respondent filed a replying affidavit sworn by Peter Obondo Kahi, the liquidator. It was deponed that Nyabena Nyakundi Advocates requested for typed proceedings via a letter dated 26th March 2015. The same was received by the Employment and Labour Relations Court's registry on 27th March 2015. Subsequently, by a notice dated 7th December 2015, the firm was notified that the typed proceedings were ready for collection. On record was an acknowledgment on the notice of receipt of the proceedings by one Elizabeth Agimba and a receipt of payment issued in the name of Nyabena Nyankundi Advocates.

By a letter dated 10th December 2015, which was received on 17th December 2015, Nyabena Nyakundi Advocates sought to be supplied with a certificate of delay to enable them lodge to the appeal. A certificate of delay was issued by the Deputy Registrar on 09th February 2016 but the year was erroneously recorded as 2015.

Mr. Wesonga wrote a letter to the Deputy Registrar dated 28th December 2016 requesting the rectification of the error on the face of the certificate to correctly indicate the year as 2016. He also asked for copies of the pleadings, proceedings and judgment. Subsequently, the firm wrote another letter requesting for a copy of the decree. According to the respondent, the firm of Wesonga, Mutembei & Kigen were not instructed on the 14th of February as was indicated by the applicant. The correct certificate of delay was therefore issued to the current Advocates on record and not the previous ones.

The learned single Judge considered the application and pointed out that the applicant had a duty to offer a plausible explanation why it did not file its appeal with the time period prescribed under the rules. In dismissing the application, the learned Judge held;

> ***"The upshot of the foregoing is that there is unexplained delay for the period between 9th February 2016 and 28th October 2016 when Wesonga, Mutembei & Kigen Advocates applied for correction of the erroneous certificate of delay. There is also unexplained delay between 11th November, 2016 being the date of the corrected certificate of delay and the date of filing of the instant application on 27th April 2017.But that is not all, the applicant appears to have withheld relevant information in its application until it was prompted by the disclosures in the replying affidavit."***

During the hearing of this reference, Mr. Wesonga, Counsel for the applicant argued that the delay was not inordinate as the same was explained. He submitted that the delay between 11th November 2016 and 29th March 2017 was explained as the fault of the previous Advocates who failed to take action. He laid blame on the previous counsel for failing to be diligent even after noticing the error on the certificate of delay. He urged the Court to set aside the ruling by the learned single Judge.

In opposition, **Ms. Kamau** for the respondent urged the Court to uphold the decision of the single Judge since the delay was inordinate as was stated by the single Judge. She also held the same sentiments that the Advocates for the applicant were economical with the truth. She urged the Court to dismiss the reference.

We have considered the reference and are distinctly aware of the discretionary powers bestowed on a single Judge under **rule 4**. Therefore the decision arrived at ought not to be easily dislodged, unless, as earlier stated, the applicant demonstrably shows that discretion was exercised contrary to law, that is, that the judge misapprehended the applicable law, or that the judge failed to take into account a relevant factor or took into account an irrelevant one, or that applying the facts and the law in the particular matter the decision is shown to be plainly wrong. (See **LINGAM ENTERPRISES LIMITED & 4 OTHERS V RADIO AFRICA LIMITED [2015] eKLR**).

The factors which the learned single Judge was to consider were well-elucidated by this Court in **THUITA MWANGI V KENYA AIRWAYS LTD [2003] eKLR** that;

> ***"Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:***
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> > *"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"***"**

From the foregoing, we find that the learned single Judge took into account the length of the delay and the reasons thereof and we find no fault in his finding. The delay was inordinate and the applicant was unable to offer a plausible explanation for it. What is concerning is the reluctance of the Advocate to act with urgency having come on record from the 28th October 2016. While it was obvious that the typed proceedings were ready and the rectified certificate of delay issued on 11th November 2016, why did they take more than three months to file the record of appeal? For emphasis,

we echo the decision of the Supreme Court in **NICHOLAS KIPTOO ARAP KORIR SALAT V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR**;

> ***"Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant***

against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”

Still on equity, we note that the learned Judge was unimpressed by the applicant’s lack of candour. He was entitled to take that view of the matter in his discretion and we cannot fault him for so doing.

In sum, we find that this reference lacks merit and so dismiss it with costs.

Dated and delivered at Nairobi this 10th day of July, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR