



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: J. MOHAMMED, J.A (IN CHAMBERS))

CIVIL APPLICATION NO. 82 OF 2019

BETWEEN

LEE MWENGA KIOKO.....APPLICANT

AND

DAC AVIATION (E.A) LIMITED.....RESPONDENT

(An application to file and serve a notice of appeal out of time from the decision of the Employment & Labour Relations Court at Nairobi (O. N. Makau, J.) dated 30th November, 2018)

in

ELRC Cause NO. 1074 OF 2015)

RULING

Background

1) This is an application dated 15th March, 2019 by **Lee Mwenga Kioko** (the applicant) seeking leave to file and serve a notice of appeal out of time against the judgment of the High Court, (**O. N. Makau, J.**) delivered on 30th November, 2018.

2) The application seeks extension of time within which to file and serve the notice of appeal and is expressed to be brought under **Rules 4, 41 & 42** of the **Court of Appeal Rules** and **Sections 3A & 3B of the Appellate Jurisdiction Act**. The application is premised on the grounds that; upon delivery of the impugned judgment, the applicant through his advocates requested certified copies of the typed proceedings and judgment on 3rd December, 2018 but the same was not availed until 17th December, 2018 when time for filing a notice of appeal had already lapsed; that in the circumstances, his counsel was not able to appreciate the reasoning of the court and thereafter advise him on the effects and the merits of filing an appeal within time; that it was only feasible for him to file and serve the notice of appeal after having read and appreciated the reasoning of the court in its judgment; and that the applicant is desirous of appealing against the whole judgment on the basis of fundamental errors on points of law and the failure by the court to consider the full facts and pertinent issues placed before it.

3) It is the applicant's contention that the intended appeal is arguable and raises triable issues; that the respondent will suffer no prejudice or irreparable loss should the orders sought be granted; that the applicant has since filed a notice of appeal dated 11th December, 2018 and that the instant application has been brought timeously and without unreasonable delay; that any delay is attributable to the applicant's actions as the events leading to the delay were well beyond his control. The application was supported by the applicant's affidavit sworn on 4th March, 2019 in which he reiterated the grounds on the face of the application save to add that in the period between 1st December, 2018 and 16th January, 2019 he was out of the country on official duties hence the delay in filing the application.

4) **Dac Aviation (E.A) Limited** (the respondent) opposed the application. In a replying affidavit sworn by its Managing Director, **Thom Pilgrim** on 6th May, 2019 the respondent stated that the impugned judgment was read in open court in the presence of all and the applicant's advocates had the opportunity to take detailed notes of the contents thereof; that a copy of the said judgment was available in the court registry three days after delivery and the respondent's advocates obtained a copy thereof on 3rd December, 2018; that no reason has been given for the failure by counsel for the applicant to collect a copy of the judgment on the same date; that the applicant has not shown what action he took to follow up on the matter or the difficulties he encountered in obtaining the impugned judgment; that the applicant has filed the instant application as an afterthought since a notice of appeal is a simple document which does not require the aggrieved party to set out grounds on which he intends to appeal; and that the notice of appeal can be filed without having had sight of a copy of the judgment

especially when judgment is delivered in the presence of parties.

5) It was the respondent's further contention that the applicant has not given any reasonable explanation why after receiving a copy of the judgment he required a period of three months to file the instant application; and that it has not been clearly explained how his absence from the country hindered the filing of the notice of appeal when his signature was not required on the notice of appeal; that the applicant has not explained why it took him another two months upon his return to the country to file the instant application; that based on the applicant's conduct, he is not desirous of appealing against the impugned judgment; and that he is guilty of inexplicable laches and he has not demonstrated any sufficient cause for this Court to exercise its jurisdiction in his favour. The respondent urged that the application be dismissed with costs.

Determination

6) I have considered the application, grounds in support thereof, the respondent's replying affidavit and the law. The issue for determination is whether the application has met the threshold for enlargement of time.

7) **Rule 4 of the Court of Appeal Rules** does not provide for factors the court ought to consider in an application for extension of time but courts have 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." [Emphasis supplied].

8) 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."

9) 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."

10) There is no maximum or minimum period of delay set out under the law. Further, the reason or reasons for the delay must be reasonable and 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."

11) The delay in filing the notice of appeal was approximately three months. The applicant cited the delay in obtaining a copy of the judgment and his being out of the country as the reasons for delay. He has however not explained the delay in filing the instant application even after he had obtained a copy of the judgment. In **Eliud Buku Thuku v Beatrice Wambui Mwangi [2013] eKLR**, the Court stated thus:

"The applicant was represented by Counsel at the High Court when judgment was delivered on 23rd September, 2011. As was stated by Tunoi, JA. (as he then was) in Njoka Muriu & Another vs Evan Githinji Muriu & Another, Civil App. No. NAI 356 of 2003, a notice of appeal is a simply one page formal piece of paper whose lodgment is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client's interest"

12) As was stated by this Court in **Bi-Mach Engineers Limited v James Kahoro Mwangi [2011] eKLR** filing a notice of appeal is a simple and mechanical task which could have been done soon after the delivery of the judgment.

13) As regards the chances of success of the intended appeal the applicant contends that the intended appeal is arguable as it raises issues for determination, *inter alia*, fundamental errors on points of law and failure to consider the full facts placed before the trial court. The applicant did not elaborate on the arguable points and neither did he file a draft memorandum of appeal. I therefore find that the applicant has not placed sufficient material to enable me determine whether the applicant has an arguable appeal.

14) 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.”

15) On the degree of prejudice to the respondent, I am called upon to balance the competing interests of the parties, that is, the injustice to the applicant, in denying him an extension, against the prejudice 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. However, the time for him to exercise his right of appeal has since lapsed. On the other hand, the respondent contends that the applicant has failed to clearly explain the reason for delay in filing the notice of appeal or the instant application and that the instant application is an afterthought.

16) Bearing in mind the aforementioned parameters, 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). I find that the delay in filing and serving the notice of appeal was inordinate. Without expressing definitive conclusions, the applicant has failed to demonstrate the likelihood of the intended appeal succeeding or to sufficiently explain the delay in filing and serving the notice of appeal. In the result, I decline to exercise my discretion to grant the prayer to extend time. Accordingly, I dismiss the application filed on 15th March, 2019 with costs to the respondent.

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

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR