



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 213 OF 2019 (UR 196/2019)

BETWEEN

INTCON AFRICA LIMITED.....APPLICANT

AND

JOACHIM MUTISYA NDUVA.....RESPONDENT

(An application for extension of time to file and serve a Memorandum and Record of

Appeal out of time from the judgment of the High Court of Kenya

at Nairobi (D. K. Kemei, J.) dated 24th January, 2019)

in

HCCA NO. 155 OF 2015)

RULING

[1] Before me is a Notice of Motion dated 8th July, 2019 by **Intcon Africa Limited** (the applicant) seeking leave to extend time within which to file and serve the Memorandum of Appeal out of time. The application is supported by the affidavits of **Dorry Wamugo Advocate** and **Jennifer Solovea** the Deputy Manager at **Monach Insurance Co. Ltd** which were sworn on 8th July, 2019 as well as the grounds stated in the motion. According to the applicants, **Monac Insurance Co. Ltd**, had insured the applicant against a claim which was the subject of litigation before the Magistrate's court at Mavoko where judgment was delivered on 11th September, 2015 with the applicant being found liable at 90% for the injuries suffered by the respondent and was ordered to pay a sum of Ksh. 600,000 including interest and costs.

[2] Aggrieved by the said judgment, the applicant filed an appeal before the High Court being **Civil Appeal No 155 of 2015** on the 6th October, 2015. The applicant also filed written submissions and were waiting for the judgment which they learnt was delivered in the form of a Ruling dated 24th January, 2019. In the said Ruling, the applicant's appeal was dismissed on the grounds that the High Court lacked jurisdiction to deal with cases brought under the **Work Injury Benefits Act** as such cases fell under the **Director of Occupational Hazards and Safety**. The applicants acknowledge that is the law but insist that its appeal predated the Judgment of this Court that clarified the law and practice in regard to Work Injury claims and that the decision in **Civil Appeal No 133 of 2011** was delivered on 17th November, 2017.

[3] The applicant went on to explain that the reason why the appeal was not filed on time was because the court file went missing immediately the said Ruling was delivered. Counsel for the applicant deposes in the supporting affidavit that she kept making enquiries from the court registry without success. That the delay in filing the record of appeal was due to lack of certified copies of proceedings and judgment of the court. According to counsel, the applicant has an arguable appeal that is demonstrated by the draft memorandum of appeal that contains the grounds to be argued in the intended appeal. Counsel for the applicant also relied on the written submissions and list of authorities and urged the motion be allowed.

[4] The motion was opposed by the respondent, through a replying affidavit by the respondent, written submissions and list of authorities. The respondent contends that the claim arose from an industrial accident that occurred to him on 14th May, 2013 while on duty; and that the applicant does not have an arguable appeal terming it a non-starter because the law was settled in **Civil Appeal No 133 of 2011** which decision was upheld by the Supreme Court. Also, the respondent submitted that the applicant has failed to explain a delay of about five (5)

months between the time when the ruling was delivered and when the instant application was filed on 12th July, 2019. Counsel urged that the application be dismissed with costs.

[5] As aforesaid, both parties filed written submissions and cited the well-known authorities for and against the granting of the order sought which I have duly considered together with the affidavits as per the preceding summary. This application is made under **Rule 4** of this Court Rules. As such it invokes the exercise of this Court's discretion. That discretion is however exercised judicially and the guiding principles have been enunciated in a long line of authorities especially the often cited case of **Fakir Mohamed vs. Joseph Mugambi & Two Others Civil Application No. Nai. 332 of 2004** thus: -

“The exercise of this Court’s discretion under rule 4 has followed a well beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of acts the court would consider so long as they are relevant. The period of delay, the reason of 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 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 by factors ...”

Also see **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi (1999) 2 EA 231**, which is the *locus classicus*, laid down the following parameters: -

“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.”

[6] That said, I have to subject the instant application to the above criteria, first of all by answering the question whether the appeal has reasonable chances of success. This I do with caution as it is not my role to go into the merit of the intended appeal which is not my edit. However, I think there is an issue raised in the said grounds which I think merits consideration regarding the time when the Court of Appeal made a decision regarding the jurisdiction over cases of work injuries and when the appeal was filed in the High Court. What was the fate of the disputes that were already filed, were they to be dismissed or referred to the Director as per the Act?

[7] On the issue of delay, I am not sure the applicant has obtained certified copies of proceedings and ruling. The applicant has annexed a letter dated 25th January, 2019 bespeaking the proceedings. Under the proviso to **Rule 82** of this Court Rules, regard should be taken of the days the Registry took in preparing the proceedings. In the absence of the said certificate, it is difficult to fault the applicant for failing to file the appeal within time. On the other hand, it could be merely out of ignorance that this application was filed because if the proceedings have not been availed, the applicant is still within time.

[8] In view of the above, I am inclined to allow the application and allow the applicant a further thirty (30) days from the date of this Ruling to file and serve a record of appeal. I will award the costs of this application to the respondent in any event.

Dated and delivered in Nairobi this 7th day of August, 2020.

M. K. KOOME

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR