



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIAGE J.A (IN CHAMBERS)

CIVIL APPLICATION NO. 240 OF 2020

BETWEEN

ZHONGMEI ENGINEERING (K)

GROUP LIMITED.....APPLICANT

AND

ANTHONY WACHIRA WAIRIMU

JOHNSTONE NGARI MWANGI (Suing

as Legal Representatives and Administrators

of the estate of JOSPHAT KIURI MWANGI).....RESPONDENT

(An application for extension of time to file and serve the Record of Appeal

from the Judgement and Decree of the Employment and Labour Relations Court

at Chuka (H. Wasilwa, J.) dated 6th December, 2018) in ELRC Cause No. 102 of 2018)

The applicant, Zhongmei Engineering (K) Group Limited, has brought by a Motion dated 23rd June 2020, seeking the following orders;

- 1. THAT this Honourable Court be pleased to enlarge the time for filing the Record of Appeal by 87 days.**
- 2. That the Record of Appeal filed on the 18th June 2020 be deemed as properly filed.**

I have considered the application, the grounds in support thereof, the replying affidavit filed by the respondent, the submissions as well as the law. This being a **Rule 4** application, the Court of Appeal Rules does not provide for the factors to be considered. However, this Court has, over the years, devised appropriate principles to be applied to achieve a just decision in the circumstances of each case. Thus, in the exercise of my discretion, which is free and unfettered, I shall be duly guided by the principles laid down by this Court in **LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI (1999) 2 EA 231**, that;

“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.”

The applicant stated that the notice of appeal was duly filed on 21st December 2018. A letter bespeaking the proceedings was received by the Employment and Labour Relations registry on 28th January 2019. Subsequently, two follow up letters were written, one received by the registry on 6th November 2019 and another on 23rd January 2020, when it was discovered that the typed proceedings were ready for collection. Upon receipt of the documents, it was discovered that a ruling dated 1st April 2019 was not certified. A certified copy of the same was sought by a letter received by the registry on 4th March 2020. On the same day, another letter was written which sought a certificate of delay and a copy of the Decree.

The aforementioned ruling was certified on 5th March 2020, while the Decree was issued on 10th March 2020 and the Certificate of delay was issued on 12th March 2020. On 13th March 2020, as the applicant's Counsel were preparing the record of appeal, the first COVID-19 case was confirmed in Kenya. With it followed stringent measures as announced by the President of the Republic, which resulted in the closure of schools, many establishment and court operations came to a near-standstill around the country. Similarly the applicant's advocate's office was closed on 16th March 2020 before the record of appeal was filed.

The advocate's resumed operations on 17th June 2020 and subsequently filed the record of appeal on 18th June 2020. By this time the 60 days period required to file the appeal had lapsed on 23rd March 2020. Thus, it was averred, the delay was caused by the onset of the pandemic which was totally unexpected. Further, some of the staff at the office who had travelled outside of Nairobi were inaccessible due to the lockdown measures. The applicant seeks the courts intervention to extend the time for 87 days in order for the record of appeal to be deemed as duly filed.

In opposition, the respondent filed a replying affidavit sworn by Anthony Wachira Wairimu. He deposed that the applicant was economical with the truth since the typed proceedings were ready for collection on 14th January 2020, not on 23rd January 2020 as stated. Furthermore, the letter bespeaking the proceedings and the subsequent follow up letters were never served on the respondent. Antony further deposed that service of this application was made on 16th November 2020, 4 months after it was filed, a move which he believes was meant to steal a match on them. The reason for delay is therefore baseless as counsel had the option to file the appeal through e-filing as advised by the Chief Justice on 16th March 2020. The Court was urged to dismiss this application.

Although there is no set minimum or maximum time period of delay, the Court must be satisfied that such delay has been reasonably explained. As we have held before, a plausible and satisfactory explanation is the key that unlocks the Court's flow of discretionary favour. See, **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR.**

The applicant, in essence, is claiming that the pandemic occasioned the delay, as it was impossible for Counsel to file the record of appeal until the resumption of its office operations on 17th June 2020. While it is true that the Chief Justice via a presser on 15th March 2020 ordered the scaling down of court operations for two weeks, he also issued **PRACTICE DIRECTIONS ON ELECTRONIC CASE MANAGEMENT** on 4th April 2020 which provided for e-filing and e-service system to be adopted by courts.

Additionally, Ouko, JA, President of the Court of Appeal issued on 21st April 2020 **PRACTICE NOTES FOR THE CONDUCT OF COURT BUSINESS DURING THE GLOBAL CORONAVIRUS PANDEMIC**, which were complimentary to the directions earlier issued by the Chief Justice. The directions highlighted the e-filing of documents, e-payment and e-service of documents using email and WhatsApp platforms.

In light of the foregoing, I find the reason proffered for delay to be unbelievable and unsatisfactory. The applicant had occasion to file the record of appeal as soon as the practice directions were issued, yet chose, it seems, to file the same at their convenience. The COVID-19 pandemic cannot be used as a panacea to cure the indolence of a party. The certificate of delay indicated that the delay was between 20th December 2018 and 23rd Jan 2020, a total of 399 days.

However, the certificate avails the applicant nothing asdoes not cure the omission of the applicant who failed to serve the respondent with the letter bespeaking the proceedings which contravenes the provision of **Rule 82 (2)** of the **Court of Appeal Rules**. Such omission renders it impossible for a party to enjoy the benefit of **Rule 82 (1)**. because the 60 days as prescribed by the **Rules** then run uninterrupted. See **MISTRY PREMJI GANJI (INVESTMENTS) LIMITED V KENYA NATIONAL HIGHWAYS AUTHORITY [2019] eKLR.** Therefore, the 60 days as from 23rd January 2020 ran uninterrupted and had invariably lapsed by 18th June 2020.

I have come to the conclusion that the delay was not only inordinate but also inexcusable and decline to grant the prayer to extend time. Accordingly, the application is dismissed with costs.

Dated and delivered at Nairobi this 18th day of December, 2020.

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR