



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MURGOR, JA)

CIVIL APPLICATION NO. 62 OF 2018

BETWEEN

GRACE CHEPKEMOI TUEI (Suing as personal representative

of the estate of the late SAMMY KIPNG'ETICH TUEI)...APPLICANT

AND

THE MANAGEMENT COMMITTEE BOMET CONSTITUENCY

DEVELOPMENT FUND.....RESPONDENT

(Application for extension of time to file Records of Appeal out of time in an intended appeal from the Judgment and Decree of the Employment and Labour Relations Court at Kericho (Marete, J) delivered on 15<sup>th</sup> December 2017 in Kericho Employment and Labour Relations Court Cause NO. 84 of 2016)

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RULING

**The applicant, Grace Chepkemoi Tuei (Suing as personal representative of the estate of the late Sammy Kipng'etich Tuei)** has brought this Notice of Motion lodged on 16<sup>th</sup> May 2018 seeking for time to be extended within which to file and serve a record of appeal out of time. The motion is premised on the grounds that the delay in filing the record of appeal was occasioned by circumstances beyond the applicant's control, that being an inadvertent mistake of his counsel, and it would not be fair or just to punish the innocent applicant for that mistake. The applicant's plea was that she be granted an opportunity to ventilate the intended appeal since it had an overwhelming chance of success, and that in any event the respondent would not suffer any prejudice if time were extended.

In an affidavit in support of the motion, and written submissions, Erastus Orina, applicant's advocate who had conduct of the suit in the lower court asserted that the judgment was delivered on 15<sup>th</sup> December, 2017, the Notice of Appeal was timeously lodged on 21<sup>st</sup> December, 2017 and that within thirty (30) days from the date of judgment, he applied for certified copies of the proceedings and judgment which letter was received by the court on 22<sup>nd</sup> December, 2017. Thereafter, certified copies of the proceedings were supplied on 27<sup>th</sup> March 2018, whereupon the applicant's counsel embarked on compiling the record of appeal. It was submitted that the delay in filing the record of appeal was not inordinate, as claimed by the respondent, but was as a result of the delay by the registry in supplying the requested certified copies of proceedings.

The applicant's plea was that she deserved an opportunity to ventilate the applicant's case. It was also asserted that the attached draft memorandum of appeal set out grounds which were arguable.

The respondent did not file a replying affidavit, or written submissions despite being served with the hearing notice.

The principles that guide a court in considering an application for leave to file an appeal out of time **under rule 4** of this Court's rules were laid down by this Court in the case of **Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited [2015] eKLR** thus;

**“The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.**

Guided by the above, the judgment was delivered on 15<sup>th</sup> December 2017, thereafter the Notice of appeal was lodged. Thirty (30) days later, the applicant's counsel applied for certified copies of the proceedings and judgment which letter was received in court on 22<sup>nd</sup> December 2017. The certified copies of the proceedings were subsequently supplied on 27<sup>th</sup> March 2018, and this application was lodged on 16<sup>th</sup> May 2018. In effect, the period of delay in filing the record of appeal can be computed as 5 months.

As to whether the period of delay has been explained, the period of delay ran from the time the proceedings were supplied on 27<sup>th</sup> December 2017 to when this application was filed, and therefore a period of 5 months that ought to have been explained. But no reasons were advanced to explain the delay. Then, there is no evidence that the Notice of appeal was served on the respondent, and no explanation was provided in respect of that misstep.

The applicant complains on the one hand that the delay was caused by the registry, and on the other, that it was caused by an error or mistake on the advocate's part.

In so far as the complaint that the delay was caused by the registry is concerned, I find this to be unwarranted, for the reason that between the time of request on 22<sup>nd</sup> December 2017 and the date of supply of the proceedings on 27<sup>th</sup> December 2017, was a period of 5 days. In other words, given that the proceedings were timeously supplied, the applicant cannot be heard to complain that the registry caused the delay in the filing of the record of appeal.

Concerning the allegation that the delay was due to a mistake on the advocate's part, I can find nothing in the affidavit that points to the commission of an error by the advocate particularly as, Mr. Orina who had conduct of the case, has not admitted to having caused the delay. As such, it would be wrong to attribute such delay to counsel.

In short, I can find nothing that explains the delay in filing the record of appeal.

On the likelihood of success of the intended appeal, the applicant seeks to have the deceased's termination from employment declared unlawful, and for the respondent to pay any outstanding salary. In the draft memorandum of appeal, the applicant complains that the learned judge applied the wrong principles of law to arrive at the judgment and did not take into account the applicant's case. The judgment shows that the learned judge took into account the applicant's entire case, but, this notwithstanding, it seems the weight of the respondent's case tilted heavily in its favour, which in effect would render the chances of success of the intended appeal as doubtful.

Turning to whether the respondent would suffer any prejudice if the period to file the record were to be extended, when the dispute and peculiar circumstances of the case are viewed against the delay in filing the intended appeal, purely on account of the passage of time, I consider that there would be substantial prejudice to the respondent, as the employer.

All factors construed, I am not persuaded to exercise my unfettered discretion to allow the application, which I accordingly dismiss with costs to the respondent.

**It is so ordered**

**Dated and Delivered at Nairobi this 7<sup>th</sup> day of August, 2020.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**