



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 126 OF 2020

BETWEEN

**KENYA SHIPPING, CLEARING & WAREHOUSES WORKERS UNION.....APPLICANT**

**AND**

**WILHAM KENYA LIMITED.....RESPONDENT**

(Being an Application for extension of time to file an Appeal out of time from the Judgment and Decree of the Employment and Labour Relations Court Nairobi (**Radido, J**) dated 8th March, 2019 in Cause No. 1704 of 2015)

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**RULING**

1. In a judgment rendered on 8th March, 2019, the Employment and Labour Relations Court (ELRC) (**Radido, J**) dismissed the applicant's claim for failure to deduct union dues from the applicant's members, victimization, intimidation and harassment of the applicant's members and unfair termination of employment of two of the applicant's members.

2. By a motion dated 18th May, 2020, filed by the applicant's General Secretary, the applicant is now seeking extension of time within which to lodge a notice of appeal and record of appeal. The General Secretary explains that the delay in filing the appeal was caused by breakdown in communication between the applicant and its members who were affected by the judgment, and who had to leave Nairobi for their rural homes, as they had no source of income. In addition, that it was only after several attempts that the applicant managed to make contact with the members who authorized and consented to an appeal being filed. The applicant maintain that the intended appeal raises arguable issues. It urges the Court to exercise its discretion in its favour as the delay was not intentional. [ 3] The respondent has not filed any reply to the applicant's motion nor has it filed any submissions despite notice being given that due to the Covid-19 pandemic, the hearing would proceed by way of written submissions without the presence of counsel. The applicant's motion therefore stands unchallenged.

3. Rule 75 of the Court of Appeal rules provides that any person who desires to appeal to this Court shall give notice in writing of their intention to appeal by lodging a notice of appeal with the registrar of the superior court within 14 days of the date of the decision which it is desired to appeal against. Rule 82 of the Court of Appeal Rules provides that the appeal should be lodged within sixty days of the date when the notice of appeal was lodged.

5. However, situations may arise that may justify the extension of these timelines. This is the purport of Rule 4 of the Court Rules that gives this Court the powers to extend time. The power is an unfettered discretionary power which must be exercised judicially depending on the circumstances before the Court. This Court has however given guidance on the circumstances which may justify such extension of time. In **Mutiso vs Mwangi** [1999] 2 EA 231, the Court 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. The judgment that is the subject matter in this application was delivered on 8th March, 2019. However, the applicant never lodged the notice of appeal within 14 days of delivery of the judgment. Instead, the applicant filed this application on 18th May, 2020, more than one year and two months after the delivery of the judgment.

7. Though the applicant's motion has not been opposed, the applicant's failure to lodge the notice of appeal within time and the resultant

delay was prolonged and inordinate. The applicant claims that it took them a whole year for them to get in touch with its members for them to get the necessary authority and consent to proceed with this appeal. The applicant has not demonstrated to this court of the 'hardship' encountered in trying to reach its aggrieved union members. This was a matter that was of interest to the members who had as much responsibility to find out the outcome of the claim. There is no explanation as to why the affected members did not make any effort to contact the applicant's general secretary on phone.

8. As the Supreme Court stated in County Executive of Kisumu vs County Government of Kisumu & 8 others, 2017 eKLR:

**“ It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court.”**

9. This Court was also emphatic in Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR that:

**“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.”**

10. The record shows that the applicant applied for typed proceedings of the judgment on 26th April, 2019 and that the typed proceedings were ready for collection on 16th October, 2019. Despite obtaining these proceedings, the applicant has not demonstrated to the Court what actions it took to aggressively reach out to its aggrieved members or the hardships it encountered in trying to get instructions to appeal the impugned judgment. Nor have the members given any explanation of what difficulties they had in reaching out to the applicant. The delay of more than one year is inordinate and the explanation given is neither satisfactory nor plausible.

11. For the aforesaid reasons, I come to the conclusion that the applicant has not satisfied this Court that there are appropriate circumstances that justify the exercise of the Court's discretion in the its favour. Accordingly, the application dated 18th May, 2020 is dismissed. As the respondent did not file any reply to the motion I make no orders as to costs

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

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**