



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MURGOR, JA)

CIVIL APPLICATION NO. 61 OF 2018

BETWEEN

VITALIS OMWOMA NDEMO.....APPLICANT

AND

WAKENYA PAMOJA SACCO SOCIETY LTD.....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 1st December 2017

in

Kericho Employment and Labour Relations Court Cause NO. 22 of 2017)

RULING

The applicant, Vitalis Omwoma Ndemo has brought this Notice of Motion lodged on 16th 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 that it would not be fair or just to punish the innocent applicant for that mistake. The applicant plea was that he be granted an opportunity to ventilate the intended appeal since it had an overwhelming chance of success, and that in any event the Respondents would suffer no prejudice if time were extended.

In an affidavit in support of the motion, and written submissions, Erastus Orina, Advocate who had conduce of the suit in the lower court asserted that the judgment was delivered on 15th December, 2017, and the Notice of appeal was timeously lodged on 21st December, 2017; 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 registry on 22nd December, 2017, whereupon the certified copies of the proceedings were supplied on 27th March 2018; that the applicant’s counsel then embarked on compiling a 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 him with the requested certified copies of proceedings.

The applicant’s plea was that he deserved an opportunity to ventilate his case, which according to the attached draft memorandum of appeal was arguable.

The respondent did not file a replying affidavit, but in its written submissions it was argued that the reasons advanced for delay were the inadvertent mistake of Counsel, and in the delay in receiving the proceedings, but that the delayed receipt of the proceedings had nothing to do with the inadvertent mistake of his advocate. It was also pointed out that the applicant had not served the respondent with Notice of appeal as provided under *rule 77(1)*.

It was further submitted that the appeal has no chance of success, as the applicant was not dismissed from work, but whilst in the respondent’s employment was involved in fraudulent activities. When investigations commenced, he absconded or deserted his duties, never

to be seen again and in the end, was dismissed for deserting his employment. For this reason, it was submitted, the respondent would suffer prejudice if the application was allowed.

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.*”**

Bearing the above percepts in mind, the judgment was delivered on 15th December, 2017, the Notice of appeal was timeously lodged on 21st December, 2017 and within thirty (30) days from the date of judgment, the applicant's counsel applied for certified copies of the proceedings and judgment which were received in the registry on 22nd December, 2017. The certified copies of the proceedings were supplied on 27th March 2018 whereupon the applicant's counsel embarked on compiling a record of appeal. Essentially therefore, there was a period of about 5 months delay, whereas the statutory period for filing the record of appeal is 60 days.

When the sequence of events in the process of lodging the intended appeal are considered, certain shortcomings stand out. First, there is the period between the time the proceedings were supplied on 27th December 2017 and when this application was filed, which period was not been explained. Second, there is no evidence that the Notice of appeal was served on the respondent.

The applicant complains that the delay was caused by the registry, in my view, this claim is unjustified for the reason that between the request on 22nd December 2017, and the date of supply of the proceedings on 27th December 2017 was a mere 5 days. In view of the timeous supply of the proceedings, the applicant cannot be heard to complain that the registry delayed the filing of the record of appeal.

Concerning the complaint that the delay was due to a mistake on the advocate's part, I can find nothing in the affidavit that points to an error committed by the advocate, particularly as Mr. Orina who had conduct of the suit has not admitted to having caused the delay. Such delay should not therefore be attributed to counsel.

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

As concerns the likelihood of success of the intended appeal, the applicant seeks to have his termination from employment declared unlawful, and for the respondent to be ordered to reinstatement him and to pay any outstanding salary. In his memorandum of appeal he 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. However, when the judgment is considered alongside the applicant grievances, I am not certain whether there is any chance of success.

Turning to whether the respondent would suffer any prejudice if the period to file the record were to be extended, the intended appeal is concerned with an employment dispute, and when the peculiar circumstances of the case are viewed against the inordinate delay in filing the appeal, I have no hesitation in finding that the respondent as the employer would indeed suffer prejudice.

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 7th day of August, 2020.

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR