



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE J.A (IN CHAMBERS))

NAIROBI CIVIL APPLICATION NO. 579 OF 2019

BETWEEN

WELLS FARGO LIMITED..... APPLICANT

AND

SYMON MIGWI KARANJA..... 1ST RESPONDENT

STANLEY MUTUA MBIRITHI2ND RESPONDENT

WILLIAM MUGO MAINA 3RD RESPONDENT

BONFACE KABUCHO KAMAU4TH RESPONDENT

PAUL LIVINGSTONE NGABA.....5TH RESPONDENT

BENARD ROTICH KIPSANG 6TH RESPONDENT

JOHN GITUKU MUCHIRI7TH RESPONDENT

SOLOMON KIMUTAI CHELANGA.....8TH RESPONDENT

RICHARD ORAMISI KICHWANGA9TH RESPONDENT

ALBERT SUNGU AMTALA10TH RESPONDENT

PAUL MACHARIA KIRUGUMI11TH RESPONDENT

KENNEDY KIVITI12TH RESPONDENT

PETER THUO MBURU.....13TH RESPONDENT

(An application for extension of time to file and serve a Record of Appeal from the Judgement and Decree of the Employment and Labour Relations Court at Nairobi (B. Onganya, J) dated 20th July, 2018 in ELC Cause No. 388 of 2014) Consolidated with ELC Cause Nos. 379,380,381,832,383,384,385,386,387,389,390 & 575 of 2014

RULING

Wells Fargo Limited, the applicant herein moved the Court by a Motion dated 19th December 2019, seeking the following orders;

a. THAT this Honourable Court be pleased to extend time within which the Applicant may file its Record of Appeal in this

matter.

b. THAT the Record of Appeal filed herein on the 25th Day of November 2019 be deemed as having been filed on time.

Whereas the Court of Appeal Rules do not provide for factors to be considered in a **Rule 4** application, Judges of this Court, have over the year's devised principles to be applied as they exercise their free discretion for the attainment of the ends of justice in each case.

In **MURINGA COMPANY LTD V ARCHDIOCESE OF NAIROBI REGISTERED TRUSTEES [2020] eKLR** Ouko, JA (now P.) expressed them thus;

“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.”

In the matter before me, after, the delivery of the judgment on 20th July 2018, a notice of appeal against it was duly lodged.

Thereafter the applicant's advocate wrote a letter to the Deputy Registrar of the Environment and Land Court requesting for typed proceedings. A letter indicating that they were ready for collection was received on 23rd September 2019. Subsequently, two letters dated 6th November 2019 were written to M/s Waiganjo Wachira & Co. Advocates and M/s Betty Rashid & Co. Advocates respectively, which gave them each a 7 day period to approve the draft decree. That window lapsed on 13th November 2019 whereupon the said decree was forwarded to the Deputy Registrar for signing.

It was not until late afternoon on 22nd November 2019 that the Deputy Registrar signed the decree. Counsel contended that since that was Friday and it was too late to lodge the appeal, the Record of Appeal was filed the next Monday on 25th November, 2019. He urged that the period of delay was only one day and therefore the same is not inordinate.

Even though there is no maximum or minimum period of delay set by the law, anyone seeking this relief must plausibly explain the cause of the delay. See **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR**. In most cases, parties blame the preparation of typed proceedings by the registry of courts appealed from as the cause for most delays. Since this not uncommon, the time taken for the preparation of such proceedings are excluded from the computation of the required 60days. This is provided for in **Rule 82 (1)** of the **Court of Appeal Rules** which states;

“Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellants of such copy.”

The foregoing, clearly provides that the Court can only ascertain the period of exemption pursuant to certification of the same by the registrar of the relevant court. See **KENYA PORTS AUTHORITY V MAUR ABDALLA BWANAMAKA [2018] eKLR**;

“The import of this provision is that where no application for typed proceedings is made, the appeal must be instituted strictly within 60 days of lodging the Notice of appeal. However, where an application for typed proceedings is made, the time taken to compile the proceedings is exempted in the computation of the 60 days. This means that at the time the proceedings are being prepared, time ceases to run; to enable the parties and the court ascertain when this period was, the deputy registrar of the court below issues what is known as a certificate of delay, detailing the period of exemption.”

There is no certificate of delay from the deputy registrar of the Employment and Labour Relations Court, Nairobi, on the record. I cannot therefore ascertain whether any time is to be exempted from the computation of the 60 days. The applicant's assertion that the period of delay is only one day cannot be taken at face value as Counsels' word cannot supply the absence of the certificate of delay. And it is not difficult to see why there is no certificate of delay herein.

Rule 82 (2) introduces a condition precedent to the accessing the time-exemption in **Rule 82 (1)** as follows;

“An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.”

This has been upheld by this Court in many cases including **MISTRY PREMJI GANJI (INVESTMENTS) LIMITED V KENYA NATIONAL HIGHWAYS AUTHORITY [2019] eKLR**;

“In other words, the computation of the 60 day window within which he should lodge the record of appeal is suspended during the typing of proceedings provided the appellant serves the letter bespeaking proceedings upon the court and the respondent.....It is common ground that the letter bespeaking proceedings was never served upon the respondent in this case. The appellant therefore was obliged to file the record of appeal 25th strictly within sixty uninterrupted days of filing the Notice of appeal, this period lapsed on April, 2017.”

It follows that without proof service on the respondent of the letter bespeaking proceedings, the 60 days as required by law ran uninterrupted. And the delay is therefore inordinate and unexplained, not just a simple day, as I am urged.

In the result the prayer to extend time to file and serve the Record of Appeal is unmerited and is accordingly 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